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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1977

No. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

vs.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

vs.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

SLADE GORTON
Attorney General
JAMES M. JOHNSON
Sr. Asst. Attorney General
Counsel for Petitioners

Office and Post Office Address: 600 No. Capitol Way
Olympia, Washington 98504 (206) 753-2498

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

Petitioners Washington State, Washington State Department of Fisheries and the Director of that Department, hereinafter jointly "Fisheries" or "petitioners", pray that a writ of certiorari issue to review:

(1) The opinion and judgment of the Supreme Court of Washington entered in *Puget Sound Gillnetters Assn. v. Moos*, on denial of a motion for rehearing on October 10, 1977.

(2) The opinion and judgment of the Supreme Court of Washington in *Washington Commercial Passenger Fishing Vessel Assn. v. Tollefson* entered on 23 November, 1977, after reconsideration.

OPINIONS BELOW

The opinion of the Supreme Court of Washington in *Puget Sound Gillnetters Assn. v. Moos*, hereinafter *"Gillnetters"*, (Appendix D) is reported in 88 Wn.2d 677, ____ P.2d ____ (1977).

The original opinion of the Supreme Court of Washington in *Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson*, hereinafter *"Fishing Vessel I"*, (Appendix F) is reported in 87 Wn.2d 417, 553 P.2d 113 (1977). A motion for reconsideration was granted (Appendix E). The decision upon reconsideration is found at 89 Wn.2d 276, ____ P.2d ____ (1977) hereinafter *"Fishing Vessel II"*, (Appendix B). The judgment, findings of fact and conclusions of law of the Superior Court for Thurston County in the latter action are unreported and appear in the Appendix at G.

JURISDICTION

The judgment of the Supreme Court of Washington in *Puget Sound Gillnetters Assn. v. Moos* became final upon denial of a motion for rehearing by a vote of five to three on October 10, 1977. The judgment of the Supreme Court of Washington in *Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson* became final when its decision was rendered after rehearing on 23 November 1977. The jurisdiction of this court is invoked under 28 USC 1257(3). This single petition is filed pursuant to Rule 23.5 of this Court in that the cases involve identical or closely related questions.

QUESTIONS PRESENTED

1. Do treaties executed by the United States with certain Indian tribes in 1854-55 in the Territory of Washington require state fishery management agencies, in the absence of authorization under state law, to restrict fishing by non-Indians in order to provide a specified number or percentage of fish to Indian descendents of the signatories to the treaties?

2. Is the determination by the Washington State Supreme Court that such allocation of fish is beyond the authority of state agencies a matter of state or federal law?

3. Can federal district court in interpreting the treaty language "right to fish at usual and accustomed grounds and stations in common with all citizens" require that Indian fishermen be entitled to all fish they desire for subsistence and ceremonial use, all fish harvested on reservation plus 50% of the additional harvest and empower

or require state agencies, officers and employees to effectuate such a division of the resource?

4. Does a special allocation of fish to treaty Indians who are citizens of the United States and a reduction in the available fishery for other United States citizens constitute a violation of the constitutional doctrine of equal protection and prohibition of granting of special privileges and immunities.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

Constitutional provisions, treaties and statutes involved are as follows and are reproduced in Appendix A, *infra*, pp. A-1 to A-9.

CONSTITUTIONAL PROVISIONS

	Appendix Page
(1) CONSTITUTIONAL PROVISIONS OF THE UNITED STATES	
(a) Article II, Section 2, *Powers of the President* (Section 2 Clause 2) (Presidential powers with the Advice and Consent of the Senate to make Treaties).	A-1
(b) Article VI, *Debts, Supremacy Oath*, #2, Supremacy.	A-2
(c) Amendment V, *Due Process.*	A-2-3
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(2) CONSTITUTIONAL PROVISIONS OF WASHINGTON STATE	
(a) Article 1, *Declaration of Rights* (Section 8, Irrevocable Privilege, Franchise or Immunity Prohibited).	A-4
(b) Article I, *Declaration of Rights* (Section 12, Special Privileges and Immunities Prohibited)	A-4

TREATIES

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. The six treaties are:

	Appendix Page
(a) Treaty of Medicine Creek, 10 Stat. 1132.	A-4
(b) Treaty of Point Elliott, 12 Stat. 927.	A-5
(c) Treaty of Point No Point, 12 Stat. 933.	A-5
(d) Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939.	A-5-6
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(f) Treaty with the Yakimas, 12 Stat. 951.	A-6-7

Those six treaties each contain a similar provision, only that provision is repeated in the appendix. The following is typical:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided however, that they shall not take shellfish from any beds staked or cultivated by citizens.

STATE OF WASHINGTON STATUTES

(a) RCW 75.08.012, Duties of the [Fisheries] Department. A-7-8

(b) RCW 75.08.080 Rules and Regulations — Scope. [Fisheries] A-8-9

STATEMENT OF THE FACTS

(a) *Treaties.* In the mid-1850's, the United States entered into a series of treaties with Indians in areas of what are now the States of Washington, Oregon and Idaho. Each of these treaties provided for continued fishing by those Indians in essentially similar language: "the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." 10 Stat. 1132, Medicine Creek Treaty. (Appendix A, p. A-4).

At the time of the execution of these treaties, the Indians were not citizens of the United States.

(b) *The Fishery.* At the time of the execution of these treaties, commercial fishing enterprise was

either unknown or, in those areas in which such activity had commenced, rudimentary and largely unsuccessful. This is because the process for preparing the fish for shipment to distant markets was not perfected. The invention and perfection of the canning process did not come until late in the Nineteenth Century. With the advent of the canning process commenced the development of large-scale commercial fisheries which have been and now are open to all citizens, Indian and non-Indian. The resultant boom in commercial fishing brought the need for state regulation to conserve the species and provide for an orderly fishery.

This proceeding is concerned with the fishery for anadromous fish. These fish spawn in either the fresh water systems or hatcheries of the State of Washington. At a particular time of their life cycle, they migrate out into the Pacific Ocean where they feed for one or more years, then return to the areas from which they originate to spawn. After spawning, salmon die.

There are five species of salmon in the State of Washington: chinook, coho, chum, pink and sockeye salmon. The numbers caught each year vary. Total commercial catch is in the millions of fish and annual values (to the fishermen) in the tens of millions of dollars. (In 1976, over 43 million dollars.)

(c) *Regulation of the Fishery.* In recognition of an apparent decline in numbers of salmon in the State of Washington resulting in part from the increasing commercialization in the early part of the

Twentieth Century, legislation of that state created an administrative agency with authority to regulate and conserve the food fisheries resources. That agency is the Department of Fisheries, petitioner herein, headed by a Director with authority to promulgate such regulations. (Game fish, such as steelhead trout, are regulated by a different agency.)

(d) *The Court Conflict.* The United States District Court for the Western District of Washington rendered a decision on February 12, 1974, interpreting the treaties in question here. *United States v. Washington,* 384 F.Supp. 312 (W.D. Wa. 1974). The federal district court held that the treaty language quoted above p. 6 required the state (and petitioner Fisheries) to exercise its regulatory police powers to restrict non-Indian fishermen in order to provide treaty Indians 50 percent of all the harvestable fish which would return to their usual and accustomed areas if there were no other fisheries plus (1) commercial harvest on reservation, (2) harvest for personal consumption, and (3) harvest for ceremonial purposes. These last three categories of catch are not counted by the federal court. The court did not allow nontreaty commercial and sport fishing to participate as parties in the trial of that action. (Purse Seine Vessel Owners Association, a plaintiff in *Puget Sound Gillnetters Assn. v. Moos,* was specifically rejected when they applied to intervene in that action.)

Petitioners made good faith efforts to comply

with the district court's decision and subsequent orders. The regulations as demanded by the court were promulgated, i.e., restriction of the non-Indian harvest to provide the required numbers of fish to treaty Indians.

Non-Indian fishermen of the state challenged the regulations in the courts of the State of Washington. The lower court of the State of Washington and eventually the Washington State Supreme Court in actions sought to be reviewed here held that such regulations are unlawful and may not be promulgated by petitioner. This occurred in the trial courts on several occasions despite the issuance of injunctions by the federal district court which purported to enjoin the state court proceedings. (See, e.g., Appendix, pp. H-1-6.)

The first of such regulations were promulgated in 1974 shortly after the decision in *United States v. Washington.* They were challenged in that year in the case *Fishing Vessel Assn. v. Tollefson* (Appendix B). The Thurston County Superior Court overturned those regulations, finding that they were beyond the statutory authority of Fisheries (petitioners herein). At this early stage, the argument was advanced and rejected that the Supremacy Clause required that states, their agencies and courts in recognizing treaties as the supreme law of the land must comply with federal court interpretation and implementation of those treaties. That this was the purpose of the challenged regulation is made clear in the decision of the Washington State Supreme

Court in first considering the state's appeal in the Fishing Vessel Association (hereinafter Fishing Vessel I) case:

> The Thurston County Superior Court found as a fact that the regulations in question were adopted solely as a result of the decision by the federal district Judge George H. Boldt, Western District of Washington at Tacoma, in *United States v. Washington.*

Fishing Vessel Assn. I, supra, at 417, Appendix pp. F-1-2.

By the time the Washington State Supreme Court had an opportunity to consider the appeal, the season to which the regulations would have pertained was over. Though recognizing that:

> Questions presented here are indeed serious and involve a conflict between the state and federal courts in this jurisdiction.

Fishing Vessel Assn. I, p. 419, Appendix p. F-3.

The Supreme Court of Washington dismissed the case as moot.

Subsequently, a motion was filed by petitioners asking the Washington Supreme Court to rehear the case. It was granted.

Prior to the rehearing of that action, another effort was made to get these same questions resolved. An original action was filed in the Washington State Supreme Court in *Puget Sound Gillnetters Assn. v. Moos* asking a writ of mandamus/prohibition to order Fisheries not to promulgate the regulations required by the federal court. In that case, petitioners also sought to raise each and every issue including whether through the supremacy clause the federal

court interpretation of the treaties became binding upon petitioners and the courts of the State of Washington. Those and other constitutional issues were considered as can be seen from the opinion of that court, pp. 684-693, Appendix, pp. D-8-17.

In the latter action, petitioners requested the participation of the United States Government and the treaty tribes in order to assure all issues were raised. The United States Department of Justice and numerous tribes did participate *amicus* but declined to ask party status.

The decision in *Gillnetters* was rendered 9 June 1977. (Appendix, pp. D-1) The court declined at that time to issue a mandamus/prohibition writ.

After rehearing the *Fishing Vessel* case, the Washington State Supreme Court rendered its decision 23 November 1977. The United States and tribes were also asked to participate in that action but declined to do so.

On October 10, 1977, with the denial of a petition for rehearing, the *Gillnetters* case became final.

Subsequently, the fishing groups in *Gillnetters* have renewed their request for a mandamus order from the Washington State Supreme Court contending in part the petitioners here have been or will continue to comply with the federal district court's orders. A mandamus was issued on a preliminary basis by the Chief Justice of the Washington State Supreme Court. It is also presently under consideration by the whole court.

As may be more fully seen from the decisions (Appendix pp. D-8-7 and B-4-11), the Washington State Supreme Court has held that regulation to comply with the federal court orders and allocate over 50% of the fish to Indians are beyond the statutory authority of petitioner Fisheries and barred by the constitutional prohibition against the granting of special privileges and immunities and the constitutional requirement of equal protection. Thus, such regulations may not be enforced in the courts of the State of Washington.

REASONS FOR GRANTING THE WRIT

Presently in the State of Washington there is a direct confrontation between the state and federal court systems with directly conflicting decisions and orders from those courts.[1]

The Washington State Supreme Court, in holding unconstitutional implementation of the federal court's interpretation of the Indian treaties because violative of the equal protection requirements of the Fourteenth Amendment, and prohibitions against special privileges and immunities has decided a "federal question of substance not theretofore determined" by the United States Supreme Court. Supreme Court Rule 19(a) lists this as an appropriate consideration in deciding whether grant of a writ of certiorari is appropriate.

This court has not considered the specific

[1]Note, e.g., finding of the federal district court in a recent order: "Those rulings [by the State Supreme Court] prevent defendants from complying with earlier decrees of this court."

allocation of the federal court previously (50% plus reservation ceremonial and subsistence). The Washington Supreme Court finds that particular allocation constitutionally offensive:

> the granting of more than 50 percent of the harvestable fish to .028 percent of the population (treaty Indians) and less than 50 percent to 2,243,069 non-Indian population, violates the equal protection clause of the fourteenth amendment to the United States Constitution.

Fishing Vessel II, supra, 285-286, Appendix p. B-10-11.

This Court has, of course, previously considered the treaty provision in question, most recently in *Puyallup Tribe v. Department of Game*, ___ U.S. ___, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977). In that case an allocation of fish to treaty Indians was approved. The fish were steelhead trout, a game fish in Washington regulated by a different agency from petitioners herein. The problem, however, in that case was one of protecting the non-Indian share and indeed the fish themselves from treaty Indians asserting an exclusive right to them subject to no controls. The result this Court approved, however, is an allocation of fish to treaty Indians based on the treaties in question.

As well as barring the allocation decreed by the federal district court, the Washington Supreme Court decisions may bar any allocation at all to treaty Indians:

> Indians are citizens of the United States * * * they can neither be denied equal protection of the laws nor granted special

> privileges and immunities * * *
> * * * [Fisheries] cannot allocate fish to any user of the same class, every fisherman in a class must be treated equally and each should be given an equal opportunity to fish within lawful statutes and regulations.

Gillnetters, supra, 684, 692-693, Appendix pp. D-8, 16-17.

To the extent the Washington Supreme Court decisions bar any allocation, they may be considered "probably not in accord with applicable decisions of this Court", alternative grounds for granting a writ of certiorari under Rule 19-1(a) of this Court.

It is recognized that the Court will not review a case where the problems are hypothetical or speculative. Petitioners believe the problems here are rather real and immediate falling within the meaning of "special and important reasons" mentioned by Court rule 19 for granting a writ of certiorari:

> A federal question raised by a petition may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (*Magnum Imports Co. v. Coty,* 262 U.S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Adm. Law Inst. 313.) "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

That the problem in the State of Washington is

beyond the academic and episodic is clearly recognized by the Supreme Court of that state:

> [T]his has become more than an exercise in legal theory, it has developed into a serious social and economic conflict of major proportions. I do not exaggerate when I say that all too frequently lives and property rights have already hung in balance.

(Stafford, concurring in part, dissenting in part in *Gillnetters, supra,* at 698, Appendix p. D-22)

Severe and pressing problems of law enforcement in the management of significant and important salmon fisheries have been raised. Confusion in law enforcement has frustrated efforts to biologically manage the resource for orderly harvest while assuring protection of fish runs.

Beyond these real management problems, the Court should fully understand the situation of petitioners.

The State of Washington and its Department of Fisheries are in an unenviable position, caught between conflicting decisions of the federal court and state court systems.

Fisheries' Director has been ordered to show cause why he should not be held in contempt of court — in both federal and state courts. (He has not yet been judged in contempt, however.)

The State of Washington Department of Fisheries and its Director have been prevented by the state decisions from enforcing state laws and regulations as ordered by the federal court. State officials are seeking to enforce state laws but those laws have been held violative of the federal

constitution by state courts. This court has consistently granted review of these types of important cases:

> The question of our authority to grant certiorari, on the application of state officers, to review decisions of state courts declaring state statutes, which these officers seek to enforce, to be repugnant to the Federal Constitution, has been carefully considered and our jurisdiction in that class of cases has been sustained * * *

Coleman v. Miller, 307 U.S. 433, 442-444, 59 S.Ct. 972, 83 L.Ed 1385 (1938).

This Court there cited numerous examples of prior cases in which such review was held appropriate. They include: *Blodgett v. Silbermann*, 277 U.S. 1, 72 L.Ed. 749, 48 S.Ct. 410 (1928) (certiorari granted to Connecticut tax commissioner where state supreme court held imposition of certain taxes unlawful); *Boynton v. Hutchinson Gas Co.*, 291 U.S. 656, 78 L.Ed. 1048, 54 S.Ct. 457 (1934) (certiorari granted *after argument* to the Attorney General of Kansas where that state's supreme court ruled a state statute unconstitutional under the United States Constitution); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 80 L.Ed. 1347, 56 S.Ct. 918, 103 A.L.R. 1445 (1936) (certiorari granted to New York prison warden where New York Court of Appeals held state minimum wage law violated the Federal Constitution), and *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 82 L.Ed. 3, 58 S.Ct. 87 (1937) (writ of certiorari granted to Washington State official where the supreme court of that state

held a vessel inspection law to be an unconstitutional interference with interstate commerce).

Petitioners also believe that the conflict between the federal and state courts alone is a special and important reason for this Court to grant the requested writ.

Of the existence of the conflict, a crisis of constitutional magnitude, there can be no doubt. Often when such a conflict looms, it is avoided. The doctrines of comity or abstention may be invoked and direct conflict is avoided.

Here, however, the courts recognize but have been unable to avoid the conflict. It was clearly recognized in the recent decisions of the Washington State Supreme Court, review of which is sought here:

> We hold the Director of the Department of Fisheries of the State of Washington does not have authority to apportion fish to conform to the federal district court decision, the federal district court cannot compel the state officer to act beyond his statutory authority, and the granting of more than 50 percent of the harvestable fish to 0.8 percent of the population (treaty Indians) and less than 50 percent to 2,243,069 non-Indian population, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution."

Fishing Vessel Assn. v. Tollefson, supra, at 285-286, Appendix pp. B-10-11.

The federal district court in a recent series of orders also recognized the conflict:

> Decisions by the Washington Supreme

> Court in *Puget Sound Gillnetters Assn. v. Moos*, 565 P.2d 1151 (1977), and *Purse Seine Vessel Owners Assn. v. Moos*, No. 43938, July 1977, have apparently given approval to the state court practice of dismissing prosecutions against non-treaty fishermen. In *Puget Sound Gillnetters Assn. v. Moos*, the Washington Supreme Court said that the Director of Fisheries may not "allocate fish among competing claimants for purposes other than conservation," and that he may not allocate fish to treaty Indians or to non-Indians. Those rulings prevent defendents from complying with earlier decrees of this court.

Order of 27 September, 1977, in *United States v. Washington*.

Petitioners respectfully request that this Court recognize this conflict as those courts have done and resolve that conflict. Thus, the court must compare the conflicting interpretations and implementation of the treaties and choose which is to be the law of the land.

The opinion of the federal court on how this conflict should be resolved is not of record (unless the several injunctions against state court proceedings reflect an opinion). The thoughts of the Washington Supreme Court on the subject have been expressed:

> This dilemma can be resolved only by the Supreme Court of the United States.

Fishing Vessel I, p. 421, Appendix p. F-5.

> Such an interpretation by the ultimate legal authority is the only way the current legal, economic and social conflict can be resolved. Most assuredly, this unresolved clash between federal and state judicial systems and between

> economic and social interests cannot be permitted to continue. Too much is at stake in all areas.

Gillnetters (Stafford concurring in part, dissenting in part), *supra*, at 698, Appendix p. D-22.

Short of such resolution, the situation in the State of Washington continues chaotic and violence has come to the waters of the State of Washington as a result.

As this controversy has continued and the conflict between the courts has developed, it is unfortunate there has not yet been a forum in which all interested parties have been able to litigate as parties. The intervention of all but one sport and commercial fishing groups was successfully opposed by the United States and tribes in *United States v. Washington*.

The state and its agencies have continued good faith efforts to give notice to the United States and the tribes of all actions which may affect their ability to implement the requirements of the *United States v. Washington* decision.

At the request of the United States and the tribes, the federal court has ordered the state to provide notice of such state proceedings and copies of the pleadings involved (see order of the federal court, reproduced in the appendix H-6).

Rather than participate in these numerous cases the United States and the tribes have on several occasions sought to enjoin the Washington courts. The district court has granted several orders enjoining the state superior courts from considering

any cases which may affect the implementation of the *United States v. Washington* decision (E.g., Appendix, p. H-5). Though those orders have been disregarded, no effort has yet been made to cite any state judge for contempt.

That order is of particular interest in that it leaves it to the state court to determine when actions are subsequently filed whether or not they may affect the ability of the state to implement the decision. Probably the penultimate crisis between the courts came when the United States Government brought a motion asking the federal district court to enjoin the Washington State Supreme Court in the *Gillnetters* case, review of which is sought here. Fortunately, that motion was denied.

As the cases sought to be reviewed here were taken to the Washington State Supreme Court, the state agencies invited the United States and the tribes to participate as parties. Indeed, in the *Gillnetters* case the state actually moved to interplead the United States. Despite this notice and the requests by the state to intervene, the United States and the tribes have consistently chosen to participate if at all only as *amicus* (their status in *Gillnetters*). We also urge their participation in this Court.

Orders of the federal court which conflict with the decisions we seek to have reviewed here are on appeal to the Ninth Circuit Court of Appeals. Numerous such appeals are presently set for argument in January and February of 1978. They

include orders of the federal district court allocating special fisheries for Washington Indians from the Canadian Fraser River run managed by the International Pacific Salmon Fisheries Commission (pursuant to treaty with Canada), orders allocating specific numbers of fish to treaty Indians in the most recent season, orders taking over the management of the state's fisheries (including providing for enforcement through contempt of court against individual fishermen), and an order extending this system beyond the original case area and beyond the area ceded by treaty.

It must be candidly admitted whoever prevails in those appeals, it is likely review of such decision will be sought before this Court. It may be possible to consolidate such a case with the instant action for full resolution of all issues.

The cases here, however, are an adequate and appropriate vehicle for the necessary resolution of the conflicts described above.

The confrontation between the state and federal courts with petitioners bound by conflicting decisions of each must be resolved by this Court, the only court capable of resolving such conflict.

CONCLUSION

For the above reasons, writs of certiorari should issue to review the judgments and opinions of the Supreme Court of the State of Washington.

Respectfully submitted:

SLADE GORTON
Attorney General

JAMES M. JOHNSON
Sr. Asst. Attorney General

January 2, 1978

INDEX TO APPENDIX

(A) CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

(B) OPINION — Wash. State Commercial Passenger Fishing Vessel Assn. v. Tollefson, 89 Wn.2d 276

(C) ORDER DENYING MOTION FOR RECONSIDERATION — Puget Sound Gillnetters Assn., et al. v. Donald Moos, No. 44401

(D) OPINION — Puget Sound Gillnetters Assn. v. Moos, 88 Wn.2d 677

(E) ORDER GRANTING PETITION FOR REHEARING — Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson and Washington Kelpers Assn. v. Tollefson No. 43642

(F) OPINION — Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson and Washington Kelpers Assn. v. Tollefson, 87 Wn.2d 417

(G) JUDGMENT and FINDINGS OF FACT AND CONCLUSIONS OF LAW — Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson and Washington Kelpers Assn. v. Tollefson, Nos. 50370 and 50552

(H) PRELIMINARY INJUNCTION STAYING STATE COURT INJUNCTION AND ORDER IMPLEMENTING PRELIMINARY INJUNCTION — United States v. Washington, No. 9213

APPENDIX A

UNITED STATES CONSTITUTION

ARTICLE II

§ 2 POWERS OF THE PRESIDENT. The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

ARTICLE VI

Debts, supremacy, oath. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the iand; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

AMENDMENT V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT X

POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

AMENDMENT XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON STATE CONSTITUTION

ARTICLE I
DECLARATION OF RIGHTS

§ 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

§ 12 SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class or citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

TREATIES

TREATY OF MEDICINE CREEK

December 26, 1854
10 Stat. 1132

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

TREATY OF POINT ELLIOTT

January 22, 1855
12 Stat. 927

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* that they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY OF POINT NO POINT

January 26, 1855
12 Stat. 933

ARTICLE 4. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE MAKAH (TREATY OF NEAH BAY)

January 31, 1855
12 Stat. 939

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE QUINAIELTS

July 1, 1855
12 Stat. 971

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

TREATY WITH THE YAKIMAS

June 9, 1855
12 Stat. 951

ARTICLE III. *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

WASHINGTON STATE STATUTES

75.08.012 Duties of the department. It shall be the duty and purpose of the department of fisheries to preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state and the offshore waters thereof to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof. For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well-being and stability of the commercial fishing industry in the state of Washington.

75.08.080 Rules and regulations——Scope. The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:

(1) Specifying the times when the taking of any or all the various classes of food fish and shellfish is lawful or prohibited.

(2) Specifying and defining the areas, places, and waters in which the taking and possession of the various classes of food fish and shellfish is lawful or prohibited.

(3) Specifying and defining the types and sizes of gear, appliances, or other means that may be lawfully used in taking the various classes of food fish and shellfish, and specifying the times, places, and manner in which it shall be lawful to possess or use the same.

(4) Regulating the possession, disposal, and sale of food fish and shellfish within the state, whether acquired within or without the state, and specifying the times when the possession, disposal, or sale of the various species of food fish or shellfish is prohibited.

(5) Regulating the prevention and suppression of all infectious, contagious, dangerous, and communicable diseases and pests affecting food fish and shellfish.

(6) The fixing of the size, sex, numbers, and

amounts of the various classes of food fish and shellfish that may be taken, possessed, sold, or disposed of.

(7) Regulating the landing of the various classes of food fish and shellfish or parts thereof within the state.

(8) Regulating the destruction of predatory seals and sea lions and other predators destructive of food fish or shellfish, and specifying the proof of the destruction of the same that shall be required.

(9) Specifying the statistical and biological reports that shall be required from licensed or nonlicensed fishermen, dealers, boathouses, handlers, or processors of food fish and shellfish.

(10) Specifying which species of marine and freshwater life are food fish and shellfish.

(11) Classifying the species of food fish and shellfish or parts thereof that may be used for purposes other than human consumption.

(12) Promulgating such other rules and regulations as may be necessary to carry out the provisions of this title and the purposes and duties of the department.

Subdivisions (1), (2), (3), (4), (6), and (7), shall not apply to licensed oyster farms or oysters produced thereon.

APPENDIX B

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.

WASHINGTON KELPERS ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.

[1] **Fish — Indians — Allocation of Fish Resource — Equal Protection.** An allocation of a major portion of the fish resource of this state to a small percentage of the population on the basis of race or ancestry violates the equal protection provisions of the federal constitution.

[2] **Constitutional Law — Treaties — Supremacy.** That portion of U.S. Const. art. 6 which describes treaties as the supreme law of the land does not exempt treaties or their implementing laws from compliance with constitutional provisions and mandates.

[3] **Fish — Indians — Treaty Rights — State Enforcement — Equal Protection.** Any interpretation of Indian treaties so as to require a substantially disproportionate allocation of the state's fish resource to treaty Indians is prohibited by federal equal protection provisions, and no branch of the state government is permitted under the federal constitution to implement such an interpretation.

STAFFORD, J., and WRIGHT, C.J., concur by separate opinion; UTTER and HOROWITZ, JJ., dissent by separate opinion; DOLLIVER, J., did not participate in the disposition of this case.

Nature of Action: An association of charter boat operators challenged certain state fishing regulations which reduced the daily salmon limit for sports fishermen.

Superior Court: The Superior Court for Thurston County, Nos. 50370, 50552, Gerry L. Alexander, J., found that the regulations were adopted solely as a result of a federal court mandate and, on January 23, 1975, held the regulations invalid on various grounds including equal protection and absence of statutory authority on the part of the Director of Fisheries.

Supreme Court: The court originally dismissed the cause as being moot (87 Wn.2d 417). After granting a

rehearing, the court now holds that the regulations in question were enacted in excess of the Director's authority and violated equal protection provisions of the federal constitution, and also holds that treaties between the United States and Indian tribes are not exempt from compliance with federal constitutional provisions. The judgment is *affirmed*.

Slade Gorton, Attorney General, and *James M. Johnson* and *Dennis D. Reynolds, Assistants*, for appellants.

Thom, Navoni, Hoff, Pierson & Ryder, by *Richard W. Pierson* and *Dale L. Kingman*, for respondents.

ROSELLINI, J.—The majority of this court in *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 87 Wn.2d 417, 553 P.2d 113 (1977), held that the case was moot, since the regulations involved, which were adopted in 1974, have been superseded and are now without force or effect. Upon rehearing, the majority has decided that we should address ourselves to the questions raised on appeal, because they are of a recurring nature and of public importance.

The Washington State Commercial Passenger Fishing Vessel Association (hereinafter referred to as respondent) obtained in the Superior Court a declaration that State fisheries regulations WAC 220-56-013 and -063, which reduced from three to two the daily limit of salmon which a sports fisherman was permitted to catch in ocean waters, were invalid. We sustain that judgment.

Sports fishing for salmon off the Washington and Oregon coast has been a major recreational pursuit for a number of years. Charter boats are taken for hire by sports fishermen in Washington coastal areas for the purpose of catching chinook and coho salmon. The 350 to 400 charter boats constitute a major industry in the area of Ilwaco and Westport on the southern coast of Washington and all of the Olympic Peninsula ports, including Neah Bay, Sekiu, La Push, Agate Beach, Port Angeles, and others. There also exists a charter boat industry in Astoria and other Oregon

fishing ports in the vicinity of the Columbia River which are directly in competition with Ilwaco and indirectly competing with the Westport charter fleet.

At the hearing in the Superior Court, the director was questioned with regard to the reason for the regulations, and stated that they were adopted in response to a decision by Federal District Judge George C. Boldt in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 47 L. Ed. 2d 97, 96 S. Ct. 877 (1976), holding that treaties between the treaty Indians and the United States gave the tribes the right to take a certain percentage of the fish in certain coastal streams. He was asked:

> Q. Were there any other factors for the department and yourself with respect to the regulatory enactments that were adopted in complying with the Boldt Decision? . . . A. Were it not for the Boldt Decision, we would not have taken this action.

He further testified:

> Q. What was the effect of the regulations designed with respect to the coastal areas? A. It was designed to put more fish into the coastal Indian streams.

He testified that the regulation, in conformity with Judge Boldt's ruling, was designed to significantly reduce non-Indian fishing in order to make more fish available to the Indians.

The court made the finding that the regulations were passed solely as a result of the Boldt decision and not in furtherance of the director's powers and duties under the Washington statutes which created his office. These relate to the conservation and preservation of the fishery of the State. The court found that the respondents were irreparably damaged; that there was a sharp decrease in the number of sports fishermen carried on the charter boats, which necessitated a 3- to 6-week recovery period, and that the respondents suffered economic loss. The Superior Court also took note of the fact that the United States District

Court ordered the director to make a significant reduction in non-Indian fishing.

The issues raised by this appeal are: (1) Does the director of the Department of Fisheries have the statutory power to make an unequal allocation of fish among members of the same class of user? (2) Can a Federal District Court order a state official to act beyond the powers vested in the state official by the legislature? and (3) May Congress and the executive department, by treaty, or may a court of law, in interpreting a treaty, ignore and supersede provisions of the federal constitution?

The first two questions were answered in the negative in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977). *See also Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977).

The third, though involving fundamental concepts, has not been argued in this court before.

The Federal District Court in *United States v. Washington, supra*, allocated to the treaty Indians more than 50 percent of the harvestable catch, to wit: the right to take 50 percent of the harvestable salmon and steelhead, plus all of the fish that the Indians can catch on the reservation, where they are not regulated by the State,[1] plus all that they can eat, and all they need for ceremonial purposes.

In addition, under the court's order, the share of salmon and steelhead allocated to the Indians is to be increased by

> [a]n additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside

[1]Except as provided in *Puyallup Tribe, Inc. v. Washington Game Department*, 45 U.S.L.W. 4837 (1977).

> the jurisdiction of the State, although within Washington waters.

United States v. Washington, supra at 344.

The Federal District Court ruled that treaty Indians are to be entitled to fish at other than traditional fishing grounds and

> [i]f a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share.[2]

United States v. Washington, supra at 410.

The Federal District Court found all the above rights from its interpretation of article 3 of the Treaty of Medicine Creek, 10 Stat. 1132, 1133 (1854), which states:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory* . . .

(Italics ours.)

Does the treaty, as thus interpreted, deny to citizens of the state the equal protection of the laws guaranteed under U.S. Const. amend. 14? In exploring that question, it is necessary to take into consideration the following facts:

The number of treaty Indians living in the case area, as identified by the Federal District Court, in proportion to the number of other persons living in the area, is .028 percent. The number of treaty Indians living on the reservation is less than .007 percent of the total tribal membership. The Federal District Court found that only 794 treaty Indians engaged in commercial fishing. The entire population in the Federal District Court case area was 2,243,069. In Western Washington alone there are 6,600 commercial fishermen and 283,650 sports fishermen.

[2]To enforce the federal decision, the Federal District Court proposed to use state resources and the state's power to regulate the taking of fish. Under its orders, the state regulations were not to be confined to or limited to conservation and preservation purposes, or to balancing the interest in on- and off-reservation fishing with conservation measures. The State was required to regulate the taking of fish in offshore waters, which were not a part of the treaty Indians' usual and accustomed fishing grounds, to increase the supply of fish at those places.

Thus, it is apparent that the court awarded over 50 percent of the state's natural resources to a group of its citizens comprising less than 1 percent of the population of the area involved in the decision. The decision was based upon a treaty made not with a foreign nation, but with inhabitants of this Nation who were ancestors of the Indian claimants in this action. The allocation was one which had no precedent in the interpretation of Indian treaties. It had the effect of injecting a new provision into the treaties.

[1] We think that there can be no doubt that were the executive department to enter into a treaty with a foreign nation or were the Congress to pass a law which allocated a portion of a state's natural resources to a group of its citizens, based upon their race or ancestry, that provision would be struck down as a denial of equal protection of the laws. The United States Supreme Court has observed that the language of the treaty, "in common with all citizens of the Territory", invokes the principles of equal protection. *Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (*Puyallup* II), was remanded with an admonition that *the issue of equal protection is implicit in the term "in common with" as used in the treaty.*

In *Puyallup Tribe, Inc. v. Department of Game*, 391 U.S. 392, 403, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968) (*Puyallup* I), the court had also stated with respect to the term "in common with":

> [W]e only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

Granted the equal protection clause of the Fourteenth Amendment does not mandate complete equality. But it cannot be seriously argued that an allocation of more than 50 percent of a natural resource of a state to a group of citizens comprising a little more than .028 percent of the population does not deny such protection.

[2] The appellants agree that the result achieved by the Boldt interpretation, were it enacted as a law, would run

afoul of constitutional prohibitions. They suggest, however, that the allocation is immune from constitutional restriction because treaties are the supreme law of the land and are binding within the territorial limits of the United States. While it is true that a treaty is the supreme law of the land under U.S. Const. art. 6, the constitution stands above the treaty in the order of supremacy.

U.S. Const. art. 6 reads, in part:

> *This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;* and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any *state* to the contrary notwithstanding.

(Italics ours.)

To test the notion that a treaty may supersede the constitution, let us examine a hypothetical case.

Suppose the executive branch of the government should enter into a treaty with the Vatican to the effect that all Catholic churches and schools are to be tax-supported in the United States. And suppose that the United States Senate should ratify the treaty and attempt to implement it by statutes. Would such a treaty or the implementing statutes be enforceable in the United States, in spite of the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion . . ."? Can it be seriously suggested that the courts would enforce such a treaty or laws?

If treaties are indeed supreme over the constitution, the executive and the Senate can, by exercising the treaty-making power, amend the basic document so as to grant rights not found in that instrument or deny rights otherwise mandated.

If this was the intent of the framers, then not only can the exercise of the treaty power effectively amend the constitution so as to preclude the assertion of rights guaranteed under that instrument, but it could just as easily effect

a change in the structure and character of our government itself.

With respect to the supremacy of treaties over acts of Congress, the Supreme Court has said:

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self–executing.

Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888).

Any notion that a treaty may violate any section of the constitution was laid to rest in *Reid v. Covert*, 354 U.S. 1, 16–17, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957). The court stated:

> There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.

(Footnote omitted.)

The Supreme Court has further stated:

> The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.

Doe v. Braden, 57 U.S. (16 How.) 635, 656, 14 L. Ed. 1090 (1853). *See Geofroy v. Riggs*, 133 U.S. 258, 267, 33 L. Ed. 642, 10 S. Ct. 295 (1890); *United States v. Wong Kim Ark*, 169 U.S. 649, 700, 42 L. Ed. 890, 18 S. Ct. 456 (1898); *Asakura v. Seattle*, 265 U.S. 332, 341, 68 L. Ed. 1041, 44 S. Ct. 515 (1924).

If a treaty itself may not contravene constitutional provisions, it must follow that an interpretation of a treaty which leaves it open to constitutional objections, is likewise forbidden (*Reid v. Covert, supra*); and certainly laws or regulations which violate a constitutional provision, though they be made pursuant to the terms of a treaty, must fail.

While generally the State has no jurisdiction over persons living on Indian reservations,[3] except as ceded by Congress, its off–reservation jurisdiction has been fully recognized by the Supreme Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973), where it said:

> But tribal activities conducted outside the reservation present different considerations. . . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

And see Organized Village of Kake v. Egan, 369 U.S. 60, 75, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1962), which states:

> Even where reserved by federal treaties, off–reservation hunting and fishing rights have been held subject to state regulation . . .

Both the State's Enabling Act[4] and the treaties them-

[3] *But see Puyallup Tribe, Inc. v. Department of Game*, 45 U.S.L.W. 4837 (1977).

[4] The State Enabling Act which must be read in conjunction with the treaties, *Ward v. Race Horse*, 163 U.S. 504, 41 L. Ed. 244, 16 S. Ct. 1076 (1896), and

selves (providing for the right to fish "in common") are consistent with the State's jurisdiction over its lands and waters outside the reservation, the only place we are concerned with here. This being the case, the Fourteenth Amendment has full application.

[3] The equal protection clause of the Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

> Congress may not authorize the States to violate the Equal Protection Clause. . . . Congress is without power to enlist state cooperation in a joint federal–state program by legislation which authorizes the States to violate the Equal Protection Clause.

Shapiro v. Thompson, 394 U.S. 618, 641, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). *See also Katzenbach v. Morgan*, 384 U.S. 641, 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966).

Whenever the federal law requires the State to act, the State must act in conformity with the Fourteenth Amendment. This rule must also apply to all courts; otherwise, the effect is to give to the judicial branch the power to amend the constitution. This cannot be done. *Reid v. Covert*, *supra*.

We hold that the director of the Department of Fisheries of the State of Washington does not have authority to apportion fish to conform to the Federal District Court decision, that the Federal District Court cannot compel a state officer to act beyond his statutory authority, and that the granting of more than 50 percent of the harvestable fish to .028 percent of the population (treaty Indians) and less

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Mescalero Apache Tribe v. Jones, 411 U.S. 145, 36 L. Ed. 2d 114, 93 S. Ct. 1267 (1973), did not disclaim or surrender to Indians any rights to participate in the common fishery. The Supreme Court in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414, 10 L. Ed. 997 (1842), stated:

> And it would require very plain language in these letters–patent, to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away [from the inhabitants].

than 50 percent to 2,243,069 non–Indian population, violates the equal protection clause of the fourteenth amendment to the United States Constitution.

We affirm the trial court.

HAMILTON, BRACHTENBACH, and HICKS, JJ., and WIEHL, J. Pro Tem., concur.

STAFFORD, J. (concurring in the result only)—Notwithstanding the import of any dissenting or concurring opinions to the contrary, the current decisional law of this state is reflected in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977); *Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977). As indicated therein, and as pointed out in this case, the Department of Fisheries' authority to regulate the salmon fishery is limited to "conservation" purposes.

Inasmuch as the regulations adopted in 1974 have been superseded, the issue before us is moot. Ordinarily we will not resort to mootness as a means of dismissing cases involving issues of great public importance. However, the rule is not applicable here.

The instant record makes it abundantly clear the challenged regulations were not adopted for the purpose of "conservation" but were formulated solely in response to an order of the Federal District Court. That being the case, the Director of Fisheries clearly exceeded the authority granted him by the legislature. To that extent *Puget Sound Gillnetters Ass'n* and *Purse Seine Vessel Owners Ass'n* are fully dispositive of the only real issue before us. Thus, the matter not only is moot but it no longer involves a subject of great public importance, having been previously resolved in the above cited cases.

When an appeal no longer presents the question that originally warranted our retention of a moot case, we should not continue to consider it merely to discuss, by way of dicta, other matters only tangentially related thereto. Despite the temptation to consider matters beyond the

Director's power to regulate the salmon fishery, the discussion is not necessary to the decision and should be eliminated as dicta.

Accordingly, I would dismiss the appeal of the Director of Fisheries as moot.

WRIGHT, C.J., concurs with STAFFORD, J.

UTTER, J. (dissenting)—I have sailed the waters of the Pacific Ocean from Kodiak Island in the north to Maui in the south and most of the bays and inlets of this state. My sympathies are with the men and women who sail these waters and gain their livelihood from them. The oath of office which I took, however, is paramount and binds me to uphold the laws and Constitution of the State of Washington and the Constitution of the United States as well. When there is a conflict between state and federal law, the supremacy clause of the United States Constitution (U.S. Const. art. 6, cl. 2) makes binding upon the states the rulings of the United States Supreme Court. We have recently recognized in a different context that "State and local laws cannot stand if they impede, burden, or frustrate the purpose of [federal laws]." *Lindsay v. Seattle*, 86 Wn.2d 698, 708, 548 P.2d 320 (1976).

The majority opinion holds the apportionment of harvestable fish mandated by the federal courts in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 47 L. Ed. 2d 97, 96 S. Ct. 877 (1976), to be violative of the equal protection clause of the fourteenth amendment to the United States Constitution and therefore not binding upon the State for the reason that treaty fishermen are not members of a distinct group justifying differential treatment. In so holding, the majority completely ignores the most basic principles of Indian treaty law developed over the past 70 years by the United States Supreme Court.

The majority embraces the argument that the treaty clause at issue in *United States v. Washington, supra,*

granting to signatory tribes the right to take fish at "usual and accustomed places in common with all citizens of the territory", violates the equal protection clause of the federal constitution unless interpreted to confer no greater rights than those held by nontreaty citizens. In so doing, the majority asserts that the issue "has not been argued in this court before." In fact, however, the argument has been advanced in substantially similar form before both this court and the United States Supreme Court on several occasions.

The Supreme Court has expressly rejected this theory on at least two occasions. Continued adherence to this discredited doctrine should be embarrassing to this court and is particularly unproductive in this case. I am convinced that, whatever may be the personal inclinations of the members of this court, continued refusal to accept the legal principles enunciated in *Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (*Puyallup* II), *Puyallup Tribe, Inc. v. Department of Game*, — U.S. —, 53 L. Ed. 2d 667, 97 S. Ct. 2616 (1977) (*Puyallup* III), and *United States v. Washington, supra,* will place upon us significant responsibility for whatever unfortunate events hereafter transpire.

Treaty fishermen are undeniably a unique class under well-established principles of federal law which this court is powerless to ignore. Treaty fishermen may, therefore, be treated as a distinct class of users for purposes of regulation without trammeling upon principles of equal protection. It cannot seriously be argued that the Director of the Department of Fisheries lacks power to allocate fish between distinct and competing user groups for purposes of conservation and systematic exploitation of the resource. Such allocation has been the principal effect of department regulation for many years. I would recognize the continuing power in the director to promulgate regulations for the purposes of conservation even though they have the effect

of allocating fish between distinct user groups, including treaty fishermen, and would reverse the trial court.

I

INDIAN TREATY RIGHTS AND EQUAL PROTECTION

The majority opinion proceeds from the presumption that treaty and nontreaty fishermen possess identical rights to the state fishery and cannot lawfully be placed in separate categories for purposes of regulation. An examination of United States Supreme Court decisions interpreting the crucial clause of the Treaty of Medicine Creek and similar provisions in other treaties[5] establishes this is not the law. Native Americans who are beneficiaries of treaties negotiated by our government with their ancestors possess rights to the fish in our waters which clearly exceed those of ordinary citizens.

United States v. Winans, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), is the first of a long series of cases decided by the Supreme Court from this jurisdiction and concerns the scope of the rights conferred by the fishing provision at issue here. The issue presented in *Winans* was framed by the court as follows, at page 379:

> The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places *in common* with the citizens of the Territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the State, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians from the river by reason of such ownership.

The principles enunciated by the court in answering this contention established the basic precepts which continue to control this area of law.

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[5]A typical provision reads:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . ." Article 3, Treaty of Medicine Creek, 10 Stat. 1132, 1133 (1854).

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. . . . There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty.

United States v. Winans, supra at 381. The court then held that neither the State nor an abutting landowner could exclude the Indians from access to their usual and accustomed fishing grounds. The decision clearly established over 70 years ago that treaty Indians possess rights distinct from those of ordinary citizens.

The opinion in *Winans* recognized a principle of treaty interpretation which retains crucial importance in evaluating equal protection arguments raised with respect to treaty Indian rights. The rights and powers which Indian treaties establish are not *grants* of power *to* the Indians, but rather *surrender* of rights *from* them. Thus, rights not explicitly given up are rights *reserved* by the Indians. The importance of this principle in the current case results from its

impact upon proper interpretation of the phrase, "in common with." In *Winans* the Supreme Court reversed a lower court decision limiting the Indians to only the same fishing rights as others had. Using reserved rights analysis, Justice McKenna pointed to the absurdity of this interpretation; it was hardly reasonable to conclude that the Indians had been willing to give up all of their independent fishing rights in their entirety. In an oft–quoted passage, Justice McKenna discussed the decision of the lower court and evaluated it, at page 380:

> The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.

Winans stands unequivocally for the proposition that "in common with" does not limit Indian fishing rights to those which others may also exercise. Thus, the *Winans* decision is itself a clear recognition of the separate character *and separate source* of Indian treaty rights; while the ordinary United States citizen has rights as defined by the constitution and subject to limitation by the proper exercise of the police power of the states, treaty Indians *retain rights as established under treaty* prior to the grant of United States citizenship to the Indians.[6]

[6]Complementing the reserved rights analysis of *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), are the principles of treaty construction mandating that (1) doubts and ambiguities are to be resolved in favor of the Indians, and (2) the treaties are to be construed as the Indians understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973). These principles are so well established as to be beyond the necessity for comment, but they do underscore the propriety—indeed, the *necessity*—of recognizing that the treaties reserve to the Indians rights which others simply do not have. Because the source of Indian fishing rights is different from that of others, a distinction between the rights of these two groups with respect to the *scope* of those rights cannot run afoul of equal protection guaranties.

Tulee v. Washington, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862 (1942), involved a challenge by a member of the Yakima Tribe to his conviction for fishing without a state license. The court held:

> [W]hile the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.
>
> In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 U.S. 371, this Court held that, despite the phrase "in common with citizens of the Territory," Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their "usual and accustomed places: in the ceded area; . . .

(Footnote omitted.) *Tulee v. Washington, supra* at 684.

The extent of the power of the State to regulate the treaty fishery for the conservation purposes recognized in *Tulee* was the next issue faced by the Supreme Court. In *Puyallup Tribe, Inc. v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968) (*Puyallup* I), the State sought an injunction against fresh water set net fishing by treaty Indians. The Supreme Court responded by reiterating its prior holdings to the effect that the State had power to regulate the off reservation treaty fishery where necessary for the conservation of fish, but pointed out that this standard is *"distinct from the federal constitutional standard concerning the scope of the police power of a State."* (Italics mine.) *Puyallup* I at 402 n.14. The court also dismissed the argument that the statutes granting citizenship to Indians altered or abrogated their preexisting treaty rights, stating: "The right to fish 'at all usual and accustomed' places *may*, of course, *not be qualified* by the State, *even though* all Indians born in the United States are now *citizens* of the United States." (Italics mine.)

Puyallup I at 398. Thus, *Puyallup* I directly contradicts the assertions by the majority here that the Indians' present status as citizens allows the equal protection clause to be utilized to abrogate established treaty rights.

Puyallup I was remanded for further findings on the conservation issue with the admonition that such findings "must cover the issue of equal protection implicit in the phrase 'in common with'". *Puyallup* I at 403. The majority mistakenly seizes upon this language as supportive of its position that treaty Indians have no greater rights than other citizens. Subsequent decisions of that court refute the majority's interpretation; it is now clear that the thrust of the court's equal protection concern is directed at securing full state respect for the rights of treaty fishermen.

Following the remand in *Puyallup* I, this court upheld fisheries regulations allowing a treaty net fishery for salmon and denying special rights to treaty fishermen as to steelhead. Both parties petitioned the Supreme Court for review and consolidated writs of certiorari were granted. *See Department of Game v. Puyallup Tribe, Inc.*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (*Puyallup* II). In its petition for writ of certiorari in *Puyallup* II, the State Department of Game listed as one of the grounds for Supreme Court review:

> The failure of the court, in the opinion below [*i.e.*, 80 Wn.2d 561] to hold that state conservation laws may be applied to Indian and non–Indian citizens on an equal basis in off–reservation waters violated the Equal Protection Clause adverted to by Justice Douglas in expressing the view for a unanimous court in the Puyallup opinion at 403.

Petition for Writ of Certiorari on behalf of the State of Washington Department of Game, United States Supreme Court cause No. 72–481, at 10. An examination of the briefs presented to the Supreme Court in that case confirms that the analysis embraced by the majority here was presented

to the Supreme Court in *Puyallup* II.[7] Such an analysis was expressly rejected in *Puyallup* II. The issue presented was framed thusly by the court:

> The ban on all net fishing in the Puyallup River for steelhead grants, in effect, the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

(Footnote omitted.) *Puyallup* II at 46–47. Though it was conceded that the Indians were free to pursue steelhead as sports fishermen, the court held the treaty granted to the treaty tribes special rights to a portion of the catch, over and above that enjoyed by others.

> If hook–and–line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner be *fairly apportioned* between Indian net fishing and non–Indian sports fishing . . .
>
> The aim is to *accommodate* the *rights of Indians under the Treaty and the rights of other people.*

(Italics mine.) *Puyallup* II at 48–49. *Puyallup* II clearly establishes that Indians fishing pursuant to a treaty possess special rights and constitute a distinct class of fishermen. The conclusion that the type of equal protection argument advanced here by the majority was expressly rejected in *Puyallup* II is inescapable.[8]

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[7] A similar argument has also been considered and rejected by a majority of this court. *See Department of Game v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 497 P.2d 171 (1972). Indeed, Justice Hale in dissent castigated the majority for its rejection of the equal protection analysis which the State had urged upon this court. Further, the majority opinion in that case made clear the court's recognition at that time of the distinct and separate status of treaty fishermen, a recognition which the majority's opinion in this case retracts without explicitly overruling, citing, or even acknowledging its prior analysis. It is particularly difficult to understand this court's current departure from its prior position, especially when that position was so clearly in harmony with the binding Supreme Court precedents, a distinction which the position of the majority in this case cannot enjoy.

[8] The statement in the majority opinion concerning the terms of the remand in *Puyallup* II is unfortunately inaccurate and therefore misleading. The majority asserts that *Puyallup* II was remanded with an admonition that the issue of equal protection is implicit in the term "in common with." The implication is that the majority's equal protection theory was recognized by the court in *Puyallup* II.

Puyallup II also establishes that this special class of fishermen, in addition to other rights such as those enunciated in *Winans* and *Tulee*, is entitled to a fair portion of harvestable fish covered by the treaty and that what constitutes a "fair portion" is to be decided on a case–by–case basis on the facts presented.

> What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be located, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook–and–line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

Puyallup II at 48–49.

Subsequent Supreme Court decisions reinforce this analysis. *Antoine v. Washington*, 420 U.S. 194, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975), concerned the scope of the treaty hunting rights of Colville Indians under a similar treaty provision. This court had upheld convictions for hunting out of season in violation of state law, rejecting a treaty defense. The Supreme Court reversed, again recognizing that Indian tribal members have special rights under their treaties.

> Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to hunt there. 82 Wash. 2d, at 449–450, 511 P.2d, at 1357–1358. But the provisions of Art. 6 that the preserved rights are not exclusive and are to be enjoyed "in common with all other persons," does not support that interpretation or affect the Supremacy Clause's preclusion of qualifying state regulation. Non–Indians are, of course, not beneficiaries of the preserved rights, and the State remains wholly free to prohibit or regulate non–Indian hunting and fishing. The ratifying legislation must be construed to *exempt the Indians' preserved rights from like state regulation* . . .

(Italics mine.) *Antoine v. Washington, supra* at 205–06. Justice Douglas, in a concurring opinion, further clarified his opinions in *Puyallup* I and *Puyallup* II, stating:

> *It has long been settled* that a grant of rights—in the first case, fishing rights—on an equal footing with citizens of the United States would not be construed as a grant only of such rights as other inhabitants had. As stated in *United States v. Winans*, 198 U.S. 371, 380 (1905): "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." That was our view in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). A "right" which the Federal Government grants an Indian may "not be qualified or conditioned by the State," *id.*, at 399.
>
> I agree with the Court that conservation measures, applicable to all, are available to the State, *id.*, at 398–403; but *discrimination against the Indians* by conservation measures is not permissible, *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44, 48 (1973). . . . The State boldly claims that its power to exact a hunting license from all hunters qualifies even the Indians' right to hunt granted by Congress, irrespective of any conservation need. A State may do that when it comes to non–Indians or to Indians with no federal hunting rights, *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924). *But Indians with federal hunting "rights" are quite different.*

(Italics mine.) *Antoine v. Washington, supra* at 211–12. Thus, after *Antoine* there could be no doubt that (1) the phrase "in common with" is *not* to be construed as merely giving the treaty Indians the same rights that others had, as the majority's fallacious analysis does; and (2) Indians possessing rights under treaties constitute a special and separate class for constitutional purposes.

One year after *Antoine* the United States Supreme Court denied certiorari in *United States v. Washington, supra*.

Puyallup II was not, however, remanded with such an admonition. Such a statement only appears in the *Puyallup* II opinion in the introductory paragraphs explaining the holding in *Puyallup* I. The preceding comments show that this admonition was not intended to carry the meaning given it by the majority here. There not only is no statement in *Puyallup* II which supports the majority, rather the entire opinion refutes it.

The opinion of the Ninth Circuit in that case, which affirmed the District Court, rests squarely upon the "fair portion" holding of *Puyallup* II. *See United States v. Washington*, 520 F.2d 676, 687–88 (9th Cir. 1975). The Ninth Circuit recognized the treaty Indians' right to an equitable apportionment of the harvestable fish, which was mandated by *Puyallup* II, and held the apportionment ordered by the District Court was within the trial judge's discretion as a court of equity devising an apportionment. This is entirely consistent with the Supreme Court 's holding in *Puyallup* II and adds nothing new to it. The Ninth Circuit specifically did not rest its decision upon the necessity of a precise 50 percent apportionment of fish to the treaty tribes. It held the District Court had applied the appropriate legal principles (*i.e.*, the necessity for an equitable apportionment) and reviewed the precise allocation made only for abuse of discretion. The Supreme Court predictably denied certiorari in this case because it presented no questions which the court had not passed upon in *Puyallup* II.

The Supreme Court's most recent pronouncements in this field are contained in *Puyallup* III, which arose as a result of the remand in *Puyallup* II and subsequent decision of this court in the same case. *See Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976). In its opinion following remand this court upheld an allocation of 45 percent of the natural run of steelhead to Indian fishermen. In an expansive bit of dicta the majority invited the Supreme Court to reconsider its interpretation of the treaty provision. The State, in its petition for writ of certiorari, presented once again to the Supreme Court essentially the same argument which the majority here has submitted to be unique, and indeed recognized that this issue had been previously decided. In his petition the Attorney General stated:

> We recognize that the Court [*i.e.*, the United States Supreme Court] has ruled upon this issue in Puyallup II 414 U.S. 44 . . .

Response to Petition for Certiorari and Cross Petition by State of Washington Department of Game, Supreme Court cause No. 76–423, at 24. It can hardly be said that the equal protection argument advanced in this case is new or unique. The Supreme Court affirmed the 45 percent allocation in *Puyallup* III.

To summarize, the federal cases establish that treaty Indians enjoy a specific federal right, or occupy a special class, *entitled to take fish at specific locations*. In part this is a property right, including an easement across even privately owned adjacent land to gain access to a reserved fishing site. *United States v. Winans, supra*. The exemption from taxation established in *Tulee v. Washington, supra*, is yet another aspect of this right, being an immunity which even the fee owner of riparian property may not assert. But these attributes do not exhaust the scope of the treaty clause. The treaty also provides protection from state regulation which effectively and unnecessarily destroys the right to take fish set forth by the treaty provision. In order to regulate the treaty fishery the State must show that its regulation is a reasonable and necessary conservation measure *and* that its application to the Indians is necessary in the interests of conservation. *Tulee v. Washington, supra; Department of Game v. Puyallup Tribe, Inc., supra* (*Puyallup* II); *Antoine v. Washington, supra*. Finally, the State must also "fairly apportion" the harvestable run of fish remaining available after such regulation between treaty fishermen and others. *See Puyallup* II; *United States v. Washington, supra*.

When these special rights are contrasted with those of ordinary citizens it is apparent that federal law has established that two distinct classes of fishermen exist in the state of Washington. It is settled law that the State is free to enact regulations prescribing the terms upon which private citizens may take possession of fish found in this state's waters because those fish are the property of the sovereign. *Washington Kelpers Ass'n v. State*, 81 Wn.2d 410, 502 P.2d 1170 (1972), *cert. denied*, 411 U.S. 982 (1973);

State v. Moses, 79 Wn.2d 104, 483 P.2d 832 (1971), *cert. denied*, 406 U.S. 910 (1972); *Vail v. Seaborg*, 120 Wash. 126, 207 P. 15 (1922). State regulations may not, however, be applied to treaty fishermen in a manner which conflicts with their aforementioned rights under federal treaties. Indian treaties have the same force and effect as treaties with foreign nations. As such, they are a part of the supreme law of the land and are binding upon the states, state laws to the contrary notwithstanding. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831). The fact that Indians have since been made citizens of the United States in no way impairs the continued validity of their treaty rights or the obligation of the states to respect them. *See Puyallup* I.

The majority contends the Department of Fisheries may not enact regulations for purposes of conservation which result in an allocation of fish between treaty and nontreaty fishermen because to do so would result in a discriminatory allocation of fish between members of the same class. The opinion rests upon a false premise. As has been clearly demonstrated, treaty and nontreaty fishermen are in fact members of different classes and may be treated differently without violating the precepts of equal protection.

> Article I, § 12 of the state constitution and the fourteenth amendment to the Federal constitution, prohibiting special privileges and immunities and guaranteeing equal protection of the laws, require that *class legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within, and those without, a designated class.* Within the limits of these restrictive rules, the legislature has a wide measure of discretion, and its determination, when expressed in statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust.

Washington Kelpers Ass'n v. State, supra at 421, quoting *Clark v. Dwyer*, 56 Wn.2d 425, 435–36, 353 P.2d 941 (1960).

Contrary to the assertion in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977), the proposed regulations do not result in classification on the basis of race, but upon rights under federal treaties. Many native Americans do not possess the special treaty rights which the federal courts have ordered this State to respect. Treaty Indians possess vested rights which set them apart from ordinary citizens and establish them as a distinguishable class for purposes of state regulation. There is no violation of equal protection here.

II

THE SCOPE OF THE DIRECTOR'S REGULATORY POWERS

The Director of Fisheries' regulatory powers are set forth principally in three statutes, RCW 75.08.012; .020; .080. These statutes are clearly designed to allow the director to enact regulations to conserve the state fishery in order to preserve and enhance the industry's economic viability. The director's duties in this regard are set forth in mandatory terms in RCW 75.08.012.

> It shall be the duty and purpose of the department of fisheries to preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state and the offshore waters thereof to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof. For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well–being and stability of the commercial fishing industry in the state of Washington.

The more specific provisions of RCW 75.08.020 and .080[9] are consistent with this general mandate. In order to effectively exercise the mandatory duties imposed upon him by

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[9] "The director shall devote his time to the duties of his office and enforce the laws and regulations of the director relating to propagation, protection, conservation, preservation, and management of food fish and shellfish." RCW 75.08.020.

"The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore

statute, it is essential that this court recognize the power of the director to enact regulations which he finds necessary to preserve and promote the fisheries resource in light of the new demands placed upon it by virtue of federal court decisions which are binding upon the state. As pointed out by Justice Horowitz in his dissent in *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 693–94, 565 P.2d 1151 (1977):

> *United States v. Washington, supra* at 389–93, 399–412, 413–20, and particularly at page 416, held that the Department of Fisheries and its director had the authority and were indeed obligated under the supremacy clause to refrain from violating the District Court injunction. Indeed, the defendants, including the Department of Fisheries and its director, are specifically ordered to "fully observe and to the best of their ability carry out the provisions and purposes of the treaties cited in paragraph 1 of the Findings of Fact," and "conform their regulatory action and enforcement to each and all of the standards set forth in Final Decision #1." *United States v. Washington, supra* at 414. This provision is now final in the federal court system and the Department of Fisheries and its director are bound by the injunction. Moreover, as *United States v. Washington, supra* at 402 states: "Because the right of each treaty tribe to take

waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:

"(1) Specifying the times when the taking of any or all the various classes of food fish and shellfish is lawful or prohibited.

"(2) Specifying and defining the areas, places, and waters in which the taking and possession of the various classes of food fish and shellfish is lawful or prohibited.

"(3) Specifying and defining the types and sizes of gear, appliances, or other means that may be lawfully used in taking the various classes of food fish and shellfish, and specifying the times, places, and manner in which it shall be lawful to possess or use the same.

". . .

"(6) The fixing of the size, sex, numbers, and amounts of the various classes of food fish and shellfish that may be taken, possessed, sold, or disposed of.

"(7) Regulating the landing of the various classes of food fish and shellfish or parts thereof within the state.

". . .

"(12) Promulgating such other rules and regulations as may be necessary to carry out the provisions of this title and the purposes and duties of the department." RCW 75.08.080.

> anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any actions of the state."

To fail to recognize this binding ruling at this point will only further imperil the resource itself and insure that the State will lose a substantial amount of control over this vital resource to the federal government and those agencies which ultimately are vested with control of the treaty fishery. Such a result is certainly counterproductive. The refusal of our state courts to accept as binding the pronouncements of federal courts with regard to the federal rights of treaty fishermen has already contributed to a substantial loss of state control over the state fisheries resource. The federal government has now entirely preempted the power of the states to manage the offshore fishery beyond the territorial limits of the state. *See Northwest Trollers Ass'n v. Moos*, 89 Wn.2d 1, 568 P.2d 793 (1977). Federal enforcement officers also patrol our inland waters, utilizing the federal contempt power to enforce federal rights which our state courts have chosen in many instances to ignore. The state fisheries director has himself been placed in personal jeopardy by the federal court for alleged refusal to comply with its orders. The state fisheries resource has suffered considerably from the absence of a consistent comprehensive management policy throughout this lengthy legal entanglement. More importantly, this controversy has escalated to the point at which the lives and property of individual citizens are in peril. It would be painfully naive to assert that this court's reluctance to recognize the validity of the decisions of the United States Supreme Court and other federal courts with regard to the treaty fishery is not at least in part responsible for this situation.

In *Gillnetters* the majority recognized that the director possesses the power to allocate fish between competing claimants for the purpose of conservation. *Puget Sound*

Gillnetters Ass'n v. Moos, supra at 683. It held, however, that this power did not include authority to allocate fish between competing claimants of the *same class*. As the previous discussion shows, treaty and nontreaty fishermen are not "of the same class" and the *Gillnetters* decision is therefore not controlling.

Gillnetters also mistakenly rests upon the proposition that the United States Supreme Court has not construed the treaty provision in a manner which is binding upon the State. This is also incorrect. *Puyallup* II expressly holds that the treaty clause entitles its beneficiaries to take a fair portion of the harvestable fish. The subsequent decision in *United States v. Washington, supra,* is expressly based upon the controlling rule of law enunciated in *Puyallup* II. This court is, of course, *not* free to interpret the treaty clause in a manner inconsistent with *Puyallup* II. The allocation ordered against the State by the District Court in *United States v. Washington, supra,* has been held to be within the trial court's discretion under the fair portion rule by the Ninth Circuit and the Supreme Court has denied certiorari, making that judgment final and binding upon the State as a party to that action.

Given all this, the simple fact is that, if the director is not allowed to promulgate regulations for the conservation of the fishery which reflect the competing rights of treaty and nontreaty fishermen, someone else will. The regulations promulgated by the department under these statutes have for many years resulted in allocation of fish between competing classes of user groups such as commercial and noncommercial, seiners and gillnetters, etc. A new class now exists which it is both logical and necessary that the director take into account. To hold that he is without power to do so is both inconsistent with established law and will but assure that the legislative purpose set forth in RCW 75.08-.012 will be entirely frustrated.

> The words "conservation" and "management" in the applicable statutes are broad enough to encompass the

> principles of allocation embodied in the challenged regulations. Allocation is an important factor in the conservation of fish runs. Where a resource is not presently plentiful enough to satisfy all needs, a restriction on withdrawal must be instituted in order to conserve the renewable resource and insure its availability in the future.

Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 87 Wn.2d 417, 423-24, 553 P.2d 113 (1976) (Utter, J., dissenting).

The majority opinion misconstrues cases and ignores binding precedent. It reaches a result which can only make a poor situation much worse for all citizens of our state. I dissent.

HOROWITZ, J., concurs with UTTER, J.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

No. 44401

ORDER

DENYING MOTION FOR RECONSIDERATION

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL,
Petitioners,

v.

DONALD MOOS, ET AL,
Respondents.

The Court having decided by a vote of five to three that the respondents' petition for reconsideration should be denied,

It is ordered that the petition be and it hereby is denied.

Dated this 10th day of October, 1977.

/s/ Charles A. Wright,
Chief Justice

APPENDIX D

[No. 4401. En Banc. June 9, 1977.]

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL,
Petitioners, v. DONALD MOOS, ET AL,
Respondents.

[1] Fish — State Regulation — Department of Fisheries — Statutory Authority. The authority of the Department of Fisheries to regulate commercial salmon fishing (RCW Title 75) is limited to conservation purposes, *viz.*, to prevent harvesting of fish required for natural or artificial spawning. It has no power to allocate fish among users of the same class.

[2] Fish — Indians — State Conservation Rules — Treaty Indians. Indians, as citizens of the United States and this state, are bound by constitutional requirements of equal protection and prohibitions against special privileges and immunities. Distinction based upon a fisherman's race is improper, and unequal treatment of commercial fishermen based upon their being Indian or non-Indian would be unconstitutional.

[3] States — Federal Court Mandate — Statutory Agencies. Federal courts cannot order state agencies to affirmatively act in excess of their statutory authority.

[4] Fish — Indians — Treaties — Jurisdiction. Federal district courts do not have jurisdiction to the exclusion of state courts to

interpret Indian treaties which affect important interests of the state.

HOROWITZ, STAFFORD, and UTTER, JJ., dissent in part by separate opinions; DOLLIVER and HICKS, JJ., did not participate in the disposition of this case.

Nature of Action: The petitioners, an individual and a commercial fishing association, filed an original action against a state officer (Director of Fisheries) in the nature of mandamus. The petitioners sought a writ requiring the director to restrict fishing regulations to those necessary for conservation and to treat Indian and non–Indian fishermen equally.

Supreme Court: The court holds that the Department of Fisheries has no power to regulate fishing except for conservation purposes and that equal protection concepts require that fishing regulations apply equally to Indian and non–Indian commercial fishermen. The court further holds that it is not bound by federal district court judgments in this matter and that the federal court cannot require the Department of Fisheries to act beyond its statutory authority. No writ is issued on the basis that the director will voluntarily abide by the court's decision.

Douglas M. Fryer, Jacob A. Mikkelborg, Charles E. Yates, and *Henry Haugen* (of *Moriarty, Long, Mikkelborg & Broz),* for petitioners.

Slade Gorton, Attorney General, and *James M. Johnson* and *Dennis D. Reynolds, Assistants,* for respondents.

Joseph T. Mijich and *John P. World,* for intervenors.

Peter R. Taft and *Edmund B. Clark* on behalf of United States Department of Justice and *Alan C. Stay, John Clinebell, Steven S. Anderson,* and *Mason D. Morisset* on behalf of Lummi, Makah, Quileute, Puyallup, Muckleshoot, and Skokomish Indian Tribes, amici curiae.

ROSELLINI, J.—Petitioners are commercial gillnet fishermen who harvest salmon in the waters of Washington state.

They seek a writ of mandate ordering the Director of Fisheries to issue regulations which apply equally and in a nondiscriminatory fashion to both treaty and nontreaty fishermen. They further ask that the Department of Fisheries be ordered to confine its regulation of commercial gillnet fishing to conservation purposes. They also request a declaration that treaty Indians do not have a greater right of access to hatchery–reared fish than do non–Indian fishermen.

By statute, RCW 75.12.010, the Coho season opens on the second Monday of September and lasts through the 30th day of November, unless the Department of Fisheries provides otherwise. This year, according to department estimates, there will be 702,750 Coho salmon available for harvesting after allowing for escapement for the enhancement of future runs. The total estimated market value of the Coho available for harvesting this year is approximately $5 million.

The legislature has declared:

> The preservation of the fishing industry and food fish and shellfish resources of the state of Washington is vital to the state's economy, and effective measures and remedies are necessary to prevent the depletion of these resources.

Laws of 1973, 1st Ex. Sess., ch. 220, § 1, p. 1700.

The federal district court for the Western District of Washington, in *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), construed the Medicine Creek and other Indian treaties and held that treaty fishermen were entitled to 50 percent of the harvestable salmon in Puget Sound, plus such salmon as are necessary for ceremonial and subsistence purposes.

This court, in *Department of Game v. Puyallup Tribe, Inc.,* 86 Wn.2d 664, 548 P.2d 1058 (1976), on a direct remand from the United States Supreme Court, *Department of Game v. Puyallup Tribe,* 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973), interpreted the same treaty language to mean that the right accorded the Indians under

the Medicine Creek treaty to fish "in common with others" was a right, not to a certain number or percentage of fish, but to an equal opportunity to fish. We further held that if the treaties guarantee more than this to the Indian signatories, then hatchery–reared fish were beyond the scope of the treaty.

In response to these conflicting court decisions, the department issued a regulation which was designed to allot to treaty Indians 554,400 of the 702,750 Coho available for harvest.

The Superior Court for Thurston County has heard a number of suits[1] challenging the right of the department to promulgate regulations for the apportionment of the catch rather than for conservation purposes. That court has consistently held that regulations promulgated to facilitate the federal court's ruling rather than for the purpose authorized by statute—that of conservation—are beyond the authority of the Department of Fisheries and therefore void.

The Department of Fisheries, in its arguments in open court, requested that the court define its authority in regard to regulation for conservation purposes and to declare whether it has the right to allocate fish. Because of the uniqueness of its position and its evident good faith in attempting to carry out its duties, we decline to issue a writ of mandate but will set forth our opinion upon the questions concerning the authority of the department. We have full confidence that the director will abide by our decision.

The Department of Fisheries, a statutory agency of the state, is established by RCW Title 75, which also defines the extent of its authority to act. RCW 75.08.012 sets forth the duties and purposes of the department. It provides that it shall be its duty to

[1]An example of these cases is seen in *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 87 Wn.2d 417, 553 P.2d 113 (1976). Some other cases have been Antone v. Tollefson, Thurston County cause No. 46427; Columbia River Fishermen's Protective Ass'n v. Moos, Thurston County cause No. 55339; Schroeder v. Moos, Thurston County cause No. 55387.

> preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state and the offshore waters thereof to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof. For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well–being and stability of the commercial fishing industry in the state of Washington.

This court has previously considered the meaning of substantially the same language used with reference to the Department of Game's authority to act. In the case of *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975), this court looked to RCW 77.12.010, which provided as follows:

> The game animals . . .*shall be preserved, protected, and perpetuated*, and *to that end* such game animals . . . shall not be taken at such times or places, by such means, in such manner, or in such quantities *as will impair the supply thereof.*

(Italics ours.) We determined that this language gave to the Department of Game the authority to act in matters of conservation only.

The Washington State Legislature has established, in RCW 75.12.010, a fishing season for salmon. The statute provides:

> [S]ubject to such seasons and regulations as may be established from time to time by the director, it shall be lawful to fish for commercial purposes . . . for other legal salmon from the second Monday of September to and including the thirtieth day of the following November, except during the hours beginning 4:00 o'clock p.m. of Friday and ending 4:00 o'clock p.m. of the Sunday following . . .

By the terms of this statute, salmon fishing in Puget Sound is open after the second Monday in September unless closed by the regulations of the department. Here, the department is authorized to perform a specific act, but the statute contains in itself no guidelines or limitations.

These are found in RCW 75.08.012, which declares it to be the duty of the department to protect the supply of fish.

A further specific direction is contained in the third proviso of RCW 75.12.010. The proviso states:

> *And provided,* That whenever the director determines that a stock or run of salmon cannot be feasibly and properly harvested in the usual manner, and that such stock or run of salmon may be in danger of being wasted and surplus to natural or artificial spawning requirements, the director may maneuver units of lawful gill net and purse seine gear in any number or equivalents at his discretion, by time and area, to fully utilize such harvestable portions of these salmon runs *for the economic well being of the citizens of this state,* . . .

(Italics ours.)

By this proviso the department is given an affirmative duty to determine whether there are salmon available that are surplus to natural or artificial spawning requirements and, if so, to authorize the harvesting of this surplus, so as to fully utilize the harvestable portions for the economic well-being of the citizens as a whole.

[1] Reading those statutes together, it will be seen that the department has the statutory duty to authorize the harvesting of salmon not required for natural or artificial spawning. It is clear, therefore, that the department may restrict the harvesting of salmon by the commercial fishermen only to the extent that no surplus exists and that the restriction is necessary to prevent the impairment of the supply of salmon.

Supporting the conclusion that the department is authorized to act for conservation purposes only is the fact that there is no other statute regulating commercial fishing which contains any substantive directive to the Department of Fisheries.

An additional expression of legislative intent that the department's activities should be designed to conserve fish is found in the final paragraph of RCW 75.08.012.

> For the purpose of conservation, and in a manner consistent therewith, the department shall seek to maintain the economic well-being and stability of the commercial fishing industry in the state of Washington.

It has been suggested that RCW 75.08.080 provides authority for the department to act for purposes other than conservation. This section provides, insofar as pertinent:

> The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:

There follows a series of paragraphs requiring the director to regulate fishing areas, gear, disposal of fish, landing of fish, destruction of predators, and the prevention and suppression of disease; also to specify types of fish which may be taken and reports which must be made; and the kinds of uses which may be made of particular fish.

RCW 75.08.080 delineates the methods by which the department shall comply with the guidelines set forth in RCW 75.08.012. Nowhere does the section authorize the director to allocate fish among competing claimants for purposes other than conservation. It is obvious that all of the regulations required or authorized are directed to the purpose of conservation.

It is evident that the department's construction of the statutes is the same as ours. There has been introduced at its instance in the last two sessions of the state legislature, legislation which would grant the department this authority to allocate fish among Indians and non-Indians. The most recent bill introduced was House Bill No. 1334, which died in committee in the 1976 session.

As recently as December 11, 1976, the Tacoma News Tribune reported that the Director of Fisheries said he would ask the legislature for the right to allocate fish and the power to set different fishing seasons for non-Indians and treaty Indians. A reasonable inference would appear to be that the department recognizes that it does not have the statutory authority to allocate fish to treaty Indians or to non-Indians.

[2] But were we to assume that the Department of Fisheries has the authority to adopt regulations designed for the purpose of allocating fish among competing claimants, we would be confronted by constitutional provisions which stand in the way of its doing so in a manner which discriminates among fishermen of the same class.

Since Indians are citizens of the United States and of this state—and not citizens of a foreign power—they are subject to the constitutions of these governments. The restrictions which these documents place upon governmental action apply to actions taken with regard to these citizens. Thus, they can neither be denied equal protection of the laws nor granted special privileges and immunities. Classification which distinguishes between commercial and noncommercial fishermen has a reasonable basis in fact, which is related to the legitimate governmental purposes of conservation and promotion of the economic welfare of the state. Distinctions between fishermen based upon their race or ethnic background are not proper. Treaties protecting Indian rights in the state's natural resources should be read so as to harmonize their provisions with constitutional mandates if this can reasonably be done. We think the construction which this court placed upon the words "in common with" in the case of *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), achieves this purpose, and accords with the intent expressed in the treaties.

There remains the question whether federal courts can order state agencies to act beyond their authority as defined by state law.

[3] The United States Supreme Court has stated that a federal court will not compel governmental officers to do any act which they are not authorized to do by laws of the state from which they derive their power. *Supervisors v. United States*, 85 U.S. (18 Wall.) 71, 21 L. Ed. 771 (1873); *United States v. County of Clark*, 95 U.S. 769, 24 L. Ed. 545 (1878); *Missouri ex rel. Laclede Gas Light Co. v. Murphy*, 170 U.S. 78, 42 L. Ed. 955, 18 S. Ct. 505 (1898).

In *Murphy* the court stated at page 95:

> Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act.

And following on page 99, the court stated:

> The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; *and the court could not command him to do that which it was not his official duty to perform.*

(Italics ours.)

In *Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), the Court of Appeals in discussing the relationship of federal and state governments quoted at pages 841–42 with approval the following statement from Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 515–16 (1954):

> Judicial mandates to non-judicial state officers to enforce either primary or remedial duties requiring the performance of affirmative acts are relatively infrequent. Lower federal courts may *prohibit* state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment. Whether a writ of mandamus to compel performance of a ministerial duty would be regarded as an action against the state is not altogether clear. But it is significant that a practice of issuing such writs to state officers has never become established.

The court further pointed out at page 841:

> The Constitution counts upon the necessary participation of the states in the electoral process not by direct command but by the incentive of not losing the opportunity of participation. In similar fashion Congress now elicits desired affirmative performances from the states by attaching them as conditions to the receipt of federal grants-in-aid. If we search the Constitution for provisions which have the appearance of

affirmative requirements, two of the most striking are those which call for the surrender of fugitive slaves and fugitives from justice. But the first was disembowelled by the *tour de force* of *Prigg v. Pennsylvania*, [41 U.S. (16 Pet.) 539, 10 L.Ed. 1060], and the second was flatly held, in *Kentucky v. Denison* [65 U.S. (24 How.) 66, 16 L.Ed. 717], to be judicially unenforceable. "And we think it clear," said Chief Justice Taney in the latter case, "that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." Taney's statement can stand today, if we accept [*sic*] from it certain primary duties of state judges and occasional remedial duties of other state officers. Both exceptions, it will be observed, involve enforcement through the orderly and ameliorating forms of the judicial process. In any event, experience with the exceptions does little to bring into question the principle of the rule.

The respondents argue that a federal district court may require a state agency to take affirmative action regardless of the agency's statutory authority. The case upon which they rely is *Griffin v. County School Bd.*, 377 U.S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964). In that case the district court had issued an injunction requiring the court supervisors to levy taxes in order to provide for desegregated schools. The United States Supreme Court, in an opinion upholding the validity of the order, recognized the power of the official to act in accordance with both state law and the court's order saying that the district court's injunction requiring "[s]upervisors to exercise the power that is theirs to levy taxes" and operate schools on a nondiscriminatory basis was properly issued. *Griffin v. County School Bd., supra* at 233.

The cases cited therein involved actions by state officers or agencies which interfered with federal constitutional rights, and in each case the district court issued injunctions enjoining said officers or agencies from engaging in such interference. None of said cases required the state officers or agencies to take affirmative action.

In other cases cited by the respondents, the state officials or agencies ordered by the federal courts to take action, had the power under state law to comply with the federal court order.

The courts have been consistent in recognizing that a state official cannot be compelled to exceed his authority. The court in *Bradley v. School Bd.*, 51 F.R.D. 139, 142 (E.D. Va. 1970), when requested to order affirmative action by a state official, said:

> To be sure, state officials may only be directed, in fulfillment of this duty, to use those powers granted to them by state law. For this reason the relief which may be demanded of state, as opposed to local, officials is restricted . . . In each case, however, the obligation is commensurate with the scope of the power conferred by state law.

In *Wright v. County School Bd.*, 309 F. Supp. 671 (E.D. Va. 1970), the court discussed the scope of a district court's power to effectuate desegregation of a district's schools. At page 677 it said:

> [A] court will only order a public official to perform or refrain from certain acts which are within the powers conferred upon him by law, Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963), and will deny relief when those parties before it are not fully empowered, under state law, to take the action requested, Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963).

It is the duty of judges to declare and not to make law. *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973).

The reason for this restriction is eloquently set forth in the opinion of Justice Harlan in *Oregon v. Mitchell*, 400 U.S. 112, 203, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970), where he stated:

> [T]he federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the

precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.

These principles of federalism were followed most recently in *Rizzo v. Goode*, 423 U.S. 362, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976), when the Supreme Court reversed a lower federal court's order supervising the handling of citizen complaints within a local police department even though constitutional rights had been violated. The court stated, at pages 379–80:

> The District Court's injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's "latitude in the 'dispatch of its own internal affairs.'"
>
> . . .
>
> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here. Indeed, in the recent case of *Mayor v. Educational Equality League*, 415 U. S. 605 [39 L. Ed. 2d 630, 94 S. Ct. 1323] (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying: "There are also delicate issues of federal–state relationships underlying this case." *Id.*, at 615.

Contrary to the District Court's flat pronouncement that a federal court's legal power to "supervise the functioning of the police department . . . is firmly established," it is the foregoing cases and principles that must govern consideration of the type of injunctive relief granted here. When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.

The judicial determination of the extent of a state official's authority to act is solely and exclusively within the jurisdiction of the state courts. *Boal v. Metropolitan Museum of Art*, 19 F.2d 454 (2d Cir. 1927), *cert. denied*, 275 U.S. 565, 72 L. Ed. 429, 48 S. Ct. 122 (1927); 21 C.J.S. *Courts* § 524 n.34 (1940). Thus, as we have already observed, the Department of Fisheries is authorized only to promulgate regulations for conservation purposes. It cannot act to comply with a federal court order which imposes upon it a duty outside its statutory authority.

[4] With respect to the weight to be given to the decision in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), it must be remembered that, long before that case came before the federal trial court, the Washington court system had been called upon to interpret the same treaties. On August 15, 1965, the Superior Court for Pierce County passed upon the rights of Indians claiming under the Medicine Creek treaty, both as to steelhead fish and salmon. This court in *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967), and *Department of Game v. Kautz*, 70 Wn.2d 275, 422 P.2d 771 (1967), began a series of opinions which were to be considered by the United States Supreme Court on two occasions, by the Superior Court on three occasions, and by the Washington State Supreme Court on two additional occasions. (*See Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1967); *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973); *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976).)

In *Department of Game v. Puyallup Tribe, Inc., supra* at 678–79 (1976), we carefully examined both the treaties and the United States Supreme Court decisions that have been rendered concerning the Medicine Creek treaty and other Indian treaties specifically and treaty rights generally. It was said:

> We conclude therefore that a proper interpretation of the Treaty of Medicine Creek permits the State to promulgate conservation regulations meeting appropriate standards that affect all citizens, Indian and non–Indian, equally. However, such regulations cannot deny the Indians access to their usual and accustomed fishing places, nor can they restrain Indian fishing at those places except to the extent the regulations restrain the fishing rights of all state citizens, *e.g.*, regulations as to time and manner of fishing, size of catch, etc.

This interpretation finds support in the decisions rendered by the United States Supreme Court in 1967 and 1973. In *Puyallup Tribe v. Department of Game, supra* (1967), the United States Supreme Court stated, at page 398:

> [W]e see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Accord, Department of Game v. Puyallup Tribe, supra (1973).

This court, in *Department of Game v. Puyallup Tribe, Inc., supra* at 682 (1976), stated:

> [I]t is also inconceivable that either the tribe or the government intended the treaty to create any rights beyond the natural run . . . This plain language demonstrates that the rights secured to the tribe under the treaty did not encompass artificially propagated sources of fish. Likewise, the Supreme Court indicated in *Puyallup II*

> [*Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973)] that this result is correct. The majority opinion made no comment at all on the issue, but the concurring opinion of Mr. Justice White stated that "the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." *Puyallup II* at 49.

Thus prior to the decision of *United States v. Washington, supra*, there had been a long development of case law, exhibiting an approach by the United States Supreme Court, which, while it was more liberal in its interpretation than was this court, always recognized legitimate state interest in the conservation of its natural resources and never purported to find in the treaties a provision giving the Indians a right to allocations.

We are asked to accede to the federal district court's interpretation of the Medicine Creek and other Indian treaties, whereby it found that treaty Indians have the right to 50 percent of the salmon runs, plus fish for ceremonial and subsistence purposes. It appears that, if this ruling is given effect, non–Indian fishermen will be required to refrain from fishing until the Indians have harvested 50 percent of the fish runs, plus an undetermined additional number of fish.

Being cited no authority for the proposition that federal district courts have exclusive jurisdiction to construe Indian treaties—treaties which affect important interests of the state—we adhere to our own interpretation of the treaty. This interpretation, we believe, results in fairness and justice to all fishermen. It is consistent with the common understanding and practice since the treaties were signed and up until the decision of the federal district judge in *United States v. Washington, supra*. Under our interpretation, treaty Indians have always been afforded the same opportunities as non–Indians to fish commercially by trolling, purse seining, gill netting, or reef netting, and to fish for recreational and other purposes. In addition, they have

been exempt from the payment of license fees which a nontreaty Indian must pay. *See Tulee v. Washington*, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862 (1942). And further, state regulations have been subject to the requirement that there be reasonableness applied to treaty Indians. *See State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963).

We cannot ignore the facts that the holding of the district court has severe economic effect on many nontreaty fishermen; that it will result in the enrichment of some individual treaty Indian fishermen, but will not necessarily result in economic benefit to the tribal units; that it has caused discontent among nontreaty Indians; that it has caused hostility between the treaty and other fishermen, and has jeopardized the good relations heretofore existing among these parties; and that it has resulted in violence and violations of the law. But beyond all of this, it has threatened the survival of the fish runs. Already, the steelhead runs in many of the rivers have been seriously damaged. For example, the Skagit River, which had been the largest steelhead producer in the state, has been depleted to the point that it ranks seventh, and the nontreaty fishing season has been cut from 5 months to 3 months.

All of these facts attest to the soundness of our interpretation of the treaty provisions. They dictate that we should adhere to that interpretation. Our adherence to the decision in *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), makes it unnecessary to consider the petitioners' further contention that treaty Indians are not entitled to a specified percentage of hatchery fish.

We hold that the Director of Fisheries has the authority to pass regulations only for conservation purposes. We hold that he cannot allocate fish to any user of the same class, that every fisherman in a class must be treated equally, and

that each should be given an equal opportunity to fish within lawful statutes and regulations.

WRIGHT, C.J., HAMILTON, and BRACHTENBACH, JJ., and ARMSTRONG, J. Pro Tem., concur.

HOROWITZ, J. (concurring in part; dissenting in part)—The petitions for writ of mandamus in the instant case seek an order compelling the Department of Fisheries of the State of Washington and its director to take action which is violative of the injunction entered in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). Certiorari was denied by the Supreme Court of the United States, 423 U.S. 1086, ___ L. Ed. 2d ___, 96 S. Ct. 877 (1976).

The petitioners, *inter alia*, rely heavily on *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), for its interpretation of the treaty Indian fishing rights under the Treaty of Medicine Creek, 10 Stat. 1132 (1854). The petitioners recognize that "conflict already exists between this Court's opinion in *Puyallup Three*, 86 Wn.2d 664 and *U.S. v. Washington*, on both the issues of hatchery fish and equal opportunity vs. equal fish." Reply Brief of Petitioners at 14.

Petitioners concede that "[w]hether or not the decision of the federal court [*United States v. Washington, supra*] was correct is no longer an issue." Memorandum in Support of Petitioners' Application for a Writ of Mandamus at 7.

Petitioners contend, however, "[t]he only issue now which must be passed upon is how is that judgment properly enforced and who is to bear the brunt and expense of enforcement of it." Memorandum in Support of Petitioners' Application for a Writ of Mandamus at 7. The difficulty with petitioners' quoted contention is that *United States v. Washington, supra* at 389–93, 399–412, 413–20, and particularly at page 416, held that the Department of Fisheries and its director had the authority and were indeed obligated under the supremacy clause to refrain from violating

the District Court injunction. Indeed, the defendants, including the Department of Fisheries and its director, are specifically ordered to "fully observe and to the best of their ability carry out the provisions and purposes of the treaties cited in paragraph 1 of the Findings of Fact," and "conform their regulatory action and enforcement to each and all of the standards set forth in Final Decision #1." *United States v. Washington, supra* at 414. This provision is now final in the federal court system and the Department of Fisheries and its director are bound by the injunction. Moreover, as *United States v. Washington, supra* at 402 states: "Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any actions of the state."

Since the filing of the petition for the writ of mandamus, the Supreme Court of the United States has granted a writ of certiorari to review the decision in *Department of Game v. Puyallup Tribe, Inc., supra,* on which petitioners rely to define the treaty Indian fishing rights under the Treaty of Medicine Creek, *supra,* and this court has granted a rehearing in *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson,* 87 Wn.2d 417, 553 P.2d 113 (1976), dealing with the powers and duties of the Department of Fisheries and its director in the management of the salmon fisheries of this state. That rehearing will be held in the May 1977 term.

The issues involved in the petition for certiorari which has been granted by the Supreme Court of the United States, have been the subject of briefs by various parties, including an amicus curiae brief filed on behalf of the United States at the invitation of the Supreme Court of the United States to enable the United States to express its views on the issues raised in the petition for certiorari. Whether, or to what extent, the forthcoming decision of the Supreme Court of the United States in the matter on which

it granted certiorari and the forthcoming decision of this court on the rehearing of *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, supra,* will affect the outcome of the petition before this court, or a like petition should one be filed, remains to be seen.

Meanwhile, however, we must determine the effect we must give to the injunction issued in *United States v. Washington, supra,* which has now become final in the federal system.

There is no claim the injunction issued in *United States v. Washington, supra,* is void because of lack of jurisdiction of the parties and subject matter; nor is there any claim the Department of Fisheries or its director are not bound by that decision as parties to *United States v. Washington, supra.* The claim at most is that the United States District Court erred in ordering the Department of Fisheries and its director to comply with its decision and injunction, petitioners contending such compliance is beyond the authority of the Department of Fisheries and its director. As already pointed out, the United States District Court rejected this contention and the injunction is binding upon the Department of Fisheries and its director.

Accordingly, whether or not this court agrees with the decision in *United States v. Washington, supra,* is no longer the question. As already pointed out, petitioners admit the correctness of this decision "is no longer an issue." It follows that if the Department of Fisheries and its director refuse to obey the federal court injunction, they will be in contempt of the United States District Court and will be subject to sanctions for disobedience. 18 U.S.C. § 401 (1948). This court is powerless to prevent the imposition of those sanctions should the Department of Fisheries or the director violate the federal court injunction, whether or not pursuant to the order of this court.

Under the circumstances presented, if this court is to adhere to the rule that the office of a writ of mandate is to enforce a duty owing, rather than to direct its violation and if due regard is had to protect the integrity of the federal

and state constitutional structure of which this court is a part, then this court must deny the writ and I concur for the reasons stated. *See People ex rel. Ammann v. Dipper*, 392 Ill. 38, 44, 63 N.E.2d 870 (1945); *State ex rel. First Nat'l Bank v. Botkins*, 141 Ohio St. 437, 48 N.E.2d 865, 148 A.L.R. 205 (1943); *cf. State ex rel. Missouri Pac. Ry. v. Williams*, 221 Mo. 227, 255–57, 120 S.W. 740 (1909); *Thomason v. Cooper*, 254 F.2d 808, 810–11 (8th Cir. 1958).

A denial of the petition for writ of mandamus will suffice to dispose of this case. The majority opinion, however, after denying the writ, proceeds to determine the legal authority of the Department of Fisheries of the State of Washington and the Director of Fisheries to observe the Medicine Creek Treaty Indian fishing rights as construed in *United States v. Washington, supra*. They do so because, as its states: "We have full confidence that the director will abide by our decision." The majority opinion ultimately states:

> We hold that the Director of Fisheries has the authority to pass regulations only for conservation purposes. We hold that he cannot allocate fish to any user of the same class, that every fisherman in a class must be treated equally, and that each should be given an equal opportunity to fish within lawful statutes and regulations.

That the interpretation of the Washington statutes is in conflict with *United States v. Washington, supra*, and particularly paragraph 14 of the injunction clearly appears from its text expressly at, *e.g.*, pages 416, 402, and 414.

The effect of the majority's suggestion that the director abide by the majority's decision is to accomplish by indirection what the court has refused to authorize when it refused to grant the writ of mandamus. The injunction in *United States v. Washington, supra*, is expressly made binding upon the "State of Washington; Thor C. Tollefson, Director, Washington State Department of Fisheries; Carl Crouse, Director, Washington Department of Game . . . their agents, officers, employees, successors in interest . . ." *United States v. Washington, supra* at 414.

The same reasons that prevent this court from issuing a writ of mandamus to the Department of Fisheries and its director, and his successors, apply to prevent the court from inviting the Director of Fisheries to accomplish the same result by undertaking to do those things on his own violative of the federal court injunction. I agree with the majority we must deny the writ of mandamus but I dissent from the suggestion of the majority that this court, in effect, invite the Department of Fisheries and its director to take action which would embroil them in contempt proceedings we are powerless to prevent. If the United States District Court, in response to the forthcoming decision of the Supreme Court of the United States in *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), or otherwise, withdraws or modifies its injunction, a different case will be presented.

STAFFORD and UTTER, JJ., concur with HOROWITZ, J.

STAFFORD, J. (concurring with Justice Horowitz)—I concur with the opinion of Justice Horowitz. The Puget Sound Gillnetters Association concession that "[w]hether or not the decision of the federal court [*United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975)] was correct is no longer an issue" would appear to resolve the basic question before us on the writ of mandamus. However, I am compelled to comment further on *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976) (*Puyallup III*) for other reasons. As pointed out by the majority and dissenting opinions, *Puyallup* has now been before the United States Supreme Court on three occasions. At no time has the critical portion of the Treaty of Medicine Creek been interpreted so as to fully dispose of the fishing-right conflict caused by the phrase "in common with all citizens of the Territory." 10 Stat. 1133.

As a result, conflicting interpretations have caused the state and federal courts to drift into positions of direct

conflict. Unfortunately, this has become more than an exercise in legal theory, it has developed into a serious social and economic conflict of major proportions. I do not exaggerate when I say that all too frequently lives and property rights have already hung in the balance.

I cannot stress too strongly that in *Puyallup* III, now on review, the United States Supreme Court should refrain from a limited consideration of the issues. Rather, it should interpret the critical section of the treaty. Such an interpretation by the ultimate legal authority is the only way the current legal, economic and social conflict can be resolved. Most assuredly, this unresolved clash between federal and state judicial systems and between economic and social interests cannot be permitted to continue. Too much is at stake in all areas.

HOROWITZ, J., concurs with STAFFORD, J.

APPENDIX E

THE SUPREME COURT OF WASHINGTON

No. 43642

ORDER

GRANTING PETITION FOR REHEARING

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION,

Respondent,

v.

THOR TOLLEFSON, ET AL.,

Appellants.

WASHINGTON KELPERS ASSOCIATION,

Respondent,

v.

THOR TOLLEFSON, ET AL.,

Appellants.

The Court having decided by a vote of five to four that the appellants' petition for rehearing should be granted,

It is ordered that the petition be and it hereby is granted, and that the cause be set for rehearing En Banc at a later date.

Dated this 4th day of November, 1976.

/s/ Charles T. Stafford,
Chief Justice

87 Wn.2d 417

APPENDIX F

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.
WASHINGTON KELPERS ASSOCIATION, *Respondent*, v. THOR TOLLEFSON, ET AL, *Appellants*.

[1] Appeal and Error—Decisions Reviewable—Moot Questions—Questions of Public Import—Incomplete Development. An appellate court will not consider a moot case on the ground that it presents recurring issues of substantial public interest which require an authoritative determination for the future unless the questions which are necessarily and inherently involved in the case are adequately developed or argued.

[Note: Only 3 Justices concur in the above statement.]

STAFFORD, C.J., and HAMILTON, J., concur in the result only; UTTER, BRACHTENBACH, and HOROWITZ, JJ., and WIEHL, J. Pro Tem., dissent by separate opinion; DOLLIVER, J., did not participate in the disposition of this case.

Appeal from a judgment of the Superior Court for Thurston County, Nos. 50370, 50552, Gerry L. Alexander, J., entered January 23, 1975. *Dismissed.*

Actions challenging the validity of certain state fishing regulations. The defendants appeal from a judgment in favor of the plaintiffs.

Slade Gorton, Attorney General, and *James M. Johnson, Assistant,* for appellants.

Richard W. Pierson (of *Thom, Mussehl, Navoni, Hoff, Pierson & Ryder*), for respondents.

ROSELLINI, J.—This declaratory judgment action was brought to obtain a ruling that certain fishing regulations promulgated by the Department of Fisheries for a period beginning June 15, 1974, were invalid. The Thurston County Superior Court found as a fact that the regulations in question were adopted solely as a result of the decision by Federal District Judge George C. Boldt, Western District of Washington at Tacoma, in *United States v. Wash-*

ington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, ... U.S. ....., 96 S .Ct. 877, ... L. Ed. 2d ..... (1976), and not "in furtherance of" RCW 75.08 *et seq.*, the statutes defining the powers and duties of the Director and the Department of Fisheries. Upon this finding, the court concluded that the regulations were beyond the authority of the Director.

The court also held the regulations invalid on other grounds.

It is acknowledged that the regulations in question have since been superseded and are no longer of any force or effect. The Director, however, urges the court to consider the question whether the powers conferred in the cited statute include the power to regulate fishing in the waters under its jurisdiction with the object of making a greater number of fish available to the Indians at their usual and customary fishing grounds, in compliance with the order of Judge Boldt in the referenced decision.

[1] Statements of counsel upon oral argument to this court indicated that regulations which have since been promulgated are more acceptable to the Commercial Passenger Fishing Vessel Association (the only respondent participating in the appeal), from which it might be inferred that future litigation between these parties upon this question may not be threatened. But the Director maintains that the question of his authority to allocate fish in response to the federal court decision is a recurring one, of vital importance to his department and to the people of the state of Washington, which needs resolution. He calls our attention to instances in which this court has proceeded, in cases otherwise moot, to consider questions of substantial public interest, upon which an authoritative determination was needed for the future guidance of public officers, and which were of a recurring nature. Examples of such cases are *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975); *Sorenson v. Bellingham* , 80 Wn.2d 547, 496 P.2d 512 (1972); *In re Elliott*, 74 Wn.2d 600, 446 P.2d 347 (1968),

and *National Elec. Contractors Ass'n v. Seattle School Dist. 1*, 66 Wn.2d 14, 400 P.2d 778 (1965).

While each of these elements is to be found here, there are other considerations which make it undesirable that we treat this case as an exception to the general rule that the court will not render advisory opinions. In *In re Elliott*, *supra*, we recognized that one of the important factors deterring the courts from issuing advisory opinions is the risk that the question may not have been adequately developed or argued. Here, vital questions inherent in the case have not been raised, and much less argued. In all the cases where this court has rendered advisory opinions, the question decided has been adequately briefed and vigorously argued. In *State ex rel. Distilled Spirits Inst., Inc. v. Kinnear*, 80 Wn.2d 175, 492 P.2d 1012 (1972), the importance of adequate briefs and arguments was also noted. And in *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 558, 413 P.2d 972 (1966), we said that before an advisory opinion will be rendered, the proceedings must be "advanced with sufficient militancy to engender a thorough research and analysis of the major issues."

The questions presented here are indeed serious and involve a conflict between the state and federal courts in this jurisdiction. Inherent in the superior court's conclusions was a theory that the federal court could not make an effective order which would place upon an agency of the state a mandatory duty which was not within its statutory powers. The court expressed the belief that the order was not intended to create such a duty. Nevertheless, the order of the federal court by its terms imposes on the state an affirmative duty to make a designated portion of the fish in the waters of the state available to the treaty Indians who were parties to that action.

The parties to this appeal have chosen to treat the case as though the questions that seemed paramount to the trial court were not necessarily involved. The Director argues that the statutory grant of power is broad enough to permit him to manage the fish for purposes other than

conservation,[1] although he does not suggest that his department has any need for such additional powers except to meet the demands of the federal court order.

He also argues that in exercising the power to manage the fish for conservation purposes, he can consider the increased Indian fishing resulting from the federal court decision as a "mortality factor." This argument, however, does not take into account the fact that in making more fish available in the inland waters, as his regulations were designed to do, he was in fact contributing to the same mortality factor. He does not suggest that he would have any reason to increase fish mortality, absent a statutory or court-ordered duty to do so.

The Director does not argue the question whether, assuming his powers do not include the power to allocate fish for purposes other than conservation, he can nevertheless be forced to regulate the taking of fish for such purposes by court order. The respondent assumes that the Director has no such power or duty but offers no authorities in support of the court's theory.

To answer this question, we would be called upon to consider further the question whether a court may order a legislative body to enact a law or regulation (remembering that, in promulgating its regulations, the Department of Fisheries is exercising a delegated power of the legislature and noting that the order is directed to the state itself), and particularly whether a federal court can order a state legislative body to take affirmative action.[2] Also, can a court properly direct an administrative agency's exercise of its discretionary powers?

Other questions which inhere in the resolution of this

[1]*See Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975), to the contrary.

[2]A related question is whether the Indian treaties contain any language which indicates an agreement on the part of the United States or its successors in interest to take affirmative action to make fish available at Indian fishing grounds. This is a question not dealt with in the federal court opinion, although the court's order would seem to reflect a finding that the language of the treaties was open to that interpretation.

complex problem arise. For example, was the federal court acting within its proper jurisdiction when it held that the treaty Indians are entitled to a specified percentage of the fish to be found in the waters of this state, or was it, under the guise of interpreting a treaty, actually either modifying or implementing the same?[3] If not, must the courts of this state nevertheless honor the decision and enforce its order, or may they with impunity disregard those portions which they deem to be implementations or alterations?

Another question not considered in the briefs arises from the fact that this court has itself interpreted one of the treaties in question and has arrived at a conclusion as to its meaning which differs from that of the federal court. *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976). To which of these interpretations must the state agency respond? The resolution of this question cannot come from this court or from the federal district court, if no definitive authority upon the subject exists. It must come from a higher court whose decisions are binding upon both of us. In short, this dilemma can be resolved only by the Supreme Court of the United States, which, we understand, has been asked to take jurisdiction of the cases involved and settle the question.

Inasmuch as serious and controlling questions necessarily involved in any determination of the Director's powers and duties with respect to the federal court order have been

[3]The general rule appears to be that only the Congress can perform these functions. *See* 87 C.J.S. *Treaties* §§ 9, 15, 25 (1954); in *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71, 5 L. Ed. 191 (1821), where the court was asked to supply an omission in a treaty, Mr. Justice Story said:

> In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be, on our part, an usurpation of power, and not an exercise of judicial functions.

See S. Crandall, *Treaties, Their Making and Enforcement* (2d ed. 1916); and *see Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976).

ignored in the briefs, a gratuitous opinion would be inappropriate and ill-advised.

Taking into account the fact there is an imminent possibility that the United States Supreme Court will speak to one or more of these questions, such an opinion would also be premature.

We therefore decline to retain jurisdiction. The appeal will be dismissed.

HUNTER and WRIGHT, JJ., concur.

STAFFORD, C.J., and HAMILTON, J., concur in the result.

UTTER, J. (dissenting)—In legal controversies involving the validity of fishing regulations, the time between action and effect is usually so compressed that the issues are moot before the appellate process can be fully utilized. This was true in the present case. It is therefore of critical importance for this court to resolve issues that are likely to arise again, if we can, consistent with our earlier decisions. The majority recognizes all the elements exist in this case to justify this court resolving the issues presented, even if the case is moot. *See Hartman v. State Game Comm'n*, 85 Wn.2d 176, 532 P.2d 614 (1975). It refuses, however, to consider important issues involved in this appeal, raised by the parties and discussed in the briefs, stating, "vital questions inherent in the case have not been raised, and much less argued." I am completely unable to understand how this can justify our refusal to decide those issues which are fully briefed and properly before us, and which do not require consideration of the additional, peripheral questions raised by the majority. The fishermen of this state and the Department of Fisheries deserve whatever assistance this court can give them by clarifying issues likely to arise in future cases. This is particularly true where the lower court has ruled incorrectly, as I believe it has.

Assuming the Director is bound by the court decrees requiring the State to provide certain fish to Indians, the issue presented is whether he has the authority under the applicable statutes to establish management regulations over other fisheries more completely within the control of

the State. The trial court erroneously concluded certain regulations promulgated by the Director were outside his authority. The court erred by failing to consider the full statutory authority of the Director and did not consider at all his specific authority to promulgate regulations. The trial court looked only to the authority of the Director specified in RCW 75.08.020, which states in part: "The director shall devote his time to the duties of his office and enforce the laws and regulations of the director relating to propagation, protection, conservation, preservation, and management of food fish and shellfish." Additional authority is found in RCW 75.08.080, which provides:

> The director shall investigate the habits, supply and economic use of, and classify, the food fish and shellfish in the waters of the state and the offshore waters, and from time to time, make, adopt, amend, and promulgate rules and regulations as follows:
>
> . . .
>
> (2) Specifying and defining the areas, places, and waters in which the taking and possession of the various classes of food fish and shellfish is lawful or prohibited.
>
> . . .
>
> (6) The fixing of the size, sex, numbers, and amounts of the various classes of food fish and shellfish that may be taken, possessed, sold, or disposed of.

The Director's authority to control the increased Indian fishery is severely restricted both by our decisions and those of the federal courts. *See Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973); *State v. James*, 72 Wn.2d 746, 435 P.2d 521 (1967). If the Director is unable to manage Indian treaty fishing, which is the subject of federal court decisions, and non-Indian fishing as well, due to the trial court's ruling in this case, the result is a complete lack of proper management leading to over-fishing of the resource. To prevent this he must be able to promulgate regulations in the one area in which he can still exercise control.

The words "conservation" and "management" in the applicable statutes are broad enough to encompass the princi-

ples of allocation embodied in the challenged regulations. Allocation is an important factor in the conservation of fish runs. Where a resource is not presently plentiful enough to satisfy all needs, a restriction on withdrawal must be instituted in order to conserve the renewable resource and insure its availability in the future.

I dissent from the majority's refusal to resolve important issues likely to arise in future litigation. I would reverse the judgment of the trial court and affirm the action of the Director.

BRACHTENBACH and HOROWITZ, JJ., and WIEHL, J. Pro Tem., concur with UTTER, J.

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, THURSTON COUNTY

Nos. 50370 & 50552

JUDGMENT

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants,

and

WASHINGTON KELPERS ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants.

This matter having come on for trial before the undersigned Judge of the above entitled court, and the court having considered the records and files herein, evidence and testimony submitted at the time of trial, argument of counsel for all parties, briefs submitted on behalf of all parties, and having previously entered its Findings of Fact and Conclusions of Law, and plaintiff, Washington State Commercial Passenger Fishing Vessel Association, being represented by Richard W. Pierson of Thom, Mussehl, Navoni, Hoff & Pierson, and plaintiff, Washington Kelpers Association, being represented by Stephen J. Bean of Bean, Gentry & Rathbone, and the defendants, Thor Tollefson, Director of Washington State Department of Fisheries, Washington State Department of Fisheries, and State of Washington, being represented by Slade Gorton, Attorney General for the State of Washington, and Paul D. Solomon, Assistant Attorney General, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the court has jurisdiction over the parties and the subject matter of this lawsuit;

2. That the "kelpers" are a group within a class of commercial troll-fishermen who fish predominantly within three miles of the coast who have not been treated equally;

3. That WAC 220-56-013 and -063 and WAC 220-24-020(4) exceed the statutory authority of the Director;

4. That WAC 220-24-020(4) constitutes a denial of equal protection of the laws as to the plaintiff group, Washington Kelpers Association;

5. That the regulations, WAC 220-56-013 and -063 and WAC 220-24-020(4), constitute arbitrary and capricious action by the Director;

6. That the Department is permanently enjoined from the enforcement of regulations WAC 220-24-020(4) and WAC 220-56-013 and -063 for the 1974 season;

7. That said regulations are hereby declared to be invalid; and

8. That plaintiffs, Washington Charter Association and Washington Kelpers Association, recover costs and disbursements.

DATED this 23rd day of January, 1975.

/s/ Gerry L. Alexander
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, THURSTON COUNTY

Nos. 50370 & 50552

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants,

and

WASHINGTON KELPERS ASSOCIATION,

Plaintiff,

vs.

THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; and STATE OF WASHINGTON,

Defendants.

FINDINGS OF FACT

1. That the plaintiffs, Washington State Commercial Passenger Fishing Vessel Association and Washington Kelpers Association, are groups of citizens who have associated for the purpose of supporting, enhancing and furthering the interest of charter boat fishing and small boat troll-fishing, respectively.

2. Membership of the Washington State Passenger Fishing Vessel Association (hereinafter called the Washington Charter Association) consists of skippers and owners of charter boats, owners of charter offices in the ports of Ilwaco, Westport and all Olympic Peninsula ports, including but not limited to Neah Bay, Sekiu, La Push, Agate Beach, Port Angeles and others. In addition, associate members of the Washington Charter Association conduct businesses affected by the charter boat industry.

3. Members of the Washington Kelpers Association are small boat, day-trip, troll-fishermen, many of whom either fish to supplement their normal earned income, supplement their retirement income, or to provide funds with which to educate themselves. Members of the association do a predominate amount of their fishing within three miles of the shoreline of the State of Washington and along the coastal waters of the State of Washington.

4. The Washington State Department of Fisheries, hereinafter referred to as the Department, and Thor Tollefson, Director of the Department, hereinafter referred to as the Director, exist pursuant to the laws of the State of Washington, to-wit: R.C.W. 75.08.020, which states in part as follows:

> "The Director shall devote his time to the duties of his office and enforce the laws and regulations of the Director relating to propagation, protection, conservation, preservation, and management of food fish and shell fish. * * *"

and in R.C.W. 75.08 *et seq.*

5. On February 12, 1974 Federal District Judge George C. Boldt, Judge of the Western District of Washington at Tacoma, rendered a decision cited at *United States of America, et al, Plaintiffs, vs. State of Washington, et al, Defendants*, Civil No. 9213 (hereinafter referred to as the Boldt decision); wherein Judge Boldt held (pursuant to the Treaty of Medicine Creek and other treaties) that the State of Washington must insure treaty Indian fishermen:

(a) All the fish necessary for their reservation fishery,

(b) Their personal use fishery,

(c) Their ceremonial use fishery,

(d) Fifty percent of the remaining fish which are harvested at their usual and accustomed areas if not otherwise harvested in state waters, and

(e) An "equitable adjustment" to compensate the Indians for fish originating in their usual and accustomed area but harvested in areas outside the state's jurisdiction (i.e., in the ocean and in state waters under International Pacific Salmon Commission regulations).

6. On March 22, 1974 Judge Boldt entered an order providing for an interim plan, paragraph 5 of which provides:

> "The defendants will make significant reductions in the non-Indian fisheries, all are necessary to achieve the ultimate objectives of the court's decision without requiring mathematical precision, but in making such reductions will do so consistent with the concept of permitting the full harvest of fish."

7. (a) On April 24, 1974 the Department, as a direct result of the Boldt decision, passed regulations directly affecting both plaintiffs, solely as a result of the Boldt decision and not in furtherance of the statutory enabling legislation cited in paragraph 4 above, which regulations would not have been enacted but for the Boldt decision.

(b) The regulations WAC 220-56-013 and -063 and WAC 220-24-020(4) were adopted after a consideration of alternatives and after a full public hearing in accordance with the procedural provisions of the Washington State Administrative Procedures Act.

8. WAC 220-56-013 and -063, affected plaintiff Washington Charter Association, in that said regulations reduced the sport catch limit along Washington coastal waters from three to two fish per sport angler per day.

9. WAC 220-24-020(4) applies to all commercial trollers, but affects the plaintiff Washington Kelpers Association in that (4), in its entirety, states as follows:

> "It shall be unlawful to take, fish for or possess salmon taken with troll-line gear for commercial purposes from within waters under Washington State jurisdiction."

10. The Department regulates Washington commercial trollers beyond three miles of the shore and coast in that it directly assumed jurisdiction over the Washington commercial trollers who are fishing beyond three miles with a prohibited type of gear and indirectly regulates beyond three miles in that the Department proscribes regulations affecting the landing of fish caught beyond three miles when they are landed within three miles in Washington.

11. Most commercially caught salmon caught within Washington's waters are caught by trip-trollers fishing in large boats rather than by the small-boat, light-tackle commercial fisherman known as a "kelper" who does most of his fishing within three miles of shore on a day-trip basis.

12. The Department did not enact, in an attempt to comply with the Judge Boldt decision, any regulation which would have affected the so-called trip-troller.

13. One of the reasons the Director elected not to regulate the commercial fishery beyond the three-mile limit was because he believed such action would have an adverse economic impact on the State of Washington.

14. The plaintiff, Washington Charter Association, was directly and adversely affected by WAC 220-56-013 and -063 and the plaintiff, Washington Kelpers Association, was directly and adversely affected by WAC 220-24-020(4).

15. During the time period that each of these regulations was in effect, prior to temporary injunctions being issued, each plaintiff suffered an economic impact as a result of the particular regulation in question affecting it and had the regulation or regulations remained in effect, without judicial intervention, each plaintiff association and its members would continue to have been adversely economically affected by the regulations in question.

16. Irreparable harm would result to each plaintiff if the regulations were held to be valid.

17. The Washington Charter Association was irreparably damaged during the time the Department had in effect the regulation which decreased the daily sport bag limit from three to two fish in Washington coastal waters from June 15 to June 17, 1974, in that, the charter boat fleet in both Ilwaco and Westport experienced a sharp decrease in numbers of sports fishermen carried aboard the charter boat vessels which necessitated a three to six week recovery period.

18. Many small-boat commercial fishermen, members of the Washington Kelpers Association, who fish predominantly within three miles of shore would be unable to continue in business were WAC 220-24-020(4) declared valid.

19. The small-boat, light-tackle commercial fisherman, commonly known as a "kelper" fishes predominantly within three miles of the Washington coast and shoreline.

20. The "kelpers" are a group within a class of fishermen, separate and apart from the deep-sea or trip-troller type of fisherman and there is a factual difference in the methodology as well as the location of fishing between this special class of fisherman known as a "kelper" from other types of commercial fishermen.

21. The charter boat fleet in Washington coastal waters is regulated by the regulations promulgated by the defendant Department of Fisheries, the subject of this lawsuit, both within and beyond the three mile limit. The sport bag limit applies whether salmon are caught by sport fishermen within or beyond the three mile limit along the Washington coast.

From the foregoing Findings of Fact the court now makes the following

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this lawsuit.

2. The "kelpers" are a group within a class of commercial troll-fishermen who fish predominantly within three miles of the coast who have not been treated equally.

3. WAC 220-56-013 and -063 and WAC 220-24-020(4) exceed the statutory authority of the Director.

4. WAC 220-24-020(4) constitutes a denial of equal protection of the laws as to the plaintiff group, Washington Kelpers Association.

5. The regulations, WAC 220-24-020(4) and WAC 220-56-013 and -063, constitute arbitrary and capricious action by the Director and the Department of Fisheries.

6. The Department is permanently enjoined from the enforcement of regulations WAC 220-24-020(4) and WAC 220-56-013 and -063, for the 1974 season.

7. Said regulations are hereby declared to be invalid.

8. The plaintiffs, Washington Charter Association and Washington Kelpers Association, recover costs and disbursements.

DATED this 23rd day of January, 1975.

/s/ Gerry L. Alexander
Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 9213

PRELIMINARY INJUNCTION STAYING STATE COURT
INJUNCTION AND ORDER IMPLEMENTING
PRELIMINARY INJUNCTION

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

This matter having come on regularly before the Court on Plaintiffs' motion for a preliminary injunction staying state court injunction and for an order implementing the preliminary injunction, and the Court having considered the memoranda, oral argument of counsel and the record in this case, the Court makes the following Findings of Fact and Conclusions of Law and on the basis thereof, issues the following Orders:

FINDINGS OF FACT

1. In an effort to assure plaintiff tribes their federally guaranteed treaty fishing rights and at the same time avoid unnecessary conflict with the State judiciary, the United States, and the plaintiff tribes on July 28, 1977 asked this Court to specifically determine and allocate a portion of the harvestable fish between treaty and non-treaty fishermen for the 1977-78 season.

2. This request was prompted by the Washington Supreme Court's determination that the Department of Fisheries had no authority to make such an allocation under State law and the decisions of that Court that the Director must affirmatively authorize the harvest of all fish not needed for propagation escapement and must do so on a basis that does not recognize treaty fishermen as a separate class whose distinct Federally secured rights are to be specifically protected. This Court thereupon issued a preliminary order on August 10, 1977 by which it assumed the responsibility for allocating the salmon runs between treaty and non-treaty fishermen, enjoined the State from

authorizing or permitting harvest of the treaty fishermen's share, and directed the State to manage the remaining portion in a manner that would meet conservation needs and permit harvest of the remainder by non-treaty fishermen under State law and control. This Federal Court ordered allocation was necessary *only* because the State Supreme Court's interpretation of State law had prohibited State regulatory or management authorities from safeguarding or observing the treaty tribes' Federal rights. *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677 (1977). *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash. 2d ——— (1977).

3. The August 10, 1977 order referred to above allocated a specific number of Puget Sound Chinook to treaty Indians for the 1977-78 season. This Court removed from the State of Washington authority, control and jurisdiction over the treaty allocation. The State was enjoined from exercising any form of harvest management authorization over the fish so allocated.

4. The defendant Director of Fisheries promulgated regulations consistent with this Court's Orders but was then enjoined by the Superior Court for Thurston County from enforcing Emergency Orders 77-68, 77-70 and 77-73. *Puget Sound Gillnetters Association* v. *Sandison*, No. 58107. The Director had determined that his regulations were necessary to effectuate the management scheme ordered by this Court. The Director of Fisheries was also ordered by the State Court to adopt harvest regulations based upon the total predicted number of salmon in the Puget Sound Area in such a manner as to eliminate the opportunity for treaty fishermen to harvest their treaty share and in total disregard of this Court's prior orders including Final Decision No. 1.

5. The very purpose of this Court's allocation order was to provide the treaty Indian fishermen the fishing opportunity required under treaties with the plaintiff tribes as interpreted by prior decisions of this Court.

6. The number of fish needed to insure proper spawning escapement remains within the jurisdiction of the State of Washington. Regulations adopted by the state (77-68, 77-70, 77-73) were necessary to insure that non-treaty fishing did not encroach upon fish needed to perpetuate the run.

7. The regulations enjoined by the state court were adopted by the Director of Fisheries to comply with this Court's allocation order. The Thurston County Superior Court's injunction against enforcement of these regulations therefore brings that court into direct conflict with specific orders of this Court. In addition to the order of August 10, 1977, the state court's action is in direct conflict with this Court's decsion of March 12, 1974 (384 F. Supp.

312) which has been affirmed by the United States Court of Appeals for the Ninth Circuit and is now final and binding (520 F.2d 676, 693, *cert. denied* 423 U.S. 1086). That decision orders, in part, that:

> The defendants will make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision, but in making such reductions will do so consistent with the concept of permitting the full harvest of fish. 384 F. Supp. at 420.

8. If the state court's judgment is permitted to stand, the orders of this Court will be rendered ineffective and plaintiff tribes will again be denied their federally determined rights. Therefore, it now appears that in order to protect and effectuate the prior orders of this Court, and to preserve its jurisdiction over the subject matter, it is necessary that this Court stay the state court's preliminary injunction and enjoin the state courts' from proceeding further in contravention of this Court's orders.

CONCLUSIONS OF LAW

1. Based upon the legal arguments presented, this Court is satisfied that it has jurisdiction to enjoin the state court proceeding referred to, within the express exceptions to the anti-injunction statute, 28 U.S.C., Section 2283 and under the authority of *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957). The Court believes it has an urgent duty to take such action to the extent shown necessary in order to effectuate its judgment and protect the Federal treaty rights declared therein.

2. It is clear beyond reasonable question that the state court injunction referred to above, if allowed to remain in effect, would prevent defendants from complying with this Court's order to manage the non-treaty allocation share in such manner as to protect fish needed for escapement and not interfere with the treaty fishermen's opportunity to catch their allocated share of the harvestable resource. Interference with the exercise of Indian treaty fishing rights indisputably is within the jurisdiction of this federal Court, and state court proceedings instituted by non-parties to this lawsuit cannot be allowed to frustrate either the jurisdiction or the final determinations of this Court.

3. Based upon the above findings, the data, memoranda and arguments recently received and reviewed in connection with this Court's Order dated August 10, 1977, the Temporary Restraining Order dated August 26, 1977 and this motion, the Court concludes

that gross inequities between treaty and non-treaty harvest will occur if defendants are prevented from enforcing their adopted regulations. Because substantial fish resources will be lost for this year to plaintiff tribes if not harvested during the current and upcoming seasons, the immediate threat of substantial economic harm and serious hardship to many treaty right fishermen convinces this Court that prompt action is required to protect Federal treaty rights that this Court has found are constitutionally guaranteed as the law of the land and to assure the viability of this Court's orders. Plaintiffs herein have overwhelmingly met their burden of proof to show that enforcement of the proposed Department of Fisheries regulations limiting the fishing time on the non-treaty allocation would achieve at least partial compliance with this Court's directives to make additional fish available for harvest by treaty right fishermen, and that prohibition by the state court of enforcement of that regulation presents an immediate threat of substantial economic harm and serious hardship to plaintiff tribes. Thus, while plaintiffs have demonstrated irreparable injury to the treaty fishermen if the injunction is not granted, defendants have not demonstrated a substantial injury which will result to either themselves or other interested persons as a result of issuance of the preliminary injunction.

4. The Court further concludes that the public interest will best be served here by permitting the United States government to honor its treaty obligations to the Indians and by this Court seeing that its valid, final judgments and orders are protected and effectuated.

5. For the reasons set forth above, the Court finds and concludes that the plaintiffs have a strong likelihood of prevailing in this cause following a trial on the merits and thus the preliminary injunction staying the state court preliminary injunction should issue.

6. Alternatively, the Court finds and concludes that not only have plaintiffs raised serious questions, but they have demonstrated that the balance of hardships tips sharply in their favor. *See, William Inglis and Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

For the reasons hereinabove stated, unless and until this Court orders otherwise, IT IS NOW HEREBY ORDERED AS FOLLOWS:

PRELIMINARY INJUNCTION

1. That the Superior Court of the State of Washington, County of Thurston, is hereby enjoined and prohibited from in any manner or to any extent enforcing the temporary injunction issued by said Court on August 24, 1977, in No. 58107, and from issuing any other order in said cause which in effect will prevent the Department of Fisheries from fully complying with the orders of this Court.

2. That defendants, State of Washington, Gordon Sandison, the Departments of Fisheries and Game of the State of Washington, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, shall not obey, carry out, enforce or otherwise treat as having any lawful force or effect the order of the Thurston County Superior Court for the State of Washington referred to in paragraph (1) above until further order of this court.

Rule 65(c), Federal Rules of Civil Procedure, pertaining to security necessary for issuance of injunctions, provides in part: "No such security shall be required of the United States or of an officer or agency thereof." The application for injunctive relief herein having been made by the United States, this Court may not require security therefore from the United States, and does not require such security from any parties joining in or supporting said application.

IMPLEMENTING ORDERS

For reasons not clear to this Court, the Department of Fisheries takes the anomolous position of opposing entry of this preliminary injunction issued above, while asserting the correctness and appropriateness of the regulations enjoined in the State Court proceeding. This Court's preliminary injunction confirms the propriety of the Department of Fisheries regulations. Moreover, this Court has not and will not direct, limit or in any manner whatever interfere with full exercise of the prerogatives, duties and discretion vested by State law in the Directors of the Departments of Game and Fisheries, except to the extent necessary to enforce the judgment and decree entered pursuant to Final Decision No. 1 and to restore or preserve the Indian treaty rights specified therein. Nothing in this Decision or in the above injunction should be construed or applied to the contrary.

However, due to the circumstances previously recited, and to aid in achieving an equal opportunity to both treaty Indian and non-treaty fishermen to harvest fish in the case area, this Court finds it necessary in aid of its jurisdiction and to protect and effectuate its judgment, to provide as follows:

IT IS HEREBY ORDERED THAT:

1. The defendants are required to enforce their regulations providing for management and control for purposes of conservation and over the non-treaty allocation share so that the treaty allocation shall not be encroached upon.

2. Regulations governing the non-treaty allocation, once adopted by the defendants in accordance with the Court's prior rulings and this order, shall not hereafter be relaxed or rescinded without prior notice to this Court and all parties to this action, unless consent of the affected plaintiff tribes has been obtained prior thereto.

3. To the extent reduction in the non-treaty fishery adopted in accordance with the Court's prior rulings already has been relaxed or rescinded prior to the entry of this order by reason of the preliminary injunction of the Thurston County Superior Court in *Puget Sound Gillnetters Association* v. *Sandison*, No. 58107, issued August 24, 1977, defendants shall cease immediately from carrying out directives, orders or policies in accordance with said preliminary injunction and shall resume forthwith to implement the regulatory schemes and policies previously adopted to effect its management control over the non-treaty allocation share.

4. If, at any time subsequent to the entry of this order, defendants are participants in legal proceedings which, in their judgment might possibly result in an order that could impair or otherwise affect adversely their ability to conform to the requirements of this Court's allocation order, or other orders in this case, defendants shall immediately so inform this Court and shall serve upon all parties to this action copies of all papers filed in such legal proceedings.

5. Defendants shall take such action as may be necessary to notify forthwith their officers, agents, employees, and attorneys, and those persons in active concert or participation with them, of the contents of this order and the duties and obligations defined herein.

IT IS SO ORDERED, ADJUDGED AND DECREED, effective immediately upon entry hereof this 31st day of August, 1977.

/s/ George H. Boldt
Senior United States District
Judge

I hereby certify that on this 7th day of January, 1978, three copies of the Petition for Writ of Certiorari were mailed postage paid, to Mr. John P. World and Mr. Joseph T. Mijich, attorneys for Purse Seine Vessel Owners Association, 2844 Bank of California Center, Seattle, WA, 98154, to Charles E. Yates, attorney for Puget Sound Gillnetters Association, 3300 Sea. First Nat'l Bank Bldg., Seattle, WA 98154, and Mr. Richard W. Pierson, attorney for Washington State Commercial Passenger Fishing Vessel Association and for Washington Kelpers Association, 3737 Bank of California Center, Seattle, WA 98164. I further certify that all parties required to be served have been served.

JAMES M. JOHNSON
Sr. Asst. Attorney General
600 No. Capitol Way
Olympia, WA 98504

Supreme Court, U. S.
FILED
DEC 6 1978
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, et al.,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, et al.,

Respondents.

No. 78-119

STATE OF WASHINGTON, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

PETITIONS FOR WRITS OF CERTIORARI FILED
January 9, 1978, July 21, 1978 and July 24, 1978
CERTIORARI GRANTED OCTOBER 16, 1978

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,

Respondents.

AND

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,

Respondents.

No. 78-119

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES, and DONALD W. MOOS, Its Director,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

AND

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondents.

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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Preliminary Injunction Re: Enforcement, September 27, 1977	App. A-89 Pet. 78-119
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Testimony in Washington State Commercial Passenger Fishing Vessel Assn. v. Tollefson [89 Wn.2d 276 (1977)]

Thor Tollefson (Director, Fisheries — October 10, 1974):

Q. As a result of the Boldt Decision, Mr. Director, what action did you take in meeting the obligations of complying with the decision and order?

A. The first action we took had to do with the ocean fishery. It was in two parts. We reduced the daily bag limit of salmon from three fish to two and then we closed the three mile strip off our coastal commercial fishing.

Q. Those are regulatory enactments that you did in fact take, is that correct, as a result of the Boldt Decision?

A. That is correct. We followed the Washington Administrative Procedures Act.

(p. 1-13, line 24—p. 1-14, line 6)

Q. Director, what were the factors that you had in mind in adopting the regulatory enactments that we are concerned with in this proceeding, namely, the three to two closure and the three mile strip closure? What were the factors or what were you addressing yourself to in passing the regulations?

A. A very simple one. We were under injunction by Judge Boldt to significantly reduce non-Indian fishing in order to make more fish available to the Indians so they would have an opportunity to catch more.

(p. 1-23, lines 12-22)

Q. Would it also be a fair statement of the chinook and coho destined for the Puget Sound area that 50 per cent of the fish are caught by the Canadian troll fishery or more?

A. Yes, Canadians get off the west coast of Vancouver Island a mile and a quarter for coho, a little more this year, and three quarters of a mile for chinook.

Q. Is it your concept that Judge Boldt in his decision should control the Canadian fishery?

A. I am sorry.

Q. Is it your concept Judge Boldt in his decision allocating the number of fish in his decision does control Canadian fishery?

A. That is unclear to me. He did say that the Indians must abide by the Salmon Commission regulations. Under the Salmon Commission regulations, there is no possible way the Indians could harvest 50 percent of the United States share of those fish. But to specifically answer your question, it is a legal question that is unresolved as far as I know.

Q. Let me ask it this way. Were the Canadian troll fisheries controlled in any way or reduced in any way by Judge Boldt's decision this year?

A. No.

(p. 1-52, line 8—p. 1-53, line 1)

Q. What I am asking is if the Indians cannot catch 50 per cent of the fish, is it necessary to insure they can catch 50 per cent to prohibit commercial trolling within three miles of shore on the information available to you in your capacity?

A. There is no prohibition against their trolling in the three mile limit.

Q. I believe you passed a regulation.

A. Then we were enjoined.

Q. That is what we are here about today. If the Indians are not capable of catching 50 per cent of the fish, is it necessary for you to make a rule which prohibits commercial trolling within three miles of shore?

A. I can't answer that until I know what the Indian catch is.

Q. You are the highest official of the State of Washington. The buck stops with you. The information available to you is the Indians can't?

A. I don't think they have the capability of catching 50 per cent. I said that. But we provided them with the opportunity. That is our guideline.

(p. 1-58, line 30—p. 1-59, line 2)

Q. Will you agree with me that the small boat commercial troll industry has been economically hurt as a result of the regulation which prohibits them from fishing within the territorial waters of the State of Washington?

A. Yes, they have been hurt.

Q. I came up with the word "devastating" last Friday and you agreed.

A. I don't think I agreed with the word "devastating". All the non-Indian fisheries have been seriously damaged.

(p. 1-60, lines 9-18)

Q. My question used the word "include." You interpreted the Judge Boldt Decision as requiring you to make 50 per cent of the artificially spawned salmon available, too?

A. All fish, yes.

THE COURT: Before we leave the subject, I don't mean to insert myself in the litigation, I would like to have you ask the definition of "artificially spawned salmon."

Q. (By Mr. Bean) Will you please define "artificially spawned salmon?"

A. Salmon spawned in hatcheries and in artificial spawning channels.

Q. Under control of the department?

A. Under control of the Department of Fisheries.

THE COURT: In hatcheries?

THE WITNESS: And in artificial spawning channels.

THE COURT: Thank you.

Q. (By Mr. Bean) These artificially spawning projects, these are done under your supervision?

A. Yes.

Q. Who funds these?

A. We get money from the general fund, state appropriations, plus mitigation money from power companies that build dams, and we get some federal money under Public Law 88309 and 89304 for anadromous fish enhancement programs.

(p. 1-71, lines 1-28)

Q. Do you know how many licensed commercial trollers there are in the state? Do you know that?

A. Not off the top of my head. Somewhere in the neighborhood of 3,000, I would guess.

(p. 1-74, lines 25-29)

Dell Fender, Fisherman (second day):

A. My name is Dell Fender. I live in Westport, Washington, Post Office Box 432, F-E-N-D-E-R.

Q. What is your occupation, sir?

A. I am the owner of Salmon Charters, Inc., charter office, restaurant, and we do business or make reservations and charter service for 19 boats.

Q. How long have you been in the Westport area and charter business?

A. Over 20 years.

(p. 2-90, lines 5-13)

Q. Can you describe how a charter office works with respect to the 19 boats that are in your responsibility?

A. Well, mainly it is the more economical way for a small businessman to operate. He pools his resources and then all advertise as a group. You can get more

advertising out for 14 boats than you can for 5 or 6 because you have a larger sum of money to do it with. You can cover a larger area and also better service customers by having more boats than a few boats.

Q. With respect to your relationship to the people in your group, how do they compensate you?

A. We get a percentage of the gross for the charter fee for operational expense.

(p. 2-91, lines 14-26)

Q. Tell us, based upon the 20 years you have had in business and your experience of running the charter office, what impact the two fish limit would have had if it had been in effect the entire year this year?

A. When the public announcement came out the fish limit was cut to two fish on June 15, we had two cancellations for every one reservation we received.

Q. Was that attibutable solely to the two fish limit?

A. This is their excuse.

Q. If the two fish limit had continued in effect through the entire season, how would your business have fared with that problem?

A. If it would have declined the same percentage for the total season it did for the two weeks after June 15, I would hate tho think what it would be. It would be disastrous.

Q. What was the percentage of decline?

A. Over a third.

Q. Over a third. I think it shows the decline for the two weeks after June 15th —

A. Actually, our season starts picking up. We do real good in May, but in June it starts to load out. By the middle of a normal June we are usually booked pretty solid from there on through July and August.

Q. I see in July your figures on Exhibit 5 reflect the total

month of July being down 893 passengers as compared with the previous year.

A. Yes.

Q. To what do you attribute that decline?

A. Solely to the two fish limit.

Q. Why do you have that opinion?

A. This is what the people told us when they called up and cancelled out or in their letters they wrote cancelling reservations.

(p. 2-92, line 16—p. 2-93, line 19)

Robert W. Allen, Operator, Deep Sea Charters (second day):

A. Robert W. Allen, Westhaven Drive, Westport.

Q. What is your occupation, sir?

A. Charter office.

Q. Where do you operate?

A. In Westport.

Q. How long have you been in the charter business?

A. Since 1968.

Q. What is the name of your charter office?

A. Deep Sea Charters.

Q. How many boats operate out of your office?

A. Ten this year.

Q. Can you give us some idea of the investment you have in your charter operation?

A. Around $100,000.

Q. Of the boats that fish in your fleet of 10 boats, what sort of investment does that represent?

A. I would guess a quarter of a million dollars.

(p. 2-101, line 29—p. 2-102, line 15)

Q. What do your figures show with respect to the July number of passengers for 1974 as compared with the prior year?

A. Well, in July of '73 we hauled 3,071 passengers and in July of '74 we had 1,187, a decrease of 1,184.

Q. Mr. Allen, can you tell us what your understanding is of the reason why you experienced the decline in the second and third weeks of June and the very drastic decline in July of 1974?

A. Definitely the two fish limit.

Q. Why do you say that?

A. My customers told me.

Q. Are you the person who takes many of the reservations, talks with the customers?

A. The biggest share of them.

Q. Why did they say they wouldn't fish if they could catch two fish as compared with three fish?

A. They felt the investment of the trip wasn't worth it. Most of them realized that lots of times they don't get their limit, but they felt if they come down one time and get skunked, they should have a chance to get even with three fish the next time.

Q. Do you have an opinion, then, as to what the effect would be, or would have been this year, if the two fish limit had been in effect the whole year?

A. I think it would have been awful bad.

Q. Would you have been able to continue in business?

A. I don't think so.

(p. 2-103, line 7—p. 2-104, line 4)

Al Nyhus, Jr. (second day):

A. Al Nyhus, Jr., N-Y-H-U-S, P. O. Box 351, Westport.

Q. And your occupation, sir?

A. I am a charter boat owner-operator and partner in a charter office.

Q. What is the name of the office?
A. Gull Charters, Inc.
Q. They are in Westport?
A. Yes.
Q. I take it you are a member of the Westport Association, as are all the other officers who are in Westport?
A. Yes, we are.
Q. How many boats do you have in your charter office?
A. We have nine.
Q. Would you describe your boat, please?
A. Well, I presently built a new boat last winter and it is 56 feet long. It will acccommodate up to 22 passengers and it was also built for salmon fishing and also to try to take advantage of the tuna fishing industry which seems to be coming along.
Q. What is represented by your investment?
A. I have presently invested in my vessel in excess of $100,000.

(p. 2-108, line 30—p. 2-109, line 21)

Q. Do you have an opinion what might happen if the two fish limit were to be continued or were to be in effect the next season, the 1975 season?
A. I can't see any reason we shouldn't see the same decline we did, say, the 15th of June this year. Why should it be any different?
Q. If it were to reach the point where you can no longer financially continue in business, what would the marketability be of your boat and other boats equipped to do the charter fishing?
A. Well, if the charter business were to fall to that level, the market for that type of boat would be nil. The only way I could sell the boat for some other type of venture would be through extensive alterations to make it suitable for some other type, say a cruiser or a

commercial vessel which would be quite expensive, almost prohibitive. These vessels are built especially for this type of service, and to make extensive alterations would be quite expensive.

(p. 2-112, lines 6-24)

Charles Romaine, Motel Operator (second day):

A. Charles Romaine, R-O-M-A-I-N-E.
Q. Your address?
A. Post Office Box 558, Long Beach, Washington.
Q. Mr. Romaine, what is your business?
A. Motel business.
Q. Describe your motel and its location?
A. I have 120 unit motel at Long Beach, Washington, three miles from Ilwaco. It is a recreational type motel.

(p. 2-136, lines 23-30)

Q. To what extent is your motel operation dependent upon the charter business?
A. I would say 50 per cent.
Q. All right, if the charter business were not in operation in Ilwaco, what effect would that have on your ability to function as an operator?
A. We would be down, of course, 50 per cent of our net.
Q. What would that do to your operation? Would you continue to have your debt service taken care of?
A. I am afraid not.
Q. You would be out of business, would you not?
A. It would seem that way.
Q. Will you tell the Court, please, what is the nature of your investment?
A. Around $1,250,000. That is assessed by the state on our taxes.

Q. If you are talking about market value, we'd be talking about a different figure, would we not?

A. Yes.

Q. If you were selling it, what would you say it would be worth?

A. Close to $2,000,000.

Q. When someone makes a reservation at your motel, — strike that. Do you know, based upon your experience of this season, whether or not there was a decline in your business after the two fish limit became effective the third week in June?

A. Yes, there was a definite decline.

Q. To what do you attribute the decline?

A. Two fish.

Q. Why do you say that?

A. People decided they couldn't afford to come down for two fish.

(p. 2-138, line 22—p. 2-139, line 24)

Gail Schenk, Operator, Columbia Bar Charters (third day):

A. I am Gail Schenk, S-C-H-E-N-K, Box 339, Ilwaco, Washington.

Q. And what is your business?

A. We have the Columbia Bar Charters in Ilwaco, and we own three charter boats.

Q. By "we," who do you mean?

A. My husband and myself.

Q. And do your sons also work in the business?

A. My sons operate two of our charter boats; my husband operates the other one.

Q. How long has your family been in business?

A. We started our business as Columbia Bar Charters in 1966. Our boys decked for my husband several years

before that when he ran a charter boat. We have been in the business at least fifteen years.

Q. And are you responsible for the reservations, bookings, and record-keeping of Columbia Bar Charters?

A. Yes, I am.

(p. 3-56, lines 11-27)

Q. (By Mr. Pierson) Mrs. Schenk, can you tell us based on Exhibit 18 of your own knowledge of the industry and speaking with the customers, what effect the two-fish limit had on Columbia Bar Charters in Ilwaco?

A. Well, the Monday of June the 17th — we have eight boats all over twelve passengers — Monday on June 17th we had four customers. We had one hundred six on the Saturday before, because I sold that day as a three-fish day. I thought it was. I was confused, and a lot of people in Ilwaco were confused. They said midnight, June 15th, and I assumed June 15th meant midnight of that, and apparently it meant midnight of between the 14th and 15th. So we had one hundred six people that Saturday. I got notice late in the evening from the Fisheries Department — well, first I went to Olympia to ask when the three-fish went out and the two-fish came in, and I said I was confused, I thought it was the 15th, the night of the 15th, and they said they would let me know, they weren't sure. Mr. Hawe (phonetic spelling) explained to me, said: "Are more people confused?" I say, "Yes, we all are kind of up in the air." He explained to me then that he would let me know. So all through Friday of the 14th we still assumed we were on three-fish, until late in the evening I got a call from one of the wives of the Fishery men, who told me that we were going into two-fish the next day. It was late in the evening of Friday, the 14th, so we sold the 15th at three-fish, and we had one hundred six people. On Sunday, the 16th,

we dropped down to forty-five, and on Monday, the 17th, we dropped down to four. We had just a very poor latter two weeks of June. We had a very poor July. Our records show that our month of July was down just under three hundred people for the month of July, as compared to the month of July in '73. We have the same capacity boats; the same boats running through our office those two years.

Q. Now, what was the reason for that decline?

A. Well, I attribute it to the two-fish wholly and solely. Economically we thought we might have a problem, but we had such a good June we raised our prices at the opening of the season a dollar per passenger, which wasn't much, but to cover the expense of the anticipated raise in fuel and bait, and we thought maybe this might have an effect, but it didn't. Our first two weeks in June were very good, that is, throughout the economy. I figured that that might have a bearing. Then I figured the gasoline might have an effect, but it didn't, because we had the customers there in June. The first two weeks of June were very good. The only thing that changed after the 15th of June was the two-fish limit. We still had the same economy. We still had the gasoline problem. It just was bad. But the two-fish limit, the notoriety it got, it hurt us. It hurt us badly. We have vacation guides which go out all over the State, which go out all over probably the Northwest, that had articles that we had the two-fish. It was something you couldn't retract. It was something that was just there that everybody picked up those papers and read it and saw it, the two-fish, and we lived with that. Until we got the tourist trade, just the whole tourist trade back again, we suffered, and we suffered all through July.

Q. Do you have an opinion, Mrs. Schenk, what would have been the effect if the two-fish limit had continued throughout the '74 season?

A. Our office would have hurt, because we run basically on repeat customers. We are not the biggest, nor the most available. We have reservation customers, and we have repeat customers that come back to us. We lost those customers in July. We lost them the latter part of June. They had made reservations ahead of time elsewhere, and told me they did. They were friends of ours. We are kind of a friendly office. Most of our customers are our friends. They went to Oregon. We have companies that were based in Washington that cancelled out with us for their July trips. They had made their reservations the year before. I got notice earlier in the year that they cancelled out. They were going to Oregon because of our potential two-fish limit. We lost those people. They are hard to get back. You know, when you lose your customers to another community or another office or another port, you have to work real hard to get them back.

(p. 3-59, line 17—p. 3-62, line 9)

Jasper Elton Lasseter, Asst. Dir. of Operations, Fisheries (fifth day):

A. My full name is Jasper Elton Lasseter, L-A-S-S-E-T-E-R. I reside at Route 8, Box 448G, Olympia, Washington.

Q. By whom are you employed?

A. Washingtn State Department of Fisheries, Assistant Director in Charge of Operation.

Q. How long have you been employed by the State of Washington?

A. Twenty-three years last April.

Q. How long have you been employed by the Department of Fisheries? Has your employment all been with the Department of Fisheries?

A. Yes, it has.

Q. How long have you served in the capacity as assistant director?

A. I keep forgetting. I think it is 11 years.

Q. Prior to assuming your duties as assistant director for operations, what positions in the Department of Fisheries — what did your employment cover?

A. I was senior biologist in charge of — in the management research division in charge of all of the harvest of food fishes. Prior to that I was project leader on sport fishery work, and before that I worked in a laboratory at Bowmans Bay assessing the effects of pollutants on salmon and their food organisms and the rates and problems of acclimatizing young salmon from fresh water to salt water. Prior to that I went to the College of Fisheries. I had worked some part time jobs in fisheries and received a degree in fisheries from the University of Washington.

(p. 5-15, line 18—p. 5-16, line 16)

Q. (By Mr. Solomon) Would you state what guidelines, if any, were developed in formulating regulatory enactments responsive to the Boldt Decision?

A. Yes, the department was seeking or searching for those regulations which would reduce the non-treaty Indian share so the Indian share might be greater to reach toward the 50-50 allocation and trying to find whether those fish would be made available to Indian fisheries and searching for those possibilities which would do this with the least impact on the fishermen and the total state as possible.

Q. What were the regulatory proposals announced by the department as a result of its various staff meetings? What proposals were to be considered?

A. The director chose two proposals, a reduction in the sport bag limit from three fish per day to two fish per day, and he chose the proposal that all trolling would be prohibited within the three mile limit along the coast of the State of Washington.

(p. 5-22, lines 6-24)

Q. Was consideration given to limiting or regulating the troll fishery beyond the three miles?

(p. 5-56, lines 8-9)

A. I consider that area and, yes, the area beyond the three mile line was considered.

Q. Was that alternative rejected?

A. Yes, it was.

Q. Would you state why?

A. Because while we believe we can control individual Washington fishermen beyond the three mile limit, this does not give us control of the fishery.

Q. When you state it doesn't give you control of the fishery, what do you mean?

A. That fishermen could continue to fish beyond the three mile limit and land them elsewhere.

(p. 5-56, line 21—p. 5-57, line 2)

Q. Beyond the three mile limit are there others who fish the waters beyond three miles off the Washington coast?

A. You mean other Washington citizens?

Q. Other Washington citizens.

A. Yes, there are.

Q. Will you state who they are?

MR. BEAN: By name?

THE COURT: I am sure, Mr. Bean, he means groups of people.

MR. SOLOMON: Groups. I am sorry.

A. There are fishermen from all the coastal states, Alaska, Oregon, and California. There are Canadian fishermen. These are the salmon fishermen off our coast from other jurisdictions.

Q. Is there any alternatives or proposals or efforts by the Department of Fisheries to deal with the problem of the off shore trolling industry as it effects all of the

groups that fish out there that you have just described?

A. Yes, there are.

Q. Would you relate what those are?

A. We have endeavored as a state to work through the Marine Fisheries Commission to affect changes in the trolling pattern by the other states. We work through the United States with the director and the staff advising the United States government in negotiations with Canada wherein we urged that the Canadian troll fishery be diminished. We are urging the passage of a federal bill which would — I don't remember the legal word, but would allow the federal government to set regulations between the three and twelve mile limit. They have jurisdiction now, but no regulatory authority from Congress. We are strongly urging that this take place.

Q. In your opinion, Mr. Lasseter, would the imposition of regulations on Washington citizens beyond three miles restricting them from fishing beyond three miles, would that in your opinion have had the effect of returning more fish to the treaty Indians?

(p. 5-58, line 13—p. 5-59, line 21)

A. I believe there would be no appreciable return of fish to the Indian fishermen.

Q. (By Mr. Solomon) Would you state the basis for your opinion?

A. That fishermen from other states or Washington fishermen who had obtained licenses or landing permits in the other states would continue to fish and the fish would simply be landed elsewhere and that they would still be caught and therefore, the Indians would not have an opportunity to catch them.

(p. 5-60, line 29—p. 5-61, line 17)

Samuel G. Wright, Fish Resource Manager, Fisheries (sixth day):

Q. (By Mr. Solomon) Did any of the proposals that were submitted compromise any of the basic conservation principles?

Mr. Pierson: Objection, Your Honor, to the question. If we understand the question, the question is that it doesn't relate to anything specifically, doesn't relate to this case.

The Court: Is your question, were any of the statements of the Boldt decision in his opinion contrary to good salmon management? Is that what you are really asking?

Mr. Solomon: No. I think, Your Honor, the witness testified that there were certain aspects, pronouncements in the decision, the Boldt decision, that might be an incentive to compromise conservation, basic conservation principles, and I suppose I — maybe as a foundation I ought to ask what those were.

The Court: All right.

Q. (By Mr. Solomon) Would you state what you mean, what you have in mind when you state that there are parts of the decision or ruling that might compromise or be an incentive to compromising management conservation principles.

A. Well, as far as — I can only express this in terms of examples. There was, in other words, on the sharing thing, of course, when you start talking about numbers of fish you have got some — this is a definite incentive to increase size limits and cut down the numbers of fish, which in some cases conflicts with some basic conservation principles or yields that you can derive from resource. There were incentives to do things like reduce river sport catches where most of the catches are small jack salmon that pass through because of the way the thing was expressed in numbers. It was just, you know, some various incentives, of course, that did exist at the time to

make changes contrary to what you normally work with.

(p. 6-53, line 9—p. 6-54, line 15)

Q. (By Mr. Solomon) In formulating the proposals for 1974, a portion of which culminated in the sport bag limit reduction and the three-mile closure in territorial waters, did you consider the Oregon coastal and California salmon fisheries and the size of their fishing fleets?

A. That's correct.

Q. And why? What did you consider in that respect?

A. Well, we considered just basically what exists, that they do have — their salmon fisheries, of course, are just — with the exception of small river fisheries are just ocean fisheries, there are no fleet fisheries in existence south of the Columbia River, and they have also liberalized their regulations down there in having some impact on our stocks that we didn't have before, but the fisheries as exist are large and well developed fisheries, particularly the troll fisheries and they have the capability and do fish off the Washington Coast in significant numbers.

(p. 6-55, lines 12-30)

Samuel G. Wright (seventh day):

Q. All right. Let's break it down. Let me ask you this question: With respect to the Chinook run on Puget Sound stocks, isn't it a fact that Canadian fishermen take more than 50 percent of that stock?

A. I would say this is probably 50 percent or possibly more, yes, on Chinook.

Q. With respect to the Coho run on Puget Sound stocks what is the percentage that the Canadian fishermen take both troll and net fishery?

(p. 7-102, lines 24-30)

A. All fisheries combined, it is about 30 plus 15, well, let's see, about 45 percent, I would say, on the average for Puget Sound.

Q. So if I asked you the question as to what percentage of harvestable Chinook and Coho are taken by the Canadian fishermen, would you agree that it is in the range of 50 percent?

A. For Puget Sound fish, yes.

(p. 7-130, lines 1-10)

Samuel G. Wright (eighth day):

Q. Any idea how many fish were landed in Oregon?

A. In Oregon landings?

Q. Yes.

A. I have seen some estimates. I really don't — I see those things routinely. It just doesn't spring to memory.

Q. You say you have seen estimates. Would it be in the neighborhood of 500,000 fish or more?

A. Both Chinook and Coho?

Q. Yes.

A. Yes, it is definitely more than that. It is above that number.

Q. And it would be fair to say, would it not, that some of the ocean trollers in Oregon compete and fish in the same waters as the charter people from Ilwaco?

A. Yes, that's correct.

(p. 8-8, line 30—p. 8-9, line 15)

Q. All right. That same block of fish we are talking about managing, the Ilwaco and Westport example, the fishing effort by the charter fleet, if that fishing effort were reduced, would to a certain extent be reallocating those fish to the troll fishery beyond three miles,

which, as you have testified, is totally unregulated. Is that correct?

A. Yes. There's going to be transfers in that, yes. That is something that has to be figured in when you look at the —

Q. All right. And in addition to that, those fish moving northward, as you have indicated, as they would have to do to reach Puget Sound, would also be capable of being acquired and caught by the Canadian net fishery, is that correct, and the troll fishery which is unregulated by your Department?

A. This has happened to some extent, too.

Q. And it is totally unregulated by the Boldt decision. Is that correct?

A. I believe so.

(p. 8-12, line 27—p. 8-13, line 16)

Q. (By Mr. Bean) In 1970 is it fair to say that about 87 percent of the Chinook and Coho which were caught as shown on your Appendix No. 1, some study you did, on Exhibit 22, were caught beyond the three-mile area of the commercial troll salmon fishery?

A. It is approximately that.

Q. Approximately 87 percent, leaving about 13 percent of the troll fleet catching fish within the three-mile area?

A. Well, for those areas that are mentioned here, yes.

(p. 8-40, lines 1-10)

Q. And is it fair to say with regard to the Coho salmon in an even greater proportion over 90 percent of the Coho are caught beyond three miles?

A. Yes, I would say approximately 90 percent.

Q. And the commercial trollers are not regulated out of the area where 90 percent of the fish, of the Coho are caught, are they?

A. No.

Q. Not directly or indirectly?

A. Well, they are regulated in the sense that there are regulations on landings, I mean —

Q. Are there regulations affecting how many fish they can land that they catch outside?

A. No, there isn't.

(p. 8-40, line 19—p. 8-41, line 12)

Affidavit of Sam Wright, June 12, 1974:

Samuel G. Wright, being first duly sworn on oath, deposes and says:

That he is now, and at all times since November 1, 1972 has been, Supervisor of the Coastal Washington Salmon Management and Research Program for the Washington State Department of Fisheries; and gave the following statement at a public regulation hearing on April 19, 1974:

"In order to comply with the legal order requiring a greater availability of salmon to off-reservation treaty Indian fisheries, there is really only one general option available to the professional fishery manager. That, obviously, is to effectively reduce catch levels in major non-Indian sport and/or commercial salmon fisheries under State jurisdiction. The only other possibility would be to somehow shift fish from the necessary spawning ground escapement to Indian catches. This, of course, is completely unacceptable.

When considering the commercial troll fishery and the ocean sport fishery, we are dealing with Washington's two primary harvesters of chinook and coho salmon. The troll fishery accounts for about one-half of all State commercial landings (including Indian sales) for these two species. To be exact, in the past three years, trollers were responsible for 52% of all coho and 45% of all chinook landed commercially in the State. The impact of the ocean and outer Juan de Fuca Strait sport fishery is even more dramatic, for it accounts for 80% of the State's entire marine recreational catch.

For purposes of clarity, it should be noted that punch card Area No. 5 (Sekiu-Pillar Point) has been included as part of the "ocean sport fishery". This is because the biology of the fish taken in terms of size, age, maturity, migration patterns, etc. — is much closer to the ocean catch situation, not that of inner Puget Sound.

In reviewing potential restrictions for these two major fisheries, we were directed by two basic guidelines:

1. The need to effectively reduce catches and thus increase runs to Indian salmon fisheries in terminal areas; and
2. If possible, to choose those restrictive measures which would be least disruptive to each existing non-Indian fishery and its support industries.

For the commercial troll fishery, we carefully examined a group of potential restrictive measures involving areas, seasons and size limits. Since the State only has jurisdiction out to 3 miles offshore, we determined that more restrictive seasons and/or size limits would not really be effective, nor fair to Washington trollers, unless adopted by adjacent Pacific Coast states and Canada. We had some definite past experiences for guidance. For example, in the late 1940's, more restrictive regulations dealing with the coho season and chinook size limit were imposed for a portion of Washington's coast. Trollers continued to fish outside 3 miles in the supposed "closed area" and landed their catches as far away as S.E. Alaska ports. About 75% of the State's current troll landings are made by vessels with these same trip fishing capabilities.

Faced with this present jurisdictional situation, we felt that the only effective means to reduce actual troll catches would be a complete closure of all State waters. Our statistics show that very few fish were being reported as taken "inside 3 miles" due to the deterrent of a higher catch tax rate as opposed to offshore catches.

We fully realize that the specific numbers cited cannot be readily totaled up to arrive at expected ocean catch reductions or, conversely, increases in runs to

terminal fishing areas. There is a substantial amount of interaction among and between the major ocean sport and commercial troll fisheries. These will tend to reduce potential savings as will the presence of immature fish that, if not caught, would succumb to natural causes before ever reaching maturity. On the other hand, there are many factors which may further reduce ocean salmon catches but cannot be easily quantified at this time. For example, how many charter boat anglers can be expected to shun fishing under a reduced bag limit or how many trollers can be expected to shift their efforts to Alaska or California?

(p. 1, line 12 through p. 2, line 32; p. 3, lines 18 through 27)

Puget Sound Gillnetters v. Moos [88 Wn.2d 677 (1977)]

Stipulated Record

1. **Petitioners.** Petitioner, Puget Sound Gillnetters Association (PSGA) is a nonprofit organization, licensed and qualified to do business in the State of Washington. Petitioner PSGA includes in its membership approximately 600 gillnetters, the majority of the full time commercial gillnetters harvesting Coho and Chum salmon in the Puget Sound area. Petitioner Philip Sutherland, is a member and President of Petitioner PSGA. He is a resident of Washington State and a commercial gillnet fisherman who derives his income from gillnetting for Chinook, Coho, Sockeye, Chum and Pink salmon in the Puget Sound area. Petitioner Sutherland intends and is licensed by the Respondent to commercially fish with gillnet gear for Coho and Chum salmon in 1976.

2. **Intervening Petitioner.** Purse Seine Vessel Owners Association (PSVOA), is a nonprofit corporation licensed and qualified to do business in the State of Washington, and includes in its membership approximately 200 purse seiners, the majority of the full time commercial purse seiners harvesting Coho and Chum

salmon in the Puget Sound area and directly regulated in their fishing business by the Respondent. Petitioner, Frank Marinkovich (Marinkovich), is a member and Secretary-Treasurer of PSVOA, a resident of the State of Washington, and is a commercial purse seine fisherman who derives his income from purse seining for all species of salmon in the Puget Sound area. Marinkovich is duly licensed by Respondent and intends to fish commercially with purse seine gear for Coho and Chum salmon in the Puget Sound area in 1976, as he has done for many years past.

Intervening Petitioners, PSVOA and Marinkovich, have similar interests to Petitioners, PSGA and Sutherland herein, and they will be deprived of fishing time by Respondent's existing and proposed regulations, and said intervening Petitioners' claims and contentions herein and those set forth in the main action herein have questions of law and fact in common, and they should be permitted to intervene as Petitioners herein.

3. **Respondents.** Respondent, Donald W. Moos, is the Director of the Defendant, State of Washington Department of Fisheries, and said Department is an agency of the State of Washington. The Director and Department function pursuant to the statutory provisions set forth in RCW Title 75.

4. Subject to seasons and regulations established by the Director of Fisheries and subject to weekend closures established by statute, it is lawful to fish for commercial purposes with any lawful gear for Puget Sound origin salmon in Puget Sound fishing areas from the second Monday in September to and including the 30th day of November (RCW 75.12.010). Purse seine and gill net gear are lawful gear.

5. Washington State Department of Fisheries preseason prediction of Puget Sound origin coho was for a return to Puget Sound of 894,000 fish. Of the number returning to Puget Sound, 703,000 were expected to be available for harvesting over and above the needs for spawning purposes. Of the 703,000 fish available for harvest, 295,000

were predicted to be natural run coho, those artificially propagated from projects specifically for mitigation for known destruction of runs, i.e., dams, and coho from federal projects and cooperative projects involving treaty tribes. 408,000 were predicted to be hatchery produced fish from hatcheries funded unilaterally by the State of Washington.

6. Respondent is a party to the federal court action of *United States v. Washington*, 384 F.Supp. 312 (1974). The other parties to that action are the United States, State of Washington, and various Northwest Treaty Indians. Petitioners and Intervening Petitioners are not parties. Intervening Petitioners have been denied intervention, but appear as amicus.

7. Respondent has had requirements imposed on it by the judgment in *United States v. Washington, supra,* and subsequent orders of that court in the exercise of its continuing jurisdiction. These requirements are contained in the judgment in *United States v. Washington, supra,* pp. 342-343, 403. Subsequent significant orders imposing additional requirements include a temporary restraining order issued July 14, 1976, a copy of which is attached hereto and marked Exhibit A, an injunction and memorandum decision granting preliminary injunction which are issued by the court on 16 August, copies of which are attached and marked respectively Exhibits B and C. Additionally, on September 7, 1976, Judge Boldt ordered the Department to close all coho fishing for the week of September 12, 1976, to nontreaty commercial fishermen. A copy of that order is attached, marked Exhibit D. An Order on Certain Questions Re Fisheries Management was also entered by Judge Boldt. A copy is attached and marked Exhibit E. The following are excerpts from some of those orders and findings entered by the court which set out significant requirements and restrictions on Respondents.

A. Plaintiff-Intervenor tribes in United States v. Washington "shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all

fishermen at usual and accustomed grounds and stations." *U.S. v. Washington, supra* at p. 343.

B. In counting the fish for Plaintiff-Intervenor tribes, "fish taken on reservations shall not be included in any allocation of fish between treaty and nontreaty fishermen. * * *" and "fish taken to serve ceremonial and subsistence needs (of those tribes) shall not be counted in the share of fish that treaty right fishermen have the opportunity to take." *U.S. v. Washington, supra* at p. 343.

C. When reservation catch projections are furnished by the tribes, they shall govern unless shown to be significantly inaccurate on challenge by Respondents, and Respondents are required by subsequent order of the court in *U.S. v. Washington* to subtract reservation, ceremonial, and subsistence shares before computing treaty and nontreaty shares. ("Order on Certain Questions Re Fisheries Management" a copy of which is attached hereto and marked Exhibit E).

D. Respondents have been required:

> "to revise and to reorganize their regulatory action and enforcement so as to conform the same to all requirements of Final Decision No. 1 * * *"

and ordered to:

> "not adopt regulations or enforce any statute or regulations affecting the volume of anadromous fish available for harvest by a treaty tribe at usual and accustomed places unless such regulations are designed so as to carry out the purposes of the treaty provisions securing to the tribe the right to take fish." *U.S. v. Washington, supra* at p. 416

Respondents have been specifically required to:

> "make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision. * * *" *U.S. v. Washington, supra* at p. 420

E. Respondents are enjoined by subsequent order in *U.S. v. Washington* from excluding hatchery or artificially propagated fish in computing the share for treaty Indians.

("Order Granting Preliminary Injunction" a copy of which is attached hereto and marked Exhibit B.)

8. Attached marked Exhibit G and incorporated by reference herein are proposed regulations for the nontreaty commercial net Coho fishery in Puget Sound, which regulations were developed by Respondent in compliance with the requirements in *United States v. Washington, supra*. Those regulations, based upon anticipated returns, were developed to provide nontreaty fishermen fishing in Puget Sound commercial fisheries with 146,000 fish and treaty fishermen with 557,000 fish to be harvested in Puget Sound commercial net fisheries.

11. Preseason predictions of numbers of Puget Sound origin Coho which will actually return to Puget Sound areas are modified by Respondents to reflect additional information. In-season catch monitoring provides such information. Significant statistics utilized are measurements of the catch in Canadian fisheries in the outer Straits of Juan de Fuca and statistics from Puget Sound fisheries as they develop. Comparisons include total catch (by gear type), catch per unit of effort and comparisons with historical records.

The most optimistic of the indicators computed as of September 23, 1976 indicates the numbers of Coho returning to Puget Sound, after all interceptions, and prior mortalities, to be approximately 65% of the preseason prediction. Other indicators suggest a smaller total Coho run returning to Puget Sound.

As of September 23, Respondent has assumed for present management purposes that the numbers of Coho salmon which will actually return to Puget Sound after all prior interceptions and mortalities, is approximately 50% of preseason predictions. Respondent has cancelled previously established Puget Sound nontreaty commercial net seasons for Coho of Puget Sound origin.

12. Puget Sound origin Coho have also been harvested by Washington commercial trollers fishing in the Pacific Ocean and by Washington sport fishermen. Approximately 300,000 additional Coho salmon would

have returned to Puget Sound in 1976 had those fisheries not occurred.

13. The setting and revocation of these seasons have been intended to accomplish compliance with the above requirements of the federal court as to numbers of fish which must be provided treaty Indians. Even based upon the recently revised run size predictions, there are harvestable surpluses of Puget Sound Coho of both hatchery and natural origin. The regulations presently existing, *i.e.*, a total nontreaty commercial closure, will allow the harvest of all these fish by treaty Indians.

On September 22, 1976, Order No. 76-95 was superseded by Order No. 76-97 market Exhibit L and attached hereto, whereby all nontreaty commercial Coho fishing was closed. There has been no commercial gillnet or purse seine fishing authorized by the Respondent on 1976 Coho of Puget Sound origin.

15. Treaty fishermen's main method of harvesting Coho salmon in Puget Sound is through the use of gillnets, set nets and purse seines.

16. Commercial fishermen's main method of harvesting Coho salmon in Puget Sound is through the use of gillnets and purse seines.

17. The average Coho salmon when harvested commercially in Puget Sound in 1976 weighs approximately six pounds and the present price being paid for the Coho to the commercial fishermen is approximately 95 cents per pound. Both figures vary through the season.

18. Puget Sound origin Coho are available for harvest within Puget Sound marine net fisheries primarily from September through October. Before September, the Coho are migrating in marine waters and after October they have entered the fresh water streams where they are harvested only by sport fishermen and treaty Indian net fisheries.

19. The Department of Fisheries has issued approximately 1,500 licenses which authorize gillnet fishing in the 1976 Puget Sound fisheries.

20. There are approximately 600 to 700 treaty

fishermen expected to participate in the harvest of 1976 Puget Sound Coho stocks under treaty rights.

21. Artificial propagation of Coho salmon in Puget Sound through state funded hatchery programs commenced in 1895.

22. The language of the treaties which has been the basis for the decisions in *U.S. v. Washington, supra, Washington Game Department v. Puyallup Tribe*, 414 U.S. 44, 38 L.Ed.2d 254 (1973), *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L.Ed.2d 689 (1968), and *Department of Game v. Puyallup Tribe*, 86 Wn.2d 664 (1976), are identical, and a copy of the treaty representative of that language is attached, marked Exhibit F and incorporated by reference herein.

First Supplemental Stipulated Facts:

23. Federal District Court Judge George Boldt under his continuing jurisdiction in *U.S. v. Washington*, 384 F. Supp. 312 (1974), has ordered the Director of Fisheries to enact regulations, which he has enacted, for the 1976 commercial fishing season which provide and make available a greater number of harvestable salmon and allow more fishing time to treaty Indian fishermen than to non-Indian fishermen in Puget Sound commercial fisheries. If it were not for said orders of Judge Boldt, the Director would provide and make available a greater number of such salmon and more fishing time to non-Indian commercial fishermen than is presently provided under existing regulations which are being challenged herein. At the time of the hearing (October 15, 1976) all Puget Sound commercial fishing areas (except Areas 7 and 7A in which the coho stocks are primarily of Canadian origin) are closed to non-Indian commercial fishermen, but treaty Indian commercial fishermen are allowed to fish in several of these areas otherwise closed to non-Indian fishermen, as more particularly described on the chart attached hereto as Exhibit M.

25. In proposing 1976 Puget Sound commercial salmon fishing regulations, Fisheries proposed regulations

which would have allowed non-Treaty fishermen to harvest all artificially propagated salmon propagated by the state. As a result of Judge Boldt's injunction referred to in Paragraph 7 above enjoining the state from excluding hatchery or artificially propagated fish in computing the share for treaty Indians, Fisheries present regulatory pattern extends Indian treaty rights to all hatchery fish.

27. Fisheries regulations are often promulgated on an emergency basis, commonly leaving little time for court review in advance of their effective date. This action involves matters of continuing and substantial public interest. The questions presented for resolution here shall recur in the future.

Second Supplemental Stipulated Facts:

The parties hereto have heretofore filed Stipulated Facts and First Supplemental Stipulated Facts in this action. They hereby stipulate to the following additional facts to update the record in this action to include the events of the 1977 Puget Sound and Grays Harbor commercial salmon fisheries. Paragraph numbers shall run in sequence from the First Supplemental Stipulated Facts.

28. On or about July 22, 1977 Respondents, pursuant to RCW Ch. 75, adopted regulations governing commercial gillnet and purse seine salmon fishing for Puget Sound Chinook, Coho, Pink and Chum Salmon. On July 25, 1977 the defendants issued a summary of the 1977 Puget Sound Chinook, Coho, Pink and Chum Commercial Fisheries Regulations. Said regulations applied without discrimination to all Washington State citizens engaged in commercial salmon fishing and did not allocate fish between treaty Indians and other commercial fishermen. A copy of said summary is attached hereto as Exhibit A and by this reference incorporated herein.

29. On August 10, Judge Boldt, under his continuing jurisdiction in *U.S. v. Washington*, Cause No. 9213, issued a Memorandum Order and Preliminary Injunction, a copy of which is attached hereto as Exhibit B and by this

reference incorporated herein, in which he assumed overall supervision of Puget Sound commercial fishing and exclusive control and authority for the management of Puget Sound treaty Indian fishing. He ordered respondents to present to the court regulations for non-treaty Chinook, Coho and Chum Salmon fishery consistent with his determined allocation of such fish between treaty Indians and non-treaty commercial fishermen. In addition, Judge Boldt ordered the respondents to "adopt, administer and enforce such regulations which have been found necessary to manage the non-treaty allocation and provide for proper spawning escapement."

30. In response thereto, Fisheries adopted emergency regulations, copies of which is attached hereto as Exhibit C and by this reference incorporated herein, which closed certain waters in Puget Sound to non-treaty commercial fishing, i.e., canceled open fishing periods in Elliott Bay, northern Carr Inlet and part of Budd Inlet.

Their purpose was to allow treaty Indians to harvest the number of salmon which Judge Boldt decreed to be theirs. See Fisheries' News Release No. 77/189 of August 12, 1977, a copy of which is attached hereto as Exhibit D, and by this reference incorporated herein.

31. On August 22, 1977, Puget Sound Gillnetters Association (PSGA), and Purse Seine Vessel Owners Association (PSVOA) filed an action for declaratory judgment in Thurston County Superior Court (*Puget Sound Gillnetters Assn., et al. v. Sandison*, Cause No. 58107). They requested the court to enter an order that the regulations adopted by Fisheries in response to the Preliminary Injunction issued by Judge Boldt are beyond the scope of the authority of Respondent and, therefore, void. Petitioners also sought an injunction enjoining Respondents, the State of Washington, and its officers from interferring with the harvest by PSGA and PSVOA members of Puget Sound salmon not required to preserve, protect and perpetuate the species.

32. On August 25, 1977, and in reliance upon this Court's ruling in *Puget Sound Gillnetters Assn. v. Moos*,

88 Wn.2d 677 (1977), The Honorable Frank E. Baker, Judge, Thurston County Superior Court, entered a Preliminary Injunction in *Puget Sound Gillnetters Assn. v. Sandison,* which enjoined the Director and Fisheries from prohibiting commercial salmon fishing in Puget Sound during the calendar year 1977 for reasons other than conservation purposes. A copy of the Preliminary Injunction is attached hereto as Exhibit E and by this reference incorporated herein.

33. On August 25, 1977 Fisheries adopted an Emergency Order, No. 77-77, to comply with the Preliminary Injunction issued by Judge Baker in *Puget Sound Gillnetters Assn. v. Sandison.* The Emergency Order repealed prior allocation orders adopted in compliance with orders entered by Judge Boldt. A copy of said order is attached hereto as Exhibit F and by this reference incorporated herein.

34. On August 26, 1977 Judge Boldt, in *U.S. v. Washington* No. 9213, entered a Temporary Restraining Order (TRO), staying the State Court Injunction issued by Judge Baker. In his order Judge Boldt stated that,

> "A Federal Court allocation was necessary *only* because the State Supreme Court had frustrated the effectiveness of this court's prior orders by deciding that the Director of the Department of Fisheries could not allocate fishing opportunity between treaty and non-treaty fishermen."

The TRO entered by Judge Boldt temporarily prohibited and enjoined Judge Baker from enforcing his Temporary Injunction of August 24, 1977 in any manner or extent and from issuing any other order in that action which, in effect, would prevent Fisheries from fully enforcing regulations adopted in compliance with orders entered by Judge Boldt. The TRO also directed the Director and Fisheries not to obey, carry out, enforce or otherwise treat as having any lawful force or effect Judge Baker's order. (Copy attached as Exhibit F-1.)

35. Pursuant to Judge Boldt's order on August 26, 1977, Fisheries adopted an emergency order, No. 77-79.

Said order repealed Order 77-77 and set aside the original regulations adopted by Fisheries on July 22, 1977 regulating the 1977 Puget Sound commercial fishery. A copy of said order is attached hereto as Exhibit G and by this reference incorporated herein.

36. On August 31, 1977 Judge Boldt entered a Preliminary Injunction in *U.S. v. Washington,* No. 9213, which enjoined and prohibited the Thurston County Superior Court "from in any manner or to any extent enforcing the Temporary Injunction issued by said court on August 24, 1977, in No. 58107, and from issuing any other order in said cause which, in effect, will prevent the Department of Fisheries from fully complying with the orders of this court." (Copy attached as Exhibit G-1.)

37. On August 31, 1977, Judge Boldt entered a "Temporary Restraining Order Re: Enforcement of 1977 Fisheries" (TRO). The TRO provided that all commercial net fishermen licensed by the State of Washington, the Puget Sound Gillnetters Association (PSGA), the Purse Seine Vessel Owners Association (PSVOA), and all persons in active concert and participation with them are temporarily restrained from engaging in taking, possessing or selling salmon of any species in violation of the Court's Orders of August 10, 1977, or August 31, 1977, or state regulations adopted pursuant to the orders of the court. The TRO further required the United States to take all necessary steps to manage the fishery and to enforce the orders of the court. (Copy attached as Exhibit G-2.)

PSGA, PSVOA, and their individual members *are not* parties in *U.S. v. Washington.*

38. Pursuant to Judge Boldt's orders on September 19, respondents adopted emergency order, No. 77-94, a copy of which is attached hereto as Exhibit H and by this reference incorporated herein, which closed Areas 6B, 8, 9, 10 and 11 to all non-Indian commercial salmon fishing effective Tuesday, September 20. According to Fisheries' News Release No. 77/229, said areas were closed to allow treaty Indians the opportunity to take their share of the salmon harvest and the areas would remain closed to

non-Indian commercial fishermen until further notice. A copy of said news release is attached hereto as Exhibit I and by this reference incorporated herein. But for Judge Boldt's orders, these areas would have been open to non-treaty commercial fishing.

39. Pursuant to Judge Boldt's order, on September 23, 1977 respondents adopted an emergency order, No. 77-97, which provided fishing time for non-treaty commercial fishermen during the week of September 25, the Director indicated in a letter, a copy of which is attached hereto as Exhibit J and by this reference incorporated herein, that Areas 6B, 9 and 10 were not open as previously scheduled because the non-treaty share of Coho, as established by Judge Boldt, has been taken.

40. Several non-treaty commercial fishermen have been cited by Federal officials and ordered to appear before Judge Boldt to show cause why they should not be held in criminal contempt for fishing in violation of his orders of August 31 and emergency orders adopted by the Director in compliance therewith.

41. Pursuant to Judge Boldt's order allocating Coho between treaty Indians and non-treaty commercial fishermen, on September 27, 1977 the Director adopted emergency order, No. 77-101, which closed the gillnet season in Grays Harbor to non-treaty commercial fishermen. This closure was extended by an emergency order, No. 77-105. Copies of the Director's letters containing said orders are attached as Exhibits K and L, respectively, and by this reference incorporated herein.

42. On September 27, 1977 Judge Boldt entered a Preliminary Injunction Re the Enforcement of 1977 Fisheries, a copy of which is attached hereto as Exhibit M, and by this reference incorporated herein. The Preliminary Injunction provides:

> (1) "All Puget Sound and other marine waters easterly of Bonilla Point-Tatoosh line and their watersheds, all Olympic Peninsula watersheds, and all Grays Harbor watersheds are hereby closed to all net salmon fishing except during such times and such

> specific waters as are open by State of tribal regulations, or regulations of the United States conforming to the orders of this court in this case;"
>
> (2) All net fishermen licensed by the State of Washington, PSGA and PSVOA are enjoined from engaging, taking, possessing or selling salmon of any species taken from the above waters unless that individual has first determined from the Fisheries' hotline that the area which he intends to fish is open at that time;
>
> (3) The State of Washington was to serve by certified mail, return receipt requested, on all State licensed commercial fishermen a copy of the Court's Preliminary Injunction; and
>
> (4) The State of Washington was ordered to cite any fishermen who had received notice of the Preliminary Injunction and thereafter fishes in violation of the provisions of the Preliminary Injunction.

43. On September 28 Judge Boldt ordered respondents to allocate the salmon harvest in Grays Harbor so as to provide the treaty Indians with 45 percent of the chinook and coho and 50 percent of the chum which will return during the 1977 fishing season.

44. On September 29 the Director adopted a non-treaty commercial fishing schedule in Puget Sound for the week of October 2. In a letter setting out said schedule, a copy of which is attached hereto as Exhibit N, and by this reference incorporated herein, the Director said that the schedule was as directed by Paragraph E of Memorandum and Preliminary Injunction issued by U.S. District Court Judge George Boldt on August 31, 1977.

45. On October 4 the Thurston County Superior Court in *Grays Harbor Gillnetters Assn. v. Sandison*, Cause No. 58462, ordered respondents to promulgate emergency regulations which do not restrict commercial salmon fishing in Grays Harbor except for conservation purposes. On October 5 respondents adopted Order 77-108, a copy of which is attached as Exhibit N-1 which

repealed the earlier closure of Grays Harbor, thus opening the fishery by petitioners.

46. On October 5, Judge Boldt, in *U.S. v. Washington*, entered a Temporary Restraining Order (TRO) which stayed the Thurston County Superior Court and "from issuing any other order in said cause, or in any other cause, which will have the effect of preventing the State of Washington, the Washington State Department of Fisheries, or the officers and agents, from fully complying with the orders of this court." A copy of this TRO is attached hereto as Exhibit O and by this reference incorporated herein.

47. On October 6, the Chief Justice of this Court entered an order in *Grays Harbor Gillnetters Association v. Sandison*, Cause No. 45114 (copy attached as Exhibit O-1).

48. On October 7, 1977, respondents Fisheries adopted emergency regulation Order No. 77-110 to comply with that order (copy attached as Exhibit O-2) which by repealing earlier closures had the effect of opening fishing seasons in certain areas of Washington.

49. On October 8, 1977, Judge Boldt entered a Temporary Restraining Order (copy attached as Exhibit O-4) which enjoined future openings of non-treaty fisheries from being placed on the Hot Line without approval of that court, its expert or its advisory board. That order also specified what information was ordered to be provided over the Hot Line. Specifically the message was directed to include the fact areas were closed by order of the federal court and fishing in violation of those closures could subject fishermen to contempt charges.

50. On October 17, 1977, Judge Boldt entered a Preliminary Injunction Staying Thurston County Superior Court. (Copy attached hereto as Exhibit O-5) which enjoined the Superior Court from "in any manner or to any extent enforcing the temporary injunction issued by said Court (per the Honorable Frank Baker) on October 4, 1977, in Cause No. 58462, and from issuing any other order in said cause, or in any other cause, which will have

the effect of preventing (respondents) from fully complying with the orders of this court." (Page 3)

51. On October 17, 1977, Judge Boldt entered another Preliminary Injunction (Exhibit O-6) continuing in effect the notification system summarized in Paragraph 42 above.

52. Gordon Sandison has been appointed Director of Fisheries and as such has replaced Donald Moos. If this court issues a writ of mandate to the Director, it should issue the mandate to Gordon Sandison.

53. If it were not for the orders of Judge Boldt under his continuing jurisdiction in *U.S. v. Washington*, the Director would provide and make available a greater number of salmon and more fishing time to non-Indian commercial fishermen than has been previously made available under the orders of the United States District Court.

54. The 1977 Puget Sound commercial salmon fishing season runs from September 12 through November 30. As of October 24 over 975,000 coho have been taken in Puget Sound commercial (including Indian) fisheries. By the end of the season, it is forecast over one million will have been taken with aproximately 800,000 being of Puget Sound origin stocks. The average coho when harvested weighs approximately 7½ pounds and the present price being paid for the coho to commercial fishermen is approximately $1.00 per pound.

55. Fisheries' regulations are often promulgated on an emergency basis, commonly leaving little time for court review in advance of their effective date. This action involves matters of continuing and substantial public interest. The questions presented for resolution here shall recur in the future.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, vs. STATE OF WASHINGTON, *Defendant-Appellant*, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants*, NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS, *Intervenor-Defendant-Appellant*.	No. 74-2414 OPINION
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, vs. STATE OF WASHINGTON, *Defendant*, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants*, WASHINGTON REEF NET OWNERS ASSOCIATION, *Intervenor-Defendant-Appellant*.	No. 74-2437
UNITED STATES OF AMERICA, *Plaintiff*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, on its own behalf and on behalf of the QUEETS BAND OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, UPPER SKAGIT RIVER TRIBE, AND QUILEUTE INDIAN TRIBE, *Plaintiffs-Appellants*, vs. STATE OF WASHINGTON, *Defendant-Appellee*, THOR C. TOLLEFSON, etc. et al., *Intervenors-Defendants*.	No. 74-2438

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,*
vs.
STATE OF WASHINGTON, *Defendant-Appellant,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,*
CARL CROUSE, Director of the Department of Game, the WASHINGTON STATE GAME COMMISSION, *Intervenors-Defendants-Appellants.*

No. 74-2439

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,*
vs.
STATE OF WASHINGTON, *Defendant-Appellant,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, *Intervenor-Defendant-Appellant.*

No. 74-2440

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,*
vs.
STATE OF WASHINGTON, *Defendant,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants,*
WASHINGTON REEF NET OWNERS ASSOCIATION, *Defendant-Appellant.*

No. 74-2567

UNITED STATES OF AMERICA, *Plaintiff,*
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,*
PUYALLUP TRIBE OF PUYALLUP RESERVATION, *Plaintiff-Appellant,*
vs.
STATE OF WASHINGTON, *Defendant-Appellee,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants.*

No. 74-2602

UNITED STATES OF AMERICA, *Plaintiff,*
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,*
NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, *Plaintiff-Appellant,*
vs.
STATE OF WASHINGTON, *Defendant-Appellee,*
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants.*

No. 74-2705

[June 4, 1975]

On Appeal from the United States District Court
for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges,
and BURNS,* District Judge.

CHOY, Circuit Judge:

The United States brought this suit to enforce compliance by the State of Washington and its Departments of Game and Fisheries with certain treaties between the federal government and various Indian tribes of western Washington (treaty Indians; treaty tribes). The Government initially represented the interests of seven named tribes. Other tribes intervened, and fourteen tribes are now named parties plaintiff. Organizations of commercial and sports fishermen intervened as party defendants or participated as amici curiae.

The district court found that Washington could not apply its existing fishing regulations to members of the treaty tribes without violating their federal treaty rights. The court held that the state could enforce only those regulations necessary for conservation, decreed an allocation of fishing opportunity between treaty Indians and other citizens,[1] and retained continuing jurisdiction to provide advance judicial scrutiny of all future state regulations affect-

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

[1]"Other citizens" includes a substantial number of citizens of Indian ancestry who are no longer enrolled members of treaty tribes.

ing Indian treaty fishing rights. *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974). Both sides appealed.[2] We affirm and remand.

Historical Background

In the early 1850's, an increasing flow of American settlers poured into the lowlands of Puget Sound and the river valleys north of the Columbia. Washington Territory was organized in 1853. Isaac Stevens, its first governor, was commissioned to smooth the way for settlement by inducing the Indians of the area to move voluntarily onto reservations.

George Gibbs' official chronicle of the treaty proceedings reveals the governor as a tactful and effective negotiator. He united the scattered Indian communities into a number of tribes and selected "chiefs" from each tribe with whom to bargain. The Indians west of the Cascade Mountains were known as "fish-eaters"; their diets, social customs, and religious practices centered on the capture of fish. Their fish-oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons. Stevens nevertheless persuaded them to settle down on designated reservations, thus freeing the great bulk of the land for American settlement without a bloody war of conquest. In exchange, he promised the tribes money and the benefits of the white man's civilization—material goods and education. Governor Stevens assured them, moreover, that they were restricted to the reservations only for the purpose of residence; he explained that they would remain free to fish off the reservations at their traditional fishing places in common with the white settlers.

In negotiating the treaties, Stevens read a predrafted document and asked for the Indians' comments and approval. Although the treaties read as typical legal documents, few if any of the Indian negotiators read or spoke English. The treaties and the Americans' explanation of their terms were translated into Chinook jargon, a trade medium of some 300 words common to most Northwest Indians. The district court found that the jargon was inadequate to express more than the general nature of the treaty provisions.

[2]The tribes have contended on appeal that the state may not regulate their fishing activities at treaty locations for any reason. Their assertion is foreclosed by the decision in *Puyallup Tribe of Indians v. Dept. of Game of Washington,* 391 U.S. 392 (1968).

During 1854 and 1855, Stevens executed treaties with all of the treaty tribes. Each treaty contained a provision guaranteeing off-reservation fishing rights similar to that found in the Treaty of Medicine Creek, 10 Stat. 1132:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

To this day, fishing remains an important aspect of Indian tribal life, providing food, employment, and an ingredient of cultural identity. Indians have adopted modern techniques of sport and commercial fishing. They share the concern of other citizens with preservation of runs of anadromous fish. Some tribes regulate the times and manner of fishing by their members.

Decree of the District Court

The district court held that the state and its agencies can regulate off-reservation fishing by treaty Indians at their usual and accustomed grounds only if the state first satisfies the court that the regulation is reasonable and necessary for conservation. The court defined "conservation" as the perpetuation of a run or of a species of fish. The state must also show that the conservation objective cannot be attained by restricting only citizens other than treaty Indians. In addition, the regulation must not discriminate against treaty Indians and must meet appropriate due process standards.

Those treaty tribes meeting certain qualifying requirements (384 F. Supp. at 340-41) may regulate fishing by their own members free from any state regulation. Qualified tribes will be required, however, to fulfill certain conditions designed to keep the state informed concerning their regulations and fishing activities. The court found the Yakima Nation and the Quinault Tribe already qualified for self-regulation.

Each year, a certain escapement of fish is necessary to preserve the run. After this escapement has been allowed by either state or tribal regulation, the remainder of the run is available for harvest. The court decreed an allocation of this harvestable run between the treaty tribes and other citizens. The state may not regulate treaty Indians' taking of this harvestable run at their

"usual and accustomed grounds and stations" unless necessary to limit them to 50 percent of the harvest at those grounds. Treaty Indians thus are to have the opportunity to take up to 50 percent of the available harvest at their traditional grounds.

The harvest to be allocated comprises not merely those fish which actually pass the traditional fishing grounds, but also those captured en route and those bound for those grounds but caught in marine waters by non-treaty fishermen. The court decreed an "equitable adjustment" to the harvestable catch to compensate for attrition from these sources. On the other hand, those fish caught by treaty Indians on reservations or taken for traditional tribal ceremonies or personal consumption by tribal members and their immediate families are to be totally disregarded in calculating the harvestable catch.

The state and its agencies challenge virtually all of these features of the district court's decision.

Federal Preemption of State Regulation

By virtue of its police power, the state has initial authority to regulate the taking of fish and game. *Geer v. Connecticut,* 161 U.S. 519 (1896). The federal government, however, may totally displace state regulation in this area. For example, Congress has the power, under the commerce clause, to authorize construction of hydroelectric facilities, even though a dam totally destroys existing runs of fish in the river in violation of the public policy of the state and the desires expressed by a majority of its enfranchised citizens. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *Washington Department of Game v. FPC,* 207 F.2d 391 (9th Cir. 1953), *cert. denied,* 347 U.S. 936 (1954). The federal government may also preempt state control over fish and game by executing a valid treaty and legislating pursuant to it. *Missouri v. Holland,* 252 U.S. 416, 432 (1920). Furthermore, such a treaty may preempt state law even without implementing legislation; a treaty guaranteeing certain rights to the subjects of a signatory nation is self-executing and supersedes state law. *Asakura v. City of Seattle,* 265 U.S. 332, 341 (1924). Consequently, the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian nations.

At issue, however, is not the federal government's power in executing treaties to preempt all state regulation of Indian fiishing, but whether it has in fact done so. "Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973); *see Carey v. South Dakota,* 250 U.S. 118, 122 (1919). A treaty guaranteeing a right to fish distinct from that enjoyed by other citizens would be such an "express federal law." In deciding whether the Stevens' treaties created federal rights immune from abridgement by state law, we must read their terms against a "backdrop" of Indian sovereignty, recalling that when the treaties were signed, the United States regarded the tribes as nations, independent and sovereign. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973).

Although the United States dealt from a clearly superior position, the treaties were negotiated at arms' length. The treaties were not dictated to a defeated nation. The United States wished to free most of the land in the Puget Sound area for the impending white migration and settlement. Governor Stevens' task in executing the treaties was to induce the Indians to move onto reservations. The Indians expressed their concern that they would be unable to continue their traditional way of life, centered on the gathering of fish, because of limited fishing opportunities on the proposed reservations. The governor overcame their fears by promising them continued access to their traditional fishing areas off the reservations.

The treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Winans,* 198 U.S. 371, 381 (1905). The extent of that grant will be construed as understood by the Indians at that time, taking into consideration their lack of literacy and legal sophistication, and the limited nature of the jargon in which negotiations were conducted. *See id.* at 380. Although ceding their right to occupy the vast territories in which they had been accustomed to roam unimpeded, the Indians reserved their traditional right to fish at their accustomed places. They granted the white settlers the right to fish beside them. In a sense, the treaty cloaks the Indians with an extraterritoriality while fishing at these loca-

tions. Although present Indian status is not understood in terms of tribal sovereignty, recalling past acceptance of that concept aids in perceiving the Indians' understanding of the effect of the treaties which they signed. They retained the right to continue to fish as they were accustomed. Certainly, they did not understand that in permitting other citizens access to their traditional fishing areas they were submitting to future regulations calculated to benefit those other citizens.

Nevertheless, this is precisely how the state of Washington has regulated fishing for years. In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory. As the non-Indian population has expanded, treaty Indians have constituted a decreasingly significant proportion of the total population, catching a decreasing proportion of a fixed or decreasing number of fish. "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans,* 198 U.S. at 380. *See Antoine v. Washington,* 94 S. Ct. 944, 951 (1975).

In summary, the Indians negotiated the treaties as at least quasi-sovereign nations. They relinquished millions of acres of their lands, retiring to reservations carved out of those lands. But they expressly reserved their indispensable rights to fish at their traditional places. The United States obtained for the settlers and for the subsequently-admitted state only the right of equal access to these fishing grounds. The treaty provision at issue grants the state's other citizens only a limited right to fish at treaty places; it thus is "express federal law" preempting all state regulation of Indian fishing at the treaty fishing grounds, except as hereafter stated. *Compare Mescalero,* 411 U.S. at 148-49.

State Regulation for Conservation

The relationship between treaty Indians and other fishermen which these treaties created is unique. The two groups of fishermen do not share a cotenancy in the fish or in the opportunity to fish. Nevertheless, their relationship is analogous to a cotenancy, and the experience of courts in adjusting competing claims between cotenants sheds light on the interpretation of the parties' treaty rights.

Cotenants stand in a fiduciary relationship one to the other. Each has the right to full enjoyment of the property, but must use it as a reasonable property owner. A cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value. *See* Comment, *The Inter Vivos Rights of Cotenants Inter Se,* 37 Wash. L. Rev. 70, 76 (1962). A court will enjoin the commission of waste.

By analogy, neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed. The state may interfere with the Indians' right to fish when necessary to prevent the destruction of a run of a particular species in a particular stream. Thus, the Supreme Court has held that the state may regulate the time and manner in which the Indians take their catch when "necessary for the conservation of fish." *Puyallup Tribe v. Department of Game of Washington (Puyallup I),* 391 U.S. 392, 399, 402 n.14 (1968); *Tulee v. Washington,* 315 U.S. 681, 684 (1942).

The state defines "conservation" to embrace three objectives and urges that it should be allowed to curtail Indian fishing in pursuit of conservation so defined: 1) allowing sufficient escapement to perpetuate the fish run; 2) assuring the maximum sustained harvest; and 3) providing for an orderly fishery. But the only rationale for permitting state interference with Indian fishing precludes adoption of this definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run. "Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival." *Department of Game of Washington v. Puyallup Tribe* (Puyallup II), 414 U.S. 44, 49 (1973).

The state's program for management of the state's fisheries may appear sound and commendable, but the state shares its rights in those fisheries with another party. It may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens. The state may secure treaty Indians' compliance with these regulations only by gaining their acquiescence in its goals. Direct regula-

tion of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction. *Antoine v. Washington,* 94 S. Ct. 944, 952 (1975).[3]

Tribal Self-regulation

Preservation of fishery resources is of vital importance to Indians as well as to other citizens. At the same time, regulatory interference by the state with treaty fishing is obnoxious to the treaty tribes. These tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites. *Settler v. Lameer,* (9th Cir., Nov. 26, 1974). The court, in its equitable discretion, decided that qualified tribes should have the power, subject to certain conditions, to regulate their own members in the interest of conservation free of state controls. So long as the tribes responsibly insure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed. We hold that the court did not abuse its discretion.[4]

[3]The Supreme Court observed that "the State must demonstrate that its regulation is a reasonable and necessary conservation measure . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine,* 94 S.Ct. at 952 (emphasis by the Court). This limitation on the state's police power is nullified in practice when, as here, a court has ordered an apportionment of the opportunity to take the harvestable run. By apportioning between treaty Indians and other citizens the opportunity to take all fish not needed for escapement, the court in effect requires treaty Indians to contribute to preservation of the run. To do so deprives the Indians of no rights. Both treaty Indians and other citizens share responsibility, as quasi-cotenants, for the run's perpetuation. In *Antoine,* the Court denied the state's power to *compel* the treaty tribes to assist in assuring optimum escapement; it did not question the tribes' moral or equitable duty to do so. The tribes have come to court seeking equity in allocation of the harvestable catch; the court may first require them to fulfill their equitable responsibility to allow sufficient escapement.

[4]In *Kennedy v. Becker,* 241 U.S. 556 (1916), the Court rejected a concept of "dual sovereignty" by which the state would regulate non-Indians exclusively, and the tribe, Indians. The Court held that such a duality would be unworkable; either entity would be able to destroy the resource, free of check by the other. *Id.* at 563. Neither the *Settler* panel nor we advocate such a duality. The tribe possesses a power of enforcement inferable from its power to regulate. *Settler* (slip op. at 13). This power does not displace that of the state; ordinarily the state and the tribe possess concurrent power to regulate Indian fishing at usual and accustomed sites so far as necessary to preserve the run. However, the district court has enjoined the state's exercise of its power in order to advance the congressional policy of promoting tribal autonomy. If tribal self-regulation proves impracticable, we are certain that the court will revise this feature of its judgment.

Apportionment of the Right to Fish

The necessity to limit the catch to preserve a run defines the extent to which the state may exercise police power to regulate Indian fishing. By the treaty, the Indians granted citizens of the territory the right to fish in common with them, however, and the state may enforce regulations insuring that both groups of fishermen have fair access to the fish at the treaty areas. State officials are in close daily contact with fishing conditions in Washington; they should be permitted a certain amount of flexibility in devising rules to assure both groups opportunity to exercise their rights. In so regulating, however, they must be aware that they are not enforcing state policies but applying federal rights to concrete situations. Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians.

The treaty provides only that those Indians may fish "in common with" other citizens at the traditional grounds. The legal effect of this clause has been much disputed. The district court interpreted it as justifying an equal apportionment of the opportunity to take fish:

> [N]on-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish . . . .

384 F. Supp. at 343.

The state argues that the term "in common with" was intended merely to insure that the treaty Indians would not be treated discriminatorily, that each Indian should have access to the traditional fishing grounds on the same footing as each white settler. The Supreme Court long ago considered this construction, how-

ever, and rejected it. *United States v. Winans*, 198 U.S. 371, 379-82 (1905).

In the early years following the signing of the treaties, a policy of providing all individuals with equal access to fishing grounds sufficiently guaranteed all parties' rights under the treaties. White civilization has since engulfed that of the Indian, however. Demand for fish has outstripped supply. By continuing to treat the outnumbered treaty Indians no differently from other citizens, the state effectively allots them a decreasing share of the resource.

A cotenant dissatisfied with his partner's exploitation of their common property may seek a partition of the property in order to protect his interest in it. Comment, *supra*, 37 Wash. L. Rev. at 77. By analogy, the Indians are entitled to an equitable apportionment of the opportunity to fish in order to safeguard their federal treaty rights. *See* ***Puyallup II***, 414 U.S. at 48-49. The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession. *Geer*, 161 U.S. at 529. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run.

The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public. *See Lemon v. Kurtzman*, 411 U.S. 192, 200-01 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). In legislative reapportionment cases, for example, the Supreme Court has been content to review and decide the broad standards (one man, one vote) dictated by the fourteenth amendment, leaving the details of the implementation of those standards to the equitable discretion of the district courts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Similarly, we propose to state only those fundamental legal principles which define the parties' respective rights, reviewing the remainder of the district court's decree only for abuse of discretion.

We affirm the conclusion of the district court that the fundamental principle to be applied in a judicial apportionment is that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. This conclusion follows naturally from the circumstances in which the treaties were signed.

The treaties must be viewed as agreements between independent and sovereign nations. *McClanahan*, 411 U.S. at 172. The "tribes" in western Washington were constructed somewhat arbitrarily by Governor Stevens for his convenience in negotiating the treaties. Each tribe in many cases was an aggregate of smaller, more natural units—communities or villages. Nevertheless, each tribe was understood to be an entity for the purpose of each treaty.

Each tribe bargained as an entity for rights which were to be enjoyed communally. *See Sac and Fox Indians (Iowa) v. Sac and Fox Indians (Oklahoma)*, 220 U.S. 481, 483-84 (1911). The reservations were reserved to each tribe *qua* tribe. Not until 1887 was the President authorized to allot reservation land to individual Indians. 24 Stat. 388. Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation." F. Cohen, Handbook of Federal Indian Law 183 (1942, reprinted 1971). The right to fish at usual and accustomed grounds was one such communal property right pertaining to the tribe. *Whitefoot v. United States*, 293 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); Juergensmeyer & Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 Natural Resources J. 361, 372 (1974). To hold that the Indian negotiators intended to secure for each member of the tribe the right to compete for fish on equal terms as an individual with each individual settler—the state's view of the "in common with" clause as a prototype of the fourteenth amendment's equal protection clause—thus would be to disregard the fabric of Indian society at the time the treaties were concluded, a society of communality whose nature was reflected in the subsequent legal character of property ownership which evolved in Federal Indian law. *See* F. Cohen, *supra*.

In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. An attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality. The district court was not required to

decree a perfect 50-50 division of fishing opportunity. *Cf. Mahan v. Howell*, 410 U.S. 315, 332-33 (1973); *Swann v. Adams*, 385 U.S. 440, 444 (1967); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The court itself recognized the difficulty in practice of attaining that theoretical ideal. 384 F.Supp. at 343-44. Nevertheless, a 50-50 apportionment reflects the equality existing between the two bargaining parties and best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties. Thus the court's apportionment was well within its discretion.

"Equitable Adjustment"

Today, the treaty Indians' "usual and accustomed" fishing grounds in general are located upstream from sites of intensive non-treaty Indian fishing. Because the parties to the treaties did not anticipate shortages of harvestable fish, they did not foresee that downstream fishing by non-Indians would someday injure the Indians' right to fish at their usual places. Therefore, the Indians are entitled to catch 50 percent not simply of the fish passing the traditional grounds, but also of those destined for those grounds but captured dowstream or in marine waters.

The district court acknowledged the difficulty in determining with mathematical precision the number of fish bound for the tribes' fishing areas. The court recognized that a large portion of these fish are taken outside the jurisdiction of the state. Furthermore, many caught within Washington waters are taken under regulations issued by the International Pacific Salmon Fisheries Commission. On the other hand, it is reasonable to suppose that many fish appropriated beyond the state's regulatory jurisdiction are nonetheless taken by Washington citizens.

The court decreed:

> An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

384 F.Supp. at 344. We agree with the state that the court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast. The treaty granted equal rights at the traditional areas to Washington citizens, and their ability to fish is equally impaired by foreign fishing. On the other hand, Washington citizens who benefit from marine catches of fish bound for traditional areas, regardless of whether they are subject to state regulation while fishing, have received a portion of the non-treaty Indian entitlement under the treaty. The court therefore may act within its equitable discretion by adjusting the number of fish which the treaty Indians have an opportunity to catch in such a way as to reflect roughly the fact that non-treaty Indian citizens have already received a portion of their share of the run past the treaty sites even before the state obtained jurisdiction over their activities.

Insofar as the 1937 convention between the United States and Canada for the protection of the Fraser River fish runs, 50 Stat. 1355, the Sockeye Salmon or Pink Salmon Fishing Act of 1947, enacted pursuant to the convention, 16 U.S.C. §§ 776-776f, and regulations issued thereunder displace the regulatory powers of the state within the state's territorial waters, fishing within those waters should be treated no differently from fishing beyond the state's territorial jurisdiction. The court therefore may adjust equitably the treaty Indians' share to compensate them for fish taken by other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which otherwise would be available for harvest at their traditional treaty areas. The court may so adjust the tribes' allocation to compensate, of course, only those tribes which share in the harvest of Fraser River salmon—or other fish affected by the Commission's regulations—at their traditional areas. Losses in the catch of those fish not regulated by the Commission caused by Commission regulation of fishing gear may also be compensated.

We reject the state's contention that the Convention and Act have "pre-empted" Indian treaty rights to harvest Fraser River salmon. The Supreme Court has indicated its extreme reluctance to find congressional abrogation of Indian treaty rights in the absence of explicit statutory language so directing. *Menominee Tribe of*

Indians v. United States, 391 U.S. 404 (1968). Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations, but, in the absence of an explicit expression of intent to terminate treaty rights, losses to other citizens sustained through compliance with those regulations should be redressed as above stated by adding to the treaty Indians' permitted catch in areas under state jurisdiction.

Fish Taken on Reservations

The state contends that fish caught by treaty Indians on their reservations should be included in their 50 percent allocation of the catch. Analysis of the structure of a typical treaty, the Treaty of Medicine Creek, 10 Stat. 1132, is instructive. In Article I, the Indians ceded their lands to the United States. In Article II, however, the treaty reserved "for the present use and occupation of the said tribes and bands, the following tracts of land. . . ." Finally, in Article III, "[t]he right of taking fish, at all usual and accustomed grounds and stations, is *further* secured to said Indians, in common with all citizens of the Territory. [Emphasis added]"

The right to take fish in common with the settlers off the reservations was a right reserved by the Indians in addition to their right to occupy and use reservation land. The settlers obtained no analogous rights on the reservations. Other citizens clearly have no more claim to a share of the fish caught on the reservations than they do to a right to reside on those reservations. The court thus did not abuse its discretion in excluding fish caught on the reservations from the apportionment.

We also affirm its decision, uncontested by the state, that fish taken off the reservation and actually used for traditional tribal ceremonies or for personal subsistence consumption by members of the tribe and their families shall not be counted in the apportionment.

Lummi Reef Net Fishing

The conflict between the Lummi Tribe and the non-treaty Indian reef net fishermen involves elements not found among the other tribes. Reef nets are installed at various locations in the

sound, parallel to the shoreline from about 125 to about 1,300 yards from shore.[5] Locations differ greatly in their productivity. The technique of reef net fishing was developed by the Indians, who used nets between reefs close to shore. Modern reef netting is far more sophisticated, making use of artificial "reefs" and heavy equipment, and is practical in deeper waters farther from shore. The court found that the fish had been driven from shallower waters by the whites' use of fish traps, now illegal, and by the widespread use of other fishing gear in the areas formerly devoted to Indian reef nets.

Reef net fishermen by gentlemen's agreement retain exclusive occupancy of a given location until they sell or otherwise dispose of their equipment. The court found that all Lummi reef net fishermen had been squeezed out of the fishery. At present, therefore, a member of the Lummi Tribe can reef net in a profitable location only by purchasing, at considerable expense, a non-treaty Indian's fishing gear.

The district court found that the present reef net areas are within the usual and accustomed grounds and stations of the Lummi Indians, and that the Lummis had a right to an opportunity to fish in those areas. The court, however, deferred for later consideration the specific relief to be afforded the Lummis at the expense of present occupants of reef net locations.

Reef net fishing is distinguishable from other forms of fishing in two important respects. First, only a finite number of profitable positions are available, each occupied at present by a white fisherman who is recognized by his fellow fishermen as owning a quasi-property interest in the site, an interest appurtenant to his ownership of his fishing gear. Any assignment of positions to treaty Indian fishermen must break down the present exclusive occupancy system. Second, and more important, the court found that:

> Reef net locations were owned [at the time of the treaty] by individuals who claimed proprietary rights by virtue of inheritance in the male line. These locations constituted very valuable properties to their native owners. . . . Some of the Lummi signers of the treaty were owners of reef net loca-

[5]This fact was determined from inspection of the aerial photos admitted by the District Court as exhibits RN 7 and RN 11.

> tions. Lummi Indians who were present at the Point Elliott Treaty Council later asserted that the Lummi signers had received assurances there that they would continue to hold the rights to their fishing grounds and stations, including their reef net locations.

384 F. Supp. at 361. The right to fish with reef nets was thus not a tribal right, as was other fishing, but one guaranteed to specific individuals.

The individual Indian's proprietary relationship with a specific reef net location presents an aberration from the general communal pattern of Indian property ownership. Nevertheless, the Treaty of Point Elliott must be interpreted with reference to the general pattern of ownership among the tribes subscribing to it, not to the aberrational.

The fact that, in general, Indians held property communally has led the courts to hold that property rights, vis-a-vis the United States, are vested in the tribe, not in the individual. Disputes among members of the tribe are left for the tribe to adjust internally. *See Whitefoot v. United States*, 293 F.2d 658, 661-63 & nn. 8 & 9 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).[6] In *Whitefoot*, for example, scarcity of good fishing locations at Celilo Falls on the Columbia river presented a similar situation. There, also, individual Indians had exercised an exclusive, hereditary right to fish certain choice locations. Nevertheless, the Court of Claims held that damages for inundation of the falls by federal construction of a dam were recoverable only by the tribe, not by individual tribal members. Similarly, no matter how Lummi fishermen held reef net locations according to tribal custom, so far as the United States is concerned, under the treaty the right to engage in reef net fishing belongs to the Lummi tribe. Therefore, fishing in the usual and accustomed reef net areas is subject to the same principle of equal division as is that in other usual and accustomed areas.

[6]The concept of "property" can scarcely exist outside a legal framework. We are reluctant to force whatever notions of rights and duties regarding fishing locations were held by Indians in 1854 into an Anglo-American mold of "property rights." We are especially reluctant to do so when the tribe still exists with which we can deal as an intermediary, allowing it to arbitrate among the conflicting claims of its members according to the values and customs of their own culture.

The non-Indian reef net fishermen maintain that today's fishing areas are not part of the Lummis' usual and accustomed areas. They assert that present reef netting is conducted in deeper water than that fished by the Lummis before the treaty was signed. The court, on the other hand, found that some present-day reef net gear is located directly upon traditional sites. It held that the "Lummi Tribe continues to hold treaty-secured rights to fish with reef net gear in its usual and accustomed places, including Legoe Bay off Lummi Island . . . ." 384 F. Supp. at 404. The court also found that:

> Since the turn of the century, the heavier volume of fish in the vicinity of Legoe Bay traveled close to shore. This has changed so that now fish must be taken in deeper water. This has been caused by the installation of traps [until they became illegal under state law] and the present abundance of other fishing gear in the reef net area. . . . In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including operation of the reef nets.

Id. at 361-62. Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a sufficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous. The term "grounds" as used in the treaties denotes a broader dimension than "stations" and can readily be understood to include the distances from shore at which present reef netting is done.

In fashioning equitable relief for the Lummis, the district court should give regard wherever practicable to minimizing the resulting hardship to present white reef net fishermen.

Muckleshoot Tribe

The Muckleshoot Indian Reservation, named after the prairie on which it is located, was established in 1857, two years after the treaties were signed. It was occupied by Indians who earlier

had been represented at Medicine Creek and at Point Elliott, as well as by some Indians who apparently were parties to neither of those treaties. The reservation was an arbitrary grouping; no Muckleshoot Tribe had previously existed. Nevertheless, the inhabitants of the reservation today are recognized as a tribe by the United States. The district court recognized the Muckleshoots as a treaty tribe. We agree.

The state refused to recognize membership in the tribe as conferring federal treaty rights. The Washington Supreme Court has held that a member of the Muckleshoot Tribe must establish that he is descended from a tribe or band which was represented at the signing of one of the treaties if he is to be accorded treaty rights. *State v. Moses,* 70 Wash.2d 282, 422 P.2d 775, *appeal dismissed,* 389 U.S. 428 (1967).

The Interior Department instructed Governor Stevens "to effect [if possible] the combination of all the Bands into six or eight Tribes, [and] to arrange half a dozen treaties or less, so that every one of the Tribes shall be a party to one of them." Exhibit USA 28. In the Treaty of Medicine Creek, 10 Stat. 1132, the tribes ceded all the land from the divide between the Puyallup and Duwamish rivers south to the Skookumchuck river, from the Sound to the crest of the Cascades. In the Treaty of Point Elliott, 12 Stat. 927, they ceded the land from the northern boundary of the territory ceded at Medicine Creek north to the Canadian border. Governor Stevens clearly believed that, except for those lands designated as reservations, he had successfully acquired the territorial rights of all the tribes in that vast area; and the district court found that the government has consistently treated the present-day Muckleshoot Tribe as the successor in interest of those of its constituent tribes which had been represented in the two treaties.

The state's principal fear seems to be that members of the Muckleshoot Tribe will be able to use the traditional areas of all the merged tribes, affording them special rights. The argument is specious. The member of every tribe composed of smaller bands possesses rights similarly more extensive than those of any one of his direct ancestors. The treaty Indians are restricted to the opportunity to take up to 50 percent of the harvestable catch at traditional areas. Each Indian can fish at but one location

at a time, so the state's concern that he is accorded double the treaty rights to which he is entitled is unfounded.

Stillaguamish and Upper Skagit Tribes

The Stillaguamish and Upper Skagit Tribes were parties to the Treaty of Point Elliott, but today are not recognized as organized tribes by the federal government. Rights under the treaties vested with the tribes at the time of the signing of the treaties. Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine. *Cf. Upper Chehalis Tribe v. United States,* 155 F. Supp. 226 (Ct.Cl. 1957). Once a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress. *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968). Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Conclusion

The decision of the district court is affirmed in all respects, with the clarification that its "equitable adjustment" should not take account of fish caught by non-Washington citizens outside the state's jurisdiction. The case is remanded to the district court so that it may maintain continuing jurisdiction.

Affirmed and remanded.

BURNS, District Judge, concurring:

I concur, but I want to add a brief comment from the viewpoint of a district judge. As was suggested at oral argument, any decision by us to affirm also involves ratification of the role of the district judge as a "perpetual fishmaster." Although I recognize

that district judges cannot escape their constitutional responsibilities, however unusual and continuing duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police departments, and so on. The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-9-75—550

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

QUINAULT TRIBE OF INDIANS, et al.,

Intervenors-Plaintiffs,

vs.

STATE OF WASHINGTON,

Defendant-Appellee,

THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al.,

Defendants.

Order No.

74-2414, 2437, 2438, 2439, 2440, 2567, 2602, 2705

On Appeal from the United States District Court, for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges, and BURNS,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Choy and Goodwin voted to reject the suggestion for rehearing en banc, and Judge Burns recommended rejection.

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has voted to grant rehearing en banc. F.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

However, the opinion heretofore filed is amended in the following particulars:

1) Amend the last sentence of the first paragraph on page 3 of the slip opinion to read:

> "Organizations of commercial and sports fishermen intervened as parties defendant or participated as amici curiae."

2) Amend the sentence running from page 16 to page 17 to read:

> "Reef nets are installed at various locations in the Sound parallel to the shoreline from about 125 to about 1300 yards from shore."

3) Amend footnote 5, page 17, to read:

> "This fact was determined from inspection of the aerial photographs admitted by the district court as exhibits RN 7 and RN 11."

Filed July 23, 1975.
Docketed Aug. 4, 1975.

UNITED STATES of America, Plaintiff,
Quinault Tribe of Indians on its own behalf and on behalf of the Queets Band of Indians, et al., Intervenor-Plaintiffs,

v.

STATE OF WASHINGTON, Defendant,
Thor C. Tollefson, Director, Washington State Department of Fisheries, et al., Intervenor-Defendants.

Civ. No. 9213.

United States District Court,
W. D. Washington at Tacoma.

Feb. 12, 1974.

STATEMENT OF THE CASE

BOLDT, Senior District Judge.

In September, 1970 the United States, on its own behalf and as trustee for several Western Washington Indian Tribes,[1] later joined as intervenor plaintiffs by additional tribes,[2] filed the complaint initiating this action against the State of Washington. Shortly later the State Department of Fisheries (Fisheries) and the State Game Commission (Game), their respective directors, and the Washington Reef Net Owners Association (Reef Net Owners) were included as defendants. By state statute Fisheries is charged with exercising regulatory authority over fishing for all anadromous food fish. Regulation of anadromous steelhead trout is vested in Game. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 concerning off reservation treaty right fishing within the case area by plaintiff tribes, which long has been and now is in controversy, and for injunctive relief to provide enforcement of those fishing rights as they previously have been or herein may be judicially determined. The case area is that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River

[1]Hoh Tribe; Makah Tribe, Muckleshoot Tribe; Nisqually Tribe; Puyallup Tribe; Quileute Tribe; Skokomish Tribe.

[2]Lummi Tribe; Quinault Tribe; Sauk-Suiattle Tribe; Squaxin Island Tribe; Stillaguamish Tribe; Upper Skagit River Tribe; Yakima Nation.

drainage area, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas.

Plaintiffs also assert claims for relief concerning alleged destruction or impairment of treaty right fishing due to state authorization of, or failure to prevent, logging and other industrial pollution and obstruction of treaty right fishing streams. Separation of those claims for pretrial and trial after trial of the issues determined in this decision was stipulated and approved by the court.

Venue is properly laid in this court under 28 U.S.C. § 1391(b). Jurisdiction is alleged as to all tribes under one or more of the following provisions: 28 U.S.C. §§ 1345, 1331, 1343,(3) and (4) and 1362.[3] All of these allegations were conceded by all defendants, subject to their contention that exclusive jurisdiction to hear and determine the issues in this case is in the Indian Claims Commission under 25 U.S.C. §§ 70-70v and Game's denial of jurisdiction as to the Puyallup Tribe. This court has previously held and hereby affirms that both of these contentions are without merit and denied. It is hereby found and held that jurisdiction and venue have been established in all particulars as detailed in Part One of the Final Pretrial Order.

Fisheries contends the Muckleshoot, Stillaguamish and Upper Skagit tribes do not hold a special treaty status to harvest anadromous fish. Game joins in this contention and makes the same contention regarding the Sauk-Suiattle Tribe. These contentions are considered and denied in the written Findings of Fact and Conclusions of Law.

Shortly after appearance in the action by all defendants the first of a considerable number of pretrial conferences was held. Among many preliminary matters considered at that time were the court's suggestions that so far as possible all tribes, agencies or organizations having or claiming direct or indirect justiciable interest in treaty fishing rights in this judicial district be brought into the case either as parties or as amicus curiae; and that every issue of substantial direct or indirect significance to the contentions of any party be raised and adjudicated in this case. Both suggestions were acceptable to all parties and to a great extent they have been put into

[3]See Final Pretrial Order paragraph 1.

effect. Thus every interested agency and organization not joined as a party has had an opportunity to present its views on any of the issues in the case.[4]

For more than three years, at the expenditure by many people of great time, effort and expense, plaintiffs and defendants have conducted exhaustive research in anthropology, biology, fishery management and other fields of expertise, and also have made extreme efforts to find and present by witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in the case. As a consequence of this extensive pretrial preparation, all parties joined in stipulating to a great many agreed facts which are stated in exhibits or included in the Final Pretrial Order. The Joint Biological Statement, Exhibit JX-2a, jointly proposed and admitted in evidence as agreed facts applicable as indicated therein, was prepared by and agreed to by highly qualified experts employed by and representing both plaintiffs and defendants and is of exceptional importance and practical value. It is believed considerable historic and scientific information never before presented in a case involving treaty rights is now recorded and may prove of value in later proceedings in this case and possibly in others.

To great advantage, all procedures recommended in the Manual for Complex Litigation have been followed by counsel in the particulars and to the extent found applicable and practicable by the court. With approval of court and counsel upon its entry the Final Pretrial Order became the final statement of all issues to be heard and determined in this decision, and pleadings pertaining to those issues passed out of the case, subject only to amendment by the court to prevent manifest injustice. Such amendments have been included in the text of the Final Pretrial Order.

Every attorney in the case has vigorously and effectively presented the particular interests and contentions of each client he represents to the maximum extent professional duty requires. On the other hand there has been a remarkable degree of highly respon-

[4]The following agencies or organizations have submitted, or concurred in written briefs: Idaho Fish & Game Department; Port of Seattle; Washington State Sportsmen's Council, Inc.; Northwest Steelheaders, Inc.; Committee to Save Our Fish; Tacoma Sportmen's Club, Inc.; Tacoma Poggie Club, Inc.; Purse Seine Vessel Owners Association.

sible and most commendable cooperation on the part of all counsel throughout trial preparation and trial which has greatly expedited discovery and full presentation of the issues and evidence in the case. All of the legal issues have been researched in depth and effectively presented and argued in the pretrial briefs, and in the final briefs submitted after the presentation of evidence was concluded and before final argument, which also was exceptional in professional quality. By direction of the court all parties either individually or jointly, as they chose, prepared and submitted proposed findings of fact and conclusions of law referenced to the record and also drafts of a proposed decree. Each proposed finding, conclusion and decree has been closely examined and considered by review of the evidence and the portions of the briefs pertaining to each item. All fact findings and legal rulings stated herein and the detailed Findings of Fact, Conclusions of Law and Decree signed and entered by the court are hereby made a part of this decision.

On January 11, 1974, when Game filed the final version of its proposed findings, conclusions and decree the issues tried were finally submitted for decision.

This court is confident the vast majority of the residents of this state, whether of Indian heritage or otherwise, and regardless of personal interest in fishing, are fair, reasonable and law abiding people. They expect that kind of solution to all adjudicated controveries, including those pertaining to treaty right fishing, and they will accept and abide by those decisions even if adverse to interests of their occupation or recreational activities.

More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists.

To this court the evidence clearly shows that, in the past, root causes of treaty right dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between state, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other

and act as fellow citizens of equal standing as far as treaty right fishing is concerned. Some commendable improvement in both respects has developed in recent years but this court believes high priorty should be given to further improvement in communication and in the attitude of every Indian and non-Indian who as a fisherman or in any capacity has responsibility for treaty right fishing practices or regulation. Hopefully that will be expedited by some of the measures required by this decision.

The ultimate objective of this decision is to determine every issue of fact and law presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do.

I. ESTABLISHED BASIC FACTS AND LAW

(Hereinafter italicize emphasis added unless otherwise indicated)

The first decision of the United States Supreme Court on Indian treaty rights, Cherokee Nation v. Georgia, 5 Pet. 1, 30 U.S. 1, 8 L.Ed. 25, was written by Chief Justice Marshall in 1831. Since then decisions on the same subject matter have been rendered in that court, other federal courts and state courts in a considerable number to the present time.[5] All of the decisions that appear to have direct or indirect application to the present case have been closely reviewed and analyzed, individually and in relation to each other. Based thereon this court finds and holds that the following statements are now well established in fact and law.

1. Art. VI, cl. 2 of the United States Constitution provides:

> The "Constitution . . . of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. To the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the

[5]The Table of cases appended hereto includes only all cases which have been cited by any party as authority pertaining to any issue in this case and other cases considered by the court. In the table, the abbreviated title of each case referred to in the decision is italicized.

means to aquire vast Indian lands. It ordered that treaty negotiations with the plaintiff tribes and others in the Northwest be conducted as quickly as possible. Isaac I. Stevens, Governor of Washington Territory, proved to be ideally suited to that purpose for in less than one year during 1854-1855 he negotiated eleven different treaties, each with several different tribes, at various places distant from each other in this rugged and then primitive area. The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.[6]

In 1899 the United States Supreme Court in considering a similar situation said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. Worcester v. Georgia, 6 Pet. 515 [8 L.Ed. 483]; The Kansas Indians, 5 Wall. 737, 760 [18 L.Ed. 667]; Choctaw Nation v. United States, 119 U.S. 1, 27, 28 [7 S.Ct. 75, 30 L.Ed. 306, 314, 315] . . . . 'The language used in treaties with the Indians should never be construed to their prejudice.' . . . 'How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' "[7]

[6]Exhibit (Ex) USA-20, pp 24-29; Finding of Fact (FF) #2.

In 1905 the above principles were reiterated in *Winans* (198 U.S. p. 380, 25 S.Ct. p. 664):

> "And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' [citing *Choctaw* and *Jones*]"

3. The United States Supreme Court in *Missouri* (252 U.S. p. 434, 40 S.Ct. p. 384) stated:

> "Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.' Baldwin v. Franks, 120 U.S. 678, 683, 7 S.Ct. 656, 32 L.Ed. 766."

4. Each of the basic fact and law issues in this case must be considered and decided in accordance with the treaty language reserving fishing rights to the plaintiff tribes, interpreted in the spirit and manner directed in the above quoted language of the United States Supreme Court. Each treaty in this case contains a provision substantially identical to that in the Medicine Creek treaty: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, . . ."[8]

> 5. "The right to resort to the [usual and accustomed] fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . [T]he treaty was not a grant of rights to the Indians but a grant of right from them—a reservation of those not granted."[9]
>
> "And surely it was within the competency of the Nation to

[7]*Jones*, 175 U.S. at 10, 11, 12, 20 S.Ct. at 5; other decisions by the same court containing the same or similar language: *Cherokee, Worcester, Kansas Indians, Winans, Kennedy, Seufert, Tulee.*

[8]Text of all treaties FF #1.

[9]U.S.Sup.Ct. in *Winans*, 198 U.S. at 381, 25 S.Ct. at 664.

secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' "[10]

6. ". . . [T]he [treaty] negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. . . . And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees."[11] That those rights are also reserved to the descendants of treaty Indians, without limitation in time, excepting as Congress may determine, has been recognized and applied by the United States Supreme Court from the first to the latest decision of that court involving Indian treaty fishing rights.

7. An *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations,[12] wherein tribal members might make their homes if they chose to do so. The tribes also reserved the *right* to off reservation fishing "at all usual and accustomed grounds and stations" and agreed that "all citizens of the territory" might fish at the same places "in common with" tribal members. The tribes and their members cannot rescind that agreement or limit non-Indian fishing pursuant to the agreement. However, off reservation fishing by other citizens and residents of the state is not a *right* but merely a *privilege* which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require.

8. The tribes reserved the right to fish at *"all* usual and accustomed grounds and stations." The words "grounds" and "stations" have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. "Stations" indicates fixed locations such as the site of a fish wier or a fishing

[10]Id. at 384, 25 S.Ct. at 665.

[11]Id. at 381-382, 25 S.Ct. at 664.

[12]This proposition is not denied or challenged by any party in this case. As previously stated in paragraph 4 of the text, the fishing clauses are substantially identical in the treaties of all plaintiff tribes. The fishing clause in the Yakima treaty applies the word "exclusive" to on reservation fishing. Although the word is used in the same context in several other treaties not involved in this case it does not appear in the treaty of any other plaintiff tribe. However, in every case involving a fishing clause substantially similar to that quoted in the text of this decision in which "exclusive" is not present, without exception the United States Supreme Court has assumed that on reservation fishing *is* exclusive and has interpreted and applied similar fishing clauses, as though the word "exclusive" was expressly stated therein as in the Yakima treaty. Research has not disclosed any reported decision to the contrary.

platform or some other narrowly limited area; "grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. "Usual and accustomed," being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.[13]

II. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This summary of the 253 separate detailed Findings of Fact and 48 Conclusions of Law filed herewith is intended as a recital of only the principal categories thereof, several of which are discussed elsewhere in this opinion.

The Findings of Fact set forth the treaties under which each tribe, or its predecessors, negotiated with the United States, and in which the Indians expressly reserved the right to fish at off reservation usual and accustomed fishing places. The pretreaty role of fishing among Northwest Indians is outlined, emphasizing the universal importance of the fishery resource, particularly salmon and steelhead, to Indians in the case area as an element of diet and in religious practices and trade. The Northwest Indians developed a wide variety of fishing methods which they utilized to catch many varieties of fish at innumerable locations throughout the areas where they lived and traveled.

In the mid-1850's the United States treated with the unlettered Northwest Tribes to acquire great expanses of land. Reluctant to be confined to small reservation bases, the Indian negotiators insisted that their people continue to fish as they had beyond the reservation boundaries. There is no indication that the Indians intended or

[13]*Seufert* and see F.F. 10 and 13.

understood the language "in common with all citizens of the Territory" to limit their right to fish in any way. For many years following the treaties the Indians continued to fish in their customary manner and places, and although non-Indians also fished, there was no need for any restrictions on fishing.

For each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and some, but by no means all, of their principal usual and accustomed fishing places. Anthropological data are also presented for several tribes, as well as information concerning present Indian culture and economy. Several tribes are currently involved in fish propagation programs which benefit the tribes and the state.

Fact findings are also presented regarding reef net fishing which show that current non-Indian reef net operations take place at or near the same locations occupied historically by Lummi Indian fishermen.

General fisheries conservation and management data are presented, incorporating the Joint Biological Statement which sets forth many significant facts concerning anadromous fish. Procedures and objectives are outlined for managing salmon and steelhead for commercial, sport and Indian user groups including regulatory schemes promulgated by state authorities and by Indian tribes. The means and locations used to harvest the resource and the quantity of the harvest are also presented.

The policies and practices of both Fisheries and Game are also presented. Due in part to the nature of the species of fish regulated, Fisheries evidences better success in managing the salmon than does Game with regard to steelhead. Fisheries has also evidenced an attitude of cooperation with the plaintiff tribes that has been lacking from Game, at least prior to *Puyallup-II*.

The Conclusions of Law, after stating the basis of jurisdiction and venue, establish the treaty status of each of the plaintiff tribes, and therefore, the right of their members to fish off reservation in common with the citizens of the state. The fishing right was reserved by the Indians and cannot be qualified by the state. The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource. For this purpose, conservation is defined to mean per-

petuation of the fisheries species. Additionally, state regulation must not discriminate against the Indians, and must meet appropriate due process standards.

The Yakima Nation and the Quinault Tribe are presently qualified to self-regulate the off reservation fishing of their tribal members. Other tribes may similarly self-regulate member fishing if and when they meet the qualifications and conditions set forth in the decision.

Several current state laws and regulations which restrict the time, place, manner and volume of off reservation fishing by treaty tribes, and reserve game fish for sport interests, have not been established as reasonable and necessary for conservation and the application thereof to plaintiff tribes is unlawful. The court will retain continuing jurisdiction of this case to grant such further relief as the court may find appropriate.

III. STATE REGULATION OF OFF RESERVATION TREATY RIGHT FISHING

There is neither mention nor slightest intimation in the treaties themselves, in any of the treaty negotiation records or in any other credible evidence, that the Indians who represented the tribes in the making of the treaties, at that time or any time afterward, understood or intended that the fishing rights reserved by the tribes as recorded in the above quoted language would, or ever could, authorize the "citizens of the territory" or their successors, either individually or through their territorial or state government, to qualify, restrict or in any way interfere with the full *exercise* of those rights. All of the evidence is overwhelmingly to the contrary, particularly in the vivid showing in the record that the treaty Indians pleaded for and insisted upon retaining the *exercise* of those rights as essential to their survival. They were given unqualified assurance of that by Governor Stevens himself without any suggestion that the Indians' *exercise* of those rights might some day, without authorization of Congress, be subjected to regulation by non-Indian citizens through their territorial or state government.[11]

For several decades following negotiation and ratification of the treaties all of the tribes extensively exercised their treaty rights by

[11] Ex. USA-20 pp 24-29, 42-43; FF #2.

fishing as freely in time, place and manner as they had at treaty time, totally without regulation or any restraint whatever, excepting only by the tribes themselves in strictly enforcing tribal customs and practices which, during that period and for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume. The first other than naturally caused threat to volume or species came from non-Indian population growth and non-Indian industrial development in the rapid westward advance of civilization.[15]

In the final pretrial order in this case issues were raised therein by the contentions of several tribes later joined by the remaining plaintiff tribes that: (a) the state police power dicta followed by the United States Supreme Court are not sound in legal logic or principle, and (b) even if so, state regulation of the exercise of Indian off reservation treaty fishing rights must be denied in "justice and reason, looking to the substance of the rights reserved as understood by the Indians who negotiated the treaties, without regard to technical rules," as all American courts for a century or more have been repeatedly admonished by the United States Supreme Court in the same or similar language.[16]

In addition to raising the above stated issues in the final pretrial order, the tribes have submitted well researched briefs and vigorous oral argument in support thereof. That the contentions are not without at least color of merit in judicial and scholarly support is shown by a decision of the Supreme Court of Idaho,[17] the judicial views of at least one highly respected Washington State Supreme Court Judge[18] and a scholarly article in The University of Washington Law Review written by a Law Professor of that University and other similar articles.[19]

No federal decision or state decision cited to this court has directly and specifically interpreted the clause "in common with all citizens of the Territory" as, in itself, directly or impliedly justifying

[15]Ex. USA-20, pp 39-42; FF # 2.

[16]See footnote 7.

[17]*Author.*

[18]Donworth dissenting in *McCoy* (p. 439, 378 P.2d 942) and *Game-I* (70 Wash.2d p. 263, 422 P.2d 754); and in *Satiacum* (50 Wash.2d p. 529, 314 P.2 400) a 4-4 decision.

[19]R. Johnson, 47 U.Wash.L.Rev. 207 (1972); C. Hobbs, 37 Geo.Wash. L.Rev. 1251 (1969); Comment, 59 U.Calif.L.Rev. 485 (1971).

state police power regulation of off reservation treaty right fishing, or has specifically stated or even indicated any federal source of or basis for such state power.

Under these circumstances and the facts hereinabove recited, judicial integrity requires that this court must give the tribes' above stated contentions serious consideration and specific determination.

The first decision of the United States Supreme Court, later cited by the same court as authority for state regulation of treaty right fishing, is *Ward*. On that subject unquestionably the decision was obiter dictum because: (a) the Indian hunting rights reserved in the treaty in question were limited to specifically designated areas outside of which Race Horse hunted, for which he was imprisoned and from which he sought enlargement by habeas corpus; and (b) because later in the opinion it was held the treaty hunting rights in question had been finally terminated by Congress prior to the allegedly criminal hunting by Race Horse.

The only statement in *Ward* in either the majority or minority opinions that could possibly justify later citation of the decision as applicable to treaty right fishing was the single sentence 163 U.S. on page 507, 16 S.Ct. on page 1076:

> "The power of a state to control and regulate the taking of game cannot be questioned. Geer v. Connecticut, 161 U.S. 519, [16 S.Ct. 600, 40 L.Ed. 793]."

However, in the next preceding paragraph of the majority opinion in *Ward* two sentences before the sentence just quoted, the majority opinion stated:

> ", . . . the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein (the treaty) referred to within the limits of the state of Wyoming in violation of its laws. If it [the treaty] gave such right, the mere fact that the state had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands *than could passage of the* [*state*] *game law.*"

This statement, even if it too be a dictum, is far more sound in treaty law applicable to fish and game regulation than the first statement quoted above.

Thus the second statement in *Ward*, quoted in the paragraph

above to the effect that exercise of treaty right hunting cannot be controlled by state regulatory laws would appear to be compelling, or at least equal, authority for denying state regulation, not authorized by Congress, of Indian fishing off reservation as specified in existing treaties which expressly record and recognize reservation of that right by the Indian tribes.

In *Geer*, Mr. Justice White, speaking for a 5-2 majority traced in detail principles pertaining to the taking of *ferae naturae* down through the ages from Solon of ancient Athens to 1895, but treaty rights were not involved in that case or even mentioned in any way whatever in the exhaustive opinion. The only issue decided in *Geer* was the holding that it was not unconstitutional for Connecticut to allow, by regulation, killing of birds within the state during a designated open season, and to permit such birds, when so killed, to be used, sold and bought for use within the state, but forbid their transportation beyond the state. Hence the statement in *Geer* as well as that in *Ward*, on the subject of off reservation treaty right fishing, were both purest dicta.

Ward was not cited in *Winans*, wherein state power to regulate off reservation treaty fishing was assumed without any explanation or citation of authority. That subject was mentioned only in the concluding clause of a sentence (198 U.S. p. 384, 25 S.Ct. p. 665):

> ". . . nor does it [the right to take fish] restrain the state unreasonably, if at all, in the regulation of the right."

Geer, *Ward*, *Patsone* and *Lacoste* are cited in footnote #2 of *Tulee* (315 U.S. p. 683, 62 S.Ct. 864) as supporting the only statement in that opinion referring to the state power to regulate off reservation fishing:

> "Relying upon its broad powers to conserve game and fish within its borders, (2) however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense, which, although within the territory originally ceded by the Yakimas, is outside of their reservation."

In *Patsone* the United States Supreme Court reviewed the conviction of an alien for possession of a shotgun in violation of a state criminal statute. One of the two defenses presented and determined in the decision was based on provisions of a United States treaty with Italy. The treaty provisions and facts in *Patsone* are totally dissimilar to those in the present case and nothing in the

holdings or language in the opinion directly or by implication would legally authorize state regulation of a federally guaranteed civil right which is expressly stated in a treaty and the exercise of which right could not possibly endanger the personal safety of any resident of the State.

Treaty rights were in no way involved in *Lacoste*. The only statement in that decision (263 U.S. p. 549, 44 S.Ct. 186) concerning state police power to regulate the taking of wild animals is supported by citation of *Geer*, *Ward*, *Kennedy* and other decisions having only remote applicability in either fact or law to the present case.

The remaining treaty right fishing decisions of the United States Supreme Court are *Puyallup-I* and *Puyallup-II*. Thus until *Puyallup-I* was decided in 1968 there was neither judicial analysis nor citation of a non-dictum decision supporting police power state regulation of the exercise of Indian off reservation treaty right fishing in any Supreme Court decision because all previous Supreme Court references to that subject were either based solely on the reiterated dicta discussed above or assumed such authority without discussion of its basis or indication of its source.

In support of a statement in *Puyallup-I* (391 U.S. p. 399, 88 S.Ct. 1725) concerning state regulation of treaty fishing outside of reservations the United States Supreme Court cited *Winans* and *Kennedy* as forerunners of *Tulee* and quoted portions of all three. As indicated above herein, the *Tulee* and *Winans* quotations were dicta.

In *Kennedy*, a habeas corpus proceeding, Indian lands were transferred by the Seneca Tribe to private ownership in a 1797 treaty containing a provision which permitted the Seneca Indians to fish in waters on the lands conveyed "at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York." Shortly after that conveyance the lands were resold and continued in private ownership to the time of *Kennedy*, decided in 1915. That decision cites *Geer* and *Ward* as the sole basis for its statement (241 U.S. p. 562, 36 S.Ct. p. 707) that "it is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state . . . ." *Kennedy* paraphrases *Winans* for more than *Winans*

held and quotes the same passing reference to regulation in *Winans* previously quoted above.[20] Most significant of all, it is stated in the very *Kennedy* language quoted in *Puyallup-I* (391 U.S. pp. 399-400, 88 S.Ct. p. 1729) that the fishing clause in the treaty conveyance "is fully satisfied by considering it a reservation of a *privilege* of fishing . . ." subject to state regulation. If at this time anything concerning treaty fishing rights should be beyond doubt or question it is the basic principle that the treaty fishing of plaintiff tribes in this case is a reserved *right* and not a *mere privilege*. The treaty fishing in *Kennedy* was held to be only a *privilege* under the peculiar facts of that case. Nothing faintly comparable to those facts can be found in either *Puyallup-I* or the present case.

Another statement in *Puyallup-I* (391 U.S. p. 398, 88 S.Ct. p. 1728) concerning police power regulation, without analysis other than as stated therein, or citation of a non-dictum authority, is:

> "Moreover, the right to fish at those respective [usual and accustomed] places is not an exclusive one. Rather it is one 'in common with all citizens of the territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State."

This statement seems to say that because a state has police power to regulate fishing *privileges* which the state has granted and may limit or entirely withdraw, that is somehow a legal reason for state regulation of federal fishing *rights* which are expressly reserved in a treaty which only Congress has authority to limit or modify. If that seeming non sequitur be the law it certainly is deserving of more specific legal analysis and justification than it has ever had in any United States Supreme Court decision.

In *Puyallup-I* it is also stated (391 U.S. p. 398, 88 S.Ct. p. 1728):

> "The *right* to fish 'at all usual and accustomed' places *may, of course, not be qualified by the State*, even though all Indians born in the United States are now citizens of the United States. [citations] But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

[20]". . . nor does it restrain the state unreasonably, if at all, in the regulation of the right." (198 U.S. p. 384, 25 S.Ct. p. 665)

That a treaty *right*, guaranteed as the supreme law of the land by the Federal Constitution, can not be "qualified" (i.e. "in some way limited or modified")[21] by a state but the *exercise* of the right may be limited or modified by state regulation, especially when these seemingly conflicting propositions are stated in consecutive sentences, is very difficult to comprehend. The practical effect of a difference between *having* a constitutional right but only a limited right to *exercise* it certainly could not have been understood and accepted by the "unlettered" Indians who negotiated the treaties and it must be little less impossible for their somewhat more sophisticated present-day descendants to comprehend and accept.

Mindful that treaty fishing is a right, not a mere privilege, the following sentence from *Murdock*, quoted in a footnote (p. 402, 88 S.Ct. p. 1730) of Puyallup-I, seems pertinent:

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

As stated by the United States Supreme Court in *Winans* (198 U.S. pp. 381-382, 25 S.Ct. 662), treaty fishing rights are personal rights held and exercised by individual tribe members. Although the exercise of that particular civil treaty right may be limited or modified in any particular or to any extent by or with authority of Congress,[22] that the exercise of such a right may be limited in any way by the police power of a state, without having previously received authority to do so from Congress, seems to be diametrically opposed to relevant treaty law and personal civil rights decisions, particularly those of recent years.

In the *Puyallup-II* decision, decided less than three months ago, it was stated (414 U.S. p. 2, 94 S.Ct. p. 332):

> "The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout."

Other than by recital or quotations from *Puyallup-I* and State Supreme Court decisions, in *Puyallup-II* there was no discussion of or ruling upon the basis of state police power to regulate off reservation treaty right fishing unless it be derived from the next to the

[21]Webster's Third New International Dictionary of the English Language, 1961 Ed. (p 1858)

[22]*Lone Wolf* citing other Supreme Court decisions to the same effect.

last paragraph in the opinion of Justice Douglas (pp. 5-6, 94 S.Ct. p. 333):

> "We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets."

Whatever the above quoted statement may have added to or taken from the right to exercise the off reservation treaty fishing rights of the plaintiff tribes, to the present time there never has been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land."

From the above summary of the United States Supreme Court decisions it is clear the following 1971 comment by the Washington State Supreme Court[23] is not overstated:

> "Surprisingly little judicial attention, we note, has been given to this rather standard treaty language [in the fishing rights clause of Indian treaties]."

It also appears that the United States Supreme Court has exercised a prerogative specifically reserved by and to Congress in the treaties. Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing. In recent years it declined to do the latter by three times failing to enact proposed legislation for the termination of Indian treaty fishing rights.[24] It may be that the refusal or failure of Congress to exercise a specific prerogative, by enactment of legislation, would legally justify judicial exercise of that particular prerogative. If so, it has never been stated or indicated in any United States Supreme Court decision as the basis

[23]*Moses-II*, 79 Wash.2d at p. 108, 483 P.2d p. 834.

[24]H.R.J. Res. 698, 87th Cong., 2d Sess. (1962); H.R.J.Res. 48, 88th Cong., 1st Sess. (1963); S.J.Res. 170 & 171, 88th Cong., 2d Sess. (1964) All have died in committee.

or source of authority for the federal judicial decisions authorizing state regulation of off reservation treaty fishing rights.

Since Congress has the power to qualify or revoke any treaty or any provision thereof,[25] unquestionable federal authority is available to provide federal regulation, or to authorize state regulation, for the protection of fishery resources against any threatened or actual harm that might arise from off reservation treaty right fishing by tribal members limited *only* by tribal regulation.[26] In these circumstances it is unfortunate, to say the least, that state police power regulation of off reservation fishing should be authorized or invoked on a legal basis never specifically stated or explained. This is particularly true because state regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future.

Having the judicial duty to independently research, consider and fairly appraise the tribes' contention concerning state regulation of off reservation treaty right fishing, this court has intended and attempted to do that as conscientiously and thoroughly as possible within the personal capabilities of the author of this decision. The results of that effort are above stated as directly and briefly as the subject matter appeared to permit.

In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic or personal misgivings, to enforce and apply every principle of law as it

[25]See footnote 22.

[26]With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.

is directly stated in a decision of the United States Supreme Court. Recently the United States Supreme Court in *Puyallup-I* and *Puyallup-II* directly and specifically held that Washington has the power to regulate off reservation treaty right fishing in the particulars and to the extent indicated in those decisions, which holding continues in effect unless and until overruled or modified by that court or by Congress. Accordingly, each of the rulings on specific issues in this case stated in Section IV of this decision has been considered and determined on that basis.

IV. RULINGS ON MAJOR ISSUES IN THIS CASE

1. In the detailed Findings of Fact and Conclusions of Law on file herein this court has found and held and hereby reaffirms that each of plaintiff tribes in this case, including each of the tribes whose status as such was challenged by some or all defendants, has established its status as an Indian tribe recognized as such by the federal government and therefore is entitled to maintain this action for relief based on a treaty of the United States negotiated by and for the tribe, its members at that time and their descendants.

An appeal from a district court decision holding that the Puyallup reservation no longer exists has not yet been determined. However, in *Menominee* (1968) the United States Supreme Court held that termination of a tribal reservation established pursuant to a treaty did not extinguish hunting and fishing rights, reserved in the treaty by implication, or impair the exercise of such rights within the area of the terminated reservation. In the opinion of this court, treaty right fishing within the area of a former Indian reservation cannot be *exclusive* when that reservation no longer exists, but such fishing must be "in common with" non-treaty right fishermen. It is so found and held and hereby shall be applicable to any plaintiff tribe, the reservation of which has been or hereafter may be terminated.

2. Ever since the first Indian treaties were confirmed by the Senate, Congress has recognized that those treaties established self-government by treaty tribes, excepting only as limited in the treaties, judicial interpretation thereof or by Congress. This basic principle was confirmed in the first United States Supreme Court decision dealing with such a treaty[27] and has always been expressly or

[27]*Cherokee*, 30 U.S. p. 15 et seq. (1831)

impliedly reaffirmed when applicable in every succeeding decision of that court. There was a period during which Congress enacted legislation limiting the exercise of tribal autonomy in various particulars. However, in the last decade Congressional legislation has definitely been in the contrary direction, notably in the socalled "Indian Civil Rights Act."[28] Among other measures in that Act encouraging the exercise of tribal autonomy are those providing for enlarged jurisdiction of tribal courts, pursuant to which special training of tribal judges and other court personnel has been in progress for some time and still continues.

These measures and others make plain the intent and philosophy of Congress to increase rather than diminish or limit the exercise of tribal self-government.

The right to fish for all species available in the waters from which, for so many ages, their ancestors derived most of their subsistence is the single most highly cherished interest and concern of the present members of plaintiff tribes, with rare exceptions even among tribal members who personally do not fish or derive therefrom any substantial amount of their subsistence. The right to fish, as reserved in the treaties of plaintiff tribes, certainly is the treaty provision most frequently in controversy and litigation involving all of the tribes and numerous of their individual members for many years past.

The philosophy of Congress referred to above and the evidence in this case as a whole clearly indicate to this court that the time has now arrived, and this case presents an appropriate opportunity, to take a step toward applying congressional philosophy to Indian treaty right fishing in a way that will not be inconsistent with *Puyallup-I* and *Puyallup-II* and also will provide ample security for the interest and purposes of conservation.

In all the circumstances shown by the evidence, including those briefly sketched above, this court hereby finds and holds that any one of plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof; PROVIDED, however, the tribe has and maintains the qualifications and accepts and abides by the conditions stated below. If, as to any plaintiff tribe, any one

[28]Pub.L. #90-284 Title II-VII; 82 Stat. pp. 77-81 (1968)

of such qualifications and conditions is not determined by the court in this decision on the evidence in this case, establishment of the qualifications and conditions of each other plaintiff tribe shall be determined either to the satisfaction of both Fisheries and Game, or upon hearing by or under direction of the court. When the qualifications and conditions of a tribe have been fully established in the manner indicated, that tribe shall be relieved of state regulation except to the extent specified in the below stated conditions. Failure of a tribe either to maintain its required qualifications or to abide by and adhere to prescribed conditions, when established and not promptly corrected, shall suspend self-regulation by such tribe until such time as all required qualifications and conditions are fully established.

To qualify for self-regulation of off reservation treaty right fishing as above provided, a tribe must establish to the satisfaction of either Fisheries and Game or the court, that the tribe has each of the following qualifications and that the tribe will accept and abide by each of the following conditions.

QUALIFICATIONS

The tribe shall have:

(a) Competent and responsible leadership.

(b) Well organized tribal government reasonably competent to promulgate and apply tribal off reservation fishing regulations that, if strictly enforced, will not adversely affect conservation.

(c) Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations.

(d) Well qualified experts in fishery science and management who are either on the tribal staff or whose services are arranged for and readily available to the tribe.

(e) An officially approved tribal membership roll.

(f) Provision for tribal membership certification, with individual identification by photograph, in a suitable form that shall be carried on the person of each tribal member when approaching, fishing in or leaving either on or off reservation waters.

CONDITIONS

The tribe shall:

(a) Provide for full and complete tribal fishing regulations which, before adoption, have been discussed in their proposed final form with Fisheries and Game, and include therein any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation.

(b) Permit monitoring of off reservation Indian fishing by Fisheries and Game to the extent reasonable and necessary for conservation.

(c) Provide fish catch reports, as to both on and off reservation treaty right fishing, when requested by Fisheries or Game for the purpose of establishing escapement goals and other reasonable and necessary conservation purposes.

All parties in this case agree that on reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case. Indeed, any contention to the contrary would be diametrically opposed to the Indian self-government intent and philosophy of Congress. However, state regulation of off reservation fishing to the extent reasonable and necessary for conservation requires that Fisheries and Game must have all information essential to such limited regulation. From the evidence in this case, the court hereby finds and holds that recording the number of fish taken in treaty right fishing, both on and off reservation, is essential to reliable estimates of future run sizes which are necessary for reasonably accurate calculation of spawning escapement requirements and for the allocation of harvestable fish as provided in this decision.

The lack of adequate, or any, approved identification of treaty right fishermen long has and now does seriously interfere with their fishing and hampers enforcement of both tribal and state regulations reasonable and necessary for conservation. Therefore, each of plaintiff tribes, self-regulated or not, is hereby directed to provide as promptly as practicable both (a) certification and identification of its tribal fishermen as specified in ¶ (f) of the above stated Qualifications; and also (b) fish catch returns as specified in ¶ (c) of the above stated conditions.

The uncontradicted evidence shows that for a considerable time

the Quinault and Yakima tribes have adopted and effectively enforced tribal fishing regulations which in some material respects are more restrictive than the regulations of Fisheries and Game. To a considerable extent those tribes have consulted and cooperated with Fisheries and Game in matters pertaining to responsible regulation of Indian fishing. In the Findings of Fact and Conclusions of Law on file herein the court has found, held and hereby confirms that the evidence in this case clearly establishes that both the Quinault and Yakima Tribes for a considerable time have had, and now have, each of the above stated Qualifications, other than (f), and have provided or permitted each of the above stated Conditions, other than (c). The items excepted can and the court believes will be promptly supplied by both tribes; and when accomplished, the Quinault and Yakima Tribes shall be entitled to exercise their treaty fishing rights without any state regulation thereof, except as hereinabove provided.

The evidence indicates several other plaintiff tribes have capacity for, and are not far from, achievement of the same status, which potentially is within the capability of every plaintiff tribe.

3. Although state police power permits state regulation of the exercise of off reservation treaty fishing rights, under all of the United States Supreme Court decisions cited or quoted hereinabove there can be no doubt that it is *not* within the province of state police power, however liberally defined, to deny or "qualify" rights which are made the supreme law of the land by the federal constitution. Therefore, in each specific particular in which the state undertakes to regulate the exercise of treaty right fishing, all state officers responsible therefor must understand that the power to do so must be interpreted narrowly and sparingly applied, with constant recognition that *any* regulation will restrict the exercise of a right guaranteed by the United States Constitution. Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish.

To clearly identify state treaty right fishing regulations and to make them more readily understood and usable by plaintiff

tribes and others interested therein such regulations shall be published either separate and apart from other state fishing regulations or as a separate and plainly labeled part thereof readily distinguishable from other fishing regulations.

4. However broadly the word may be used and applied in the theory and practice of fisheries science and management, "conservation" as used in Supreme Court decisions and herein is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish. In this context, as well as by dictionary definition, "reasonable" means that a specifically identified conservation measure is appropriate to its purpose; and "necessary" means that such purpose in addition to being reasonable must be essential to conservation.

5. The state having the burden of proof as above indicated, no regulation applied to off reservation treaty fishing can be valid or enforceable unless and until it has been shown reasonable and necessary to conservation as above defined. The arrest of, or seizure of property owned or in permitted custody of, a treaty right fisherman under a regulation not previously established to be reasonable and necessary for conservation, is unlawful and may be actionable as to any official or private person authorizing or committing such unlawful arrest or seizure.

6. If alternative means and methods of reasonable and necessary conservation regulation are available the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish.

7. In *Arizona* the United States Supreme Court held that irrigation water rights reserved by implication in an Indian treaty could only be limited in amount to the total reasonably required by the needs of the treaty tribe as determined from time to time indefinitely in the future. That holding cannot be distinguished in principle or application from the fishing rights specifically reserved by the plaintiff tribes and recognized by the United States in the treaties. Since tribal on reservation treaty right fishing is exclusive, fish taken on reservation shall not be included in any allocation of fish between treaty and non-treaty fishermen. Therefore,

the *amount* or *quantity* of any species of fish that may be taken off reservation by treaty right fishing during a particular fishing period can only be limited by either:

(a) The number of fish required for spawning escapement and any other requirements established to be reasonable and necessary for conservation, and

(b) The number of harvestable fish non-treaty fishermen may take at the tribes' "usual and accustomed grounds and stations" while fishing "in common with" treaty right fishermen.

As used above, "harvestable" means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations, after deducting the number of fish required for spawning escapement and tribal needs.

Arizona was concerned with the amount of water impliedly reserved for the use of the treaty tribe and it was held they were entitled to the full amount required to serve their needs. In the present case a basic question is the amount of fish the plaintiff tribes may take in off reservation fishing under the express reservation of fishing rights recorded in their treaties. The evidence shows beyond doubt that at treaty time the opportunity to take fish for personal subsistence and religious ceremonies (FF ## 3, 6) was the single matter of utmost concern to all treaty tribes and their members. The extent of taking fish by tribal members for these purposes is now less than in former times but for a substantial number of tribal members at or near poverty level their need in these particulars is little, if any, less than it was for their ancestors. For these reasons the court finds that the taking of fish for ceremonial and subsistence purposes has a special treaty significance distinct from and superior to the taking of fish for commercial purposes and therefore fish taken to serve ceremonial and subsistence needs shall not be counted in the share of fish that treaty right fishermen have the opportunity to take. Such needs shall be limited to the number of fish actually used for: (a) Traditional tribal ceremonies; and (b) Personal subsistence consumption by tribal members and their immediate families.

By dictionary definition and as intended and used in the Indian treaties and in this decision "in common with" means *sharing*

equally the opportunity to take fish[29] at "usual and accustomed grounds and stations"; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above.

While emphasizing the basic principle of sharing equally in the opportunity to take fish at usual and accustomed grounds and stations, the court recognizes that innumerable difficulties will arise in the application of this principle to the fisheries resource. For the present time, at least, precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience. However, it is necessary at the outset to establish the scope of the anadromous fish resource which is subject to being "shared equally." The amount of fish of a particular species, from which the harvestable portions allocable to treaty right fishermen and non-treaty right fishermen are to be determined, is not merely the number of harvestable fish of that species which pass through the usual and accustomed fishing places of the various treaty tribes.

It is uncontroverted in the evidence that substantial numbers of fish, many of which might otherwise reach the usual and accustomed fishing places of the treaty tribes, are caught in marine areas closely adjacent to and within the state of Washington, primarily by non-treaty right fishermen. [Ex. F-6, 7; PL-67(b)-(c); JX-2(a), pp. 125-135; Figs. 49-54, Tables 34-60]. These catches reduce to a significant but not specifically determinable extent the number of fish available for harvest by treaty right fishermen. A considerable amount of this harvest is beyond any jurisdiction or control of the State. Some of this harvest is subject to limited state control because the landings are made in areas of state jurisdiction. A considerable number of fish taken within the territorial waters of Washington are under the regulatory authority of the International Pacific Salmon Fisheries Commission, an international body estab-

[29]The court has found and hereby affirms that Indians fished for commercial purposes at and prior to treaty times and have the right to do so now and in the future. If and when any question is raised by any party pertaining to commercial fishing by Indians, it will be heard and determined by the court. (FF #7).

lished by treaty between the United States and Canada. While the defendants cannot determine or control the activities of that Commission, the Washington Department of Fisheries does have some input into development of the harvest program which is prescribed or permitted by that Commission, particularly as it pertains to harvest within Washington waters. The Commission is essentially concerned with assuring adequate spawning escapement from runs subject to its jurisdiction and equal division of the harvestable portion between the two countries. Its control over times, places and manner of harvest is designed to accomplish those results. [Ex. JX-2a, § 2.14, pp. 013-104; and the Commission's annual report for 1971.] Consequently, while it must be recognized that these large harvests by non-treaty fishermen cannot be regulated with any certainty or precision by the state defendants, it is incumbent upon such defendants to take all appropriate steps within their actual abilities to assure as nearly as possible an equal sharing of the opportunity for treaty and non-treaty fishermen to harvest every species of fish to which the treaty tribes had access at their usual and accustomed fishing places at treaty times. Some additional adjustments in the harvesting scheme under state jurisdiction may be necessary to approach more nearly an equal allocation of the opportunity to harvest fish at usual and accustomed grounds and stations.

Therefore, this court finds and holds that the amount of fish of each species from which the harvestable portions shall be determined for the purposes of allocation consistent with this opinion shall be:

1. The total number of fish within the regulatory jurisdiction of the State of Washington which, absent harvest en route, would be available for harvest at the treaty tribes' usual and accustomed fishing places; plus

2. An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

It is suggested in *Puyallup-II* that a distinction between native and propagated steelhead should be made in computing

the allocation of fish to off reservation treaty right and to non-treaty right fishing. This appears to present many difficulties and problems which must be considered and determined with all deliberate speed, by agreement or by judicial decision. Discharge of that responsibility appears to be within the jurisdiction of this court by issues all parties have submitted to this court in the Final Pretrial Order in this case. However, under the *Puyallup-II* mandate to the State Supreme Court it appears appropriate to this court that the state courts hear and determine the matter referred to, at least in the first instance.

8. Certain issues in this case are specified in the Final Pretrial Order which involve reef net fisheries. The only parties in this case directly concerned with these issues are the defendant Reef Net Owners and the plaintiff Lummi Tribe, although it may be other parties and non-parties have the same or similar interests. In the Findings of Fact and Conclusions of Law filed herein, the court has found and held: (a) that there is evidence which the court finds reasonable, credible and sufficient to establish that plaintiff Lummi Tribe has treaty fishing rights in the reef net fishing areas involved; (b) that members of the Lummi Tribe are entitled to and shall have, as a matter of *right*, the opportunity to fish with reef nets in such areas; (c) that while non-treaty fishermen when licensed by the State to fish in reef net areas have the *privilege* of fishing in those areas "in common with" Lummi Tribal members, they do not have the *right* to do so.

The specific number and location of stations in the reef net areas at which Lummi Tribal members shall have the right and opportunity to fish and what, if any, conditions shall be applicable thereto, will be determined by or under direction of this court upon hearing of those matters at the earliest date reasonably convenient to counsel and the court.

9. *Sohappy* is a 1969 decision by Judge Robert Belloni of the Oregon United States District Court on Indian treaty fishing rights involving a number of law and fact issues identical or closely similar to those presented in this case. Much of what was found and held in that thoroughly researched, well reasoned and highly practicable decision is directly applicable to issues to be determined in the present case. The *Sohappy* decision was not appealed and therefore it is controlling as to all parties to that case which include the United States and the Yakima Tribe. The following quotations from

that decision, changed by this court only as bracketed, are hereby adopted and held by this court to be applicable to the issues in the present case.

302 F.Supp. at page 907:

". . . [B]efore [Washington] may regulate the taking and disposition of fish by treaty Indians at their usual and accustomed fishing places:

'(a) It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

'(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

'(c) It must so regulate the taking of fish that the treaty tribes and their members will be accorded an opportunity to take, at their usual and accustomed fishing places, by reasonable means feasible to them, . . . fish [to the extent hereinabove specified.]

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At pages 908-909:

". . . state restriction on treaty referenced fishing must be 'necessary for the conservation of the fish.' . . . It [the Supreme Court] was not endorsing any particular state management program which is based not only upon that factor but also upon allocation of fish among particular user groups or harvest areas, or classification of fish to particular uses or modes of taking.

The state may regulate fishing by non-Indians to achieve a wide variety of management or 'conservation' objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource. The measure of the legal propriety of a regulation concerning the time and manner of exercising this 'federal right' is, therefore, 'distinct from the federal constitutional standard concerning the scope of the police power of the State.' [citations] To prove necessity, the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation. This applies to regulations restricting the type of gear which Indians may use as much as it does to restrictions on the time at which Indians may fish."

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At page 911:

"The Supreme Court has said that the right to fish at all usual and accustomed places may not be qualified by the state. Puyallup Tribe et al. v. Department of Game, et al., supra. [citations] I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located."

At page 911:

"There is no reason to believe that a ruling which grants the Indians their full treaty rights will affect the necessary escapement of fish in the least. The only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."

* * * * * *

At pages 911-912:

"In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy [at least] co-equal with the conservation of fish runs for other users. The restrictions on the exercise of the treaty right must be expressed with such particularity that the Indian can know in advance of his actions precisely the extent of the restriction which the state has [shown] to be necessary for conservation. [citations]

This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery, nor do the plaintiffs ask it to. As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid predetermina-

tion. * * * the variables that must be weighed in each given instance make judicial review of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination.' The requirements of fishery regulation are such that many of the specific restrictions, particularly as to timing and length of seasons, cannot be made until the fish are actually passing through the fishing areas or shortly before such time. Continuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions should such review become necessary.

I also do not believe that this court should at this time and on this record attempt to prescribe the specific procedures which the state must follow in adopting regulations applicable to the Indian fishery. The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process. [and to seek prompt judicial review of regulations assertedly invalid.]

This does not mean that tribal consent is required for restrictions on the exercise of the treaty rights."

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At page 912:

". . . the state's authority to prescribe restrictions within the limitations imposed by the treaties and directly binding upon the Indians is not dependent upon assent of the tribes or of the Secretary of the Interior. But certainly agreements with the tribes or deference to tribal preference or regulation on specific aspects pertaining to the exercise of treaty fishing rights are means which the state [should] adopt in the exercise of its jurisdiction over such fishing rights. Both the state and the tribes should be encouraged [and directed] to pursue such a cooperative approach . . ."

Thus far, this decision has been confined to discussion and ruling upon major issues, mostly because of the great number of secondary, or comparatively less important, issues of fact and law presented in this case. However, fact findings and legal conclusions, with comment thereon in most instances, on all of the secondary findings are

included in the Findings of Fact and Conclusions of Law filed herein. For the most part the secondary findings and conclusions provide amplifying and implementing details for both major and secondary rulings of the court. Every issue, proposed finding of fact and conclusion of law, of whatever importance, has been individually considered and determined in the Findings of Fact and Conclusions of Law on file in this case, excepting only with a few reservations that are stated and explained in each instance.

Subject to suggested limitations by some of the parties, all parties have urged that the court reserve continuing jurisdiction of this case and have suggested various ways in which such jurisdiction might be exercised. Quotations from *Sohappy,* above quoted and adopted by this court, indicate some of the purposes for, and practical importance of, continuing jurisdiction in this type of case. From the beginining most, if not all, counsel in this case and the court have anticipated that continuing jurisdiction would be of great value to all parties in promptly putting the court's rulings into effect and in providing readily available early hearing and determination of factual and legal questions that may arise in interpreting and applying such rulings. Accordingly, the court does hereby reserve continuing jurisdiction of this case without limitation at this time.

Most if not all parties have also suggested that the court should appoint a master with technical fisheries expertise to assist the court in helping the parties to reach agreed solutions of problems and questions when agreement thereon cannot be reached. Questions regarding whether or not a master should be appointed, the suggested and perhaps other purposes for appointment of a master, with or without technical fisheries expertise; and, if appointed what the master's duties should be and the manner of his selection, will be considered and determined at a hearing on the earliest date after the entry of the judgment and decree reasonably convenient to all counsel. At that hearing counsel are requested to present their views as to whether or not the court should appoint an Advisory Committee on Treaty Right Fishing. The members of such a committee should be knowledgeable and responsible citizens inclined to and capable of objectively considering, determining and reporting to the court the viewpoint of the interested public concerning Indian fishing as to: satisfactory solution of problems; means of expediting better communication between Indian and non-Indian officials and fishermen

and keeping interested citizens in this area more accurately informed on matters pertaining to Indian fishing. Other topics to be considered at the conference may be suggested by counsel.

The remaining issues in this case reserved for separate pretrial and trial in the future, however such issues may be determined, do not have direct or indirect bearing upon any issue submitted and heretofore tried by this court. Accordingly, this decision and the Declaratory Judgment and Decree based thereon, upon entry in this case, shall become unreservedly final and reviewable as provided by 28 U.S.C.A. 2201; subject only to determination of any motions that may be appropriately and timely served and filed following entry of the Final Judgment and Decree. Each such motion, if any, that may be filed shall be supported[30] by a memorandum of authorities to which counsel for adverse parties shall timely serve and file a responsive memorandum of authorities, following which such motions, if any, shall be promptly heard and determined by the court on the earliest date reasonably convenient to counsel and the court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on regularly for trial on August 27, 1973, upon the basis of a final pretrial order entered August 24, 1973, and the presentation of evidence concluded September 18, 1973. Counsel for all parties appeared and presented nearly 50 witnesses, whose testimony was reported in 4,600 pages of trial transcript, more than 350 exhibits, pretrial briefs, final oral argument 12/9—10/73 and post trial briefs. In addition to consideration of the above evidence and material by the court, more than 500 proposed findings of fact and conclusions of law, submitted by counsel and annotated to the record, have been checked to determine the accuracy

[30]Local Rules WD Wash. Civil Rule 7.

of every citation made by any counsel alleged to support a proposed finding or conclusion. Many of the proposed findings and conclusions were modified and many of the supporting citations were corrected, and additional findings and conclusions not proposed by any party were developed. The court has also read and examined, individually and in relation to one another, every case cited by any party as possible authority concerning any issue in this case, as well as other cases not cited by the parties.

Based upon this exhaustive examination of the controlling law, the briefs and oral argument of counsel and upon a preponderance of the evidence found credible and inferences reasonably drawn therefrom, the court now makes the following Findings of Fact and Conclusions of Law:

TREATY STATUS

1. The United States has entered into treaties with each of the following Indian tribes or bands (herein collectively referred to as "Plaintiff tribes" and individually by the shorter name set out after each such tribe), or with their predecessors in interest:

Hoh Indian Tribe ("Hoh Tribe")	Treaty with the Quinaeilt, et al. (Treaty of Olympia), July 1, 1855, and January 25, 1856, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 971.
Lummi Tribe of Indians ("Lummi Tribe")	Treaty of Point Elliott, January 22, 1855, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 927.
Makah Indian Tribe	Treaty with the Makah (Treaty of Neah Bay), January 31, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat. 939.

Muckleshoot Indian Tribe ("Muckleshoot Tribe")	Treaty of Point Elliott, *supra*, and also Treaty of Medicine Creek, December 26, 1854, ratified March 3, 1855, and proclaimed April 10, 1855, 10 Stat. 1132.
Nisqually Indian Community of the Nisqually Reservation ("Nisqually Tribe")	Treaty of Medicine Creek, *supra*.
Puyallup Tribe of the Puyallup Reservation ("Puyallup Tribe")	Treaty of Medicine Creek, *supra*.
Quileute Tribe of the Quileute Reservation ("Quileute Tribe")	Treaty with the Quinaeilt, et al., *supra*.
Quinault Tribe of Indians ("Quinault Tribe")	Treaty with the Quinaeilt, et al., *supra*.
Sauk-Suiattle Indian Tribe ("Sauk-Suiattle Tribe")	Treaty of Point Elliott, *supra*.
Skokomish Indian Tribe ("Skokomish Tribe")	Treaty of Point No Point January 26, 1855, ratified March 8, 1859, and proclaimed April 29, 1859, 12 Stat. 933.
Squaxin Island Tribe of Indians ("Squaxin Island Tribe")	Treaty of Medicine Creek *supra*.
Stillaguamish Indian Tribe ("Stillaguamish Tribe")	Treaty of Point Elliott, *supra*.
Upper Skagit River Tribe ("Upper Skagit Tribe")	Treaty of Point Elliott, *supra*.
Confederated Tribes and Bands of the Yakima Indian Nation ("Yakima Nation")	Treaty with the Yakimas, June 9, 1855, ratified March 8, 1859, and proclaimed April 18, 1859, 12 Stat. 951.

Each of said treaties contains a provision securing to the Indians certain off-reservation fishing rights. The following provision form the Treaty of Medicine Creek is typical of these treaty provisions:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *."

[FPTO §§ 1, 3-1; see also references as to each Plaintiff tribe under paragraphs as to such tribes, *infra*.]

PRETREATY ROLE OF FISHING AMONG NORTHWEST INDIANS

2. The anthropological reports and testimony of both Dr. Barbara Lane and Dr. Carroll Riley have been thoroughly studied and considered by the court. In so doing, the court has noted the nature, extend and duration of field work in the case area and academic research. During trial constant observation was made of the attitude and demeanor of both experts while on the stand as witnesses, and the substance of their testimony has been carefully evaluated. Allowance for the criticism by defendants that some of Dr. Lane's conclusions are "over formulated" has been made in evaluating her testimony in every instance where the criticism might be applicable. Based upon these and other factors, the court finds that in specific facts, the reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence. They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties, including the treaty councils, Indian groups covered by the treaties, the purposes of the treaties and the Indians' understanding of treaty provisions. In these particulars, nothing in Dr. Lane's report and testimony was controverted by any credible evidence in the case. Dr. Lane's opinions, inferences and conclusions based upon the information stated in detail and well documented in her reports, appeared to the court to be well taken, sound and reasonable. In summary, the court finds that where their testimony differs in any significant particular, the testimony of Dr. Lane is more credible and satisfactory than that of Dr. Riley and is accepted as such except as otherwise specified.

3. In pretreaty times Indian settlements were widely dispersed throughout Western Washington. There was considerable local diversity in the availability and importance of specific animal, plant and mineral resources used for food and artifacts. [FPTO § 3–32] But one common cultural characteristic among all of these Indians was the almost universal and generally paramount dependence upon the products of an aquatic economy, especially anadromous fish, to sustain the Indian way of life. [Ex. G–17*o*, pp. 286–287; Exs. USA–20 to 30 and 53; Exs. G–21 to 26] These fish were vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy. Throughout most of the area salmon was a staple food and steelhead were also taken, both providing essential proteins, fats, vitamins, and minerals in the native diet. [FPTO §§ 3–32, 3–33; Ex. USA–20; Ex. PL–40, p. 577; Ex. G–4, pp. 193-197] There was considerable fluctuation in abundance and availability of fish from year to year. Some causes of fluctuation were regular and predictable, as in the case of runs of certain species and races of salmon. Other causes were erratic, such as flooding and alteration in watercourses. [FPTO § 3–32]

4. The major food sources of the Northwest Indians were the wild fish, animal and vegetative resources of the area. It was, therefore, necessary for the people to be on hand when the resources were ready for harvest. These seasonal movements were reflected in native social organization. In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and lived more or less on stored food. Fresh fish and other foods were harvested during the winter but that season was devoted primarily to ceremonies and manufacturing tasks. During this time people congregated into the largest assemblages and occupied long, multifamily houses. Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, hunting, gathering roots and berries, and

agricultural pursuits. People moved about to resource areas where they had use patterns based on kinship or marriage. Families did not necessarily follow the same particular pattern of seasonal movements every year. [FPTO § 3–32; Ex. USA–20; see also Exs. USA–21 to 30 and 53; Exs. G–17a–*o*; Exs. G–21 to 26; Exs. PL–23 and PL–24; Ex. G–4, pp. 193–197]

5. At the time of the treaties and prior thereto, utilization of the rich fishery resource required an intimate knowledge of local environments and the locally available species as well as the development of a variety of specialized techniques for taking fish. [FPTO § 3–32; Ex. USA–20; Ex. JX–2a, § 3.1, pp. 108–114, Figs. 44–47, 280–283; Ex. USA 31e, pp. 17–26; Ex. PL–88a–d; Ex. L–7] The latter involved both group and individual activity and equipment. [FPTO § 3–76] Adequate Indian food preservation techniques had been developed by the time of the treaties and fish were able to be stored for use throughout the year and transported over great distances. [FPTO § 3–32; Ex. USA–20, p. 1; Ex. MLQ–1, p. 1] However, the Indians' harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of the Indian fishing gear. [Tr. 2006, *l.* 17 to 2012, *l.* 24; Ex. PL–40, p. 577; Ex. F–39; FPTO § 3-32; Ex. USA–20, p. 5]

6. The first-salmon ceremony, which with local differences in detail was general through most of the area, was essentially a religious rite to ensure the continued return of salmon. The symbolic acts, attitudes of respect and reverence, and concern for the salmon reflected a ritualistic conception of the interdependence and relatedness of all living things which was a dominant feature of native Indian world view. Religious attitudes and rites insured that salmon were never wantonly wasted and that water pollution was not permitted during the salmon season. [FPTO § 3–33; Ex. USA–20, p. 9]

7. At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. [Ex. USA–20, pp. 2–10; Tr. 1778, *l.* 6 to 1784, *l.* 13] In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. [Ex. USA–20, pp. 2–10] In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. [Ex. USA–20, p. 13] Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters. [Ex. Pl–11; Ex. USA–20, p. 15]

8. At the time of the treaties, non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful. In the 1840's and 50's, salmon was packed and shipped from the Columbia River and the case area to such distant places as New York, San Francisco, the Hawaiian Islands, South America and China, but inadequate preservation techniques and slow transportation facilities caused the salmon to reach the markets in unsatisfactory condition, and it obtained a bad reputation among dealers. [Ex. Pl–50, p. 310; Ex. MLQ–1, p. 1] There was no statistically measurable commercial fishery at the time the treaties were negotiated. [Ex. MLQ–1, p. 15] At the time of the treaties the commercial fisheries in the

case area posed no threat to the abundance of the fish resources. [Tr. 2006, *l.* 12–16; Tr. 2382, *l.* 10–18; Exs. PL–7 and PL–8]The non-Indian commercial fishing industry did not fully develop in the case area until after the invention and perfection of the canning process. The first salmon canner in Puget Sound began in 1877 with a small operation at Mukilteo. Large-scale development of the commercial fisheries did not commence in Puget Sound until the mid-1890's. [Ex. MLQ–1, pp. 1–3] The large-scale development of the commercial fishing industry in the last decades of the Nineteenth Centry brought about the need for regulation of fish harvests. [Ex. JX–2a, § 2.3.1, pp. 60–62]

9. There was a sharp decline in Indian population in the case area in the period after extensive contact with Europeans and Americans which occurred around 1780. It has been estimated that Indian populations in the Puget Sound region declined by approximately 50% between 1780 and 1840, but pre-treaty censuses were often incomplete and inaccurate. The Gibbs-Stevens census of 1854 shows a total of 7,559 Indians for all of Western Washington. A decline in population continued during the decades following the signing of the treaties, due in large part to diseases introduced by non-Indians. [Ex. D–1, pp. 9–12; Ex. G–4, pp. 181–184; Ex. MLQ–1, pp. 14, 16] The non-Indian population at treaty times has been estimated at approximately 2,000 people in Western Washington. [Tr. 2475, *l.* 7 to 2476, *l.* 8] Because of the great abundance of fish resources and these limited populations, there was no need to regulate the taking of fish by either Indians or non-Indians at treaty times. [Tr. 1849, *l.* 18–22; Tr. 2381, *l.* 25 to 2382, *l.* 18]

10. The Northwest Indians developed and utilized a wide variety of fishing methods which enabled them to take fish from nearly every type of location at which fish were present. They harvested fish from the high seas, inland salt waters, rivers and lakes. They took fish at river mouths as well as at accessible points or stretches along the rivers all the way to the headwaters. Some locations

were more heavily utilized than others. Like all fishermen, they shifted to those locales which seemed most productive at any given time. [Exs. USA–20 to 30 and 53] Fishing methods varied according to the locale but generally included trapping, dip netting, gill netting, reef netting, trolling, long-lining, jigging, set-lining, impounding, gaffing, spearing, harpooning and raking. [FPTO § 3–33] Control and use patterns of fishing gear varied according to the nature of the gear. Certain types required cooperative effort in their construction and/or handling. Weirs were classed as cooperative property but the component fishing stations on the weir were individually controlled. [FPTO § 3–76; Ex. USA–26, pp. 13–14]

11. Aboriginal Indian fishing was not limited to any species. They took whatever species were available at the particular season and location. Many varieties, including salmon and steelhead, halibut, cod, flounder, ling cod, rockfish, herring, smelt, eulachon, dogfish and trout, were taken and were important to varying degrees as food and as items of trade. [FPTO § 3–33; Ex. G–4, pp. 194–195]

12. Indian fishing practices at treaty times were largely unrestricted in geographic scope. Generally, individual indians had primary use rights in the territory where they resided and permissive use rights in the natal territory (if this was different) or in territories where they had consanguineal kin. Subject to such individual claims, most groups claimed autumn fishing use rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups from other villages. [FPTO § 3-34]

13. Each of the Plaintiff tribes had usual and accustomed fishing places within the case area. Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe's usual and accustomed grounds and stations. [FPTO § 3-34; Ex. USA–20, p. 21; Ex. USA–52, p. 4, *l.* 7 to p. 5, *l.* 29] Among the reasons for this are the following: 1) Indian

fisheries existed at all feasible places along a given drainage system. Fishing stations which were the site of weirs or permanent villages are more easily documented than riffles where fish were speared; 2) Indian fishermen shifted to those locales which seemed most productive at any given time depending upon such factors as changes in river flow, turbidity or water course; 3) some important recorded fishing sites are no longer extant because of subsequent man-made alterations in watersheds and water system; and, 4) use of some sites has been discontinued because appropriate Indian gear for those sites has been outlawed or because competing uses and users have made utilization of the sites by Indian fishermen unfeasible. [Ex. USA–20, pp. 21–23; Ex. USA–27b, pp. 1–3] Documentation as to which Indians used specific fishing sites is incomplete. George Gibbs noted that:

> "As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season." [Ex. USA–20, p. 18; Ex. USA–27b, p. 3; Ex. G–4, p. 186]

14. Although not all tribes fished to a considerable extent in marine areas, the Lummi reef net sites in Northern Puget Sound, the Makah halibut banks, Hood Canal and Commencement Bay and other bays and estuaries are examples of some Indian usual and accustomed fishing grounds and stations in marine waters. Marine waters were also used as thoroughfares for travel by Indians who trolled en route. [Ex. PL–75; Tr. 2847, *l.* 13 to 2850, *l.* 23] Such occasional and incidental trolling was not considered to make the marine waters traveled thereon the usual and accustomed fishing grounds of the trolling Indians. [Tr. 2177, *l.* 24 to 2180, *l.* 4]

15. The United States claimed the area now embraced within the State of Washington by discovery and settlement and by the treaty extinguishment of conflicting claims of Spain (Treaty of February 22, 1819, 8 Stat. 252), Russia (Convention of April 17, 1824, 8 Stat. 302), and Great Britain (Treaty of June 15, 1846, 9 Stat. 869). By the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said act "shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians * * *." Section 14 of that act extended to the Oregon Territory the Northwest Ordinance of 1787, 1 Stat. 51, Note a, which provides that "good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent." By an Act of June 5, 1850, 9 Stat. 437, Congress authorized the negotiation of treaties with the Indian tribes in the Oregon Territory (which then included the area which now comprises the State of Washington) for extinguishing their claims to land lying west of the Cascade Mountains. By the Act of March 2, 1853, 10 Stat. 172, Congress organized the Washington Territory out of part of the Oregon Territory (including all of the present State of Washington) and provided that nothing in said act shall affect the authority of the United States to "make any regulations respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise," which the Government could make if that act had never been passed. All federal laws relating to the Oregon Territory not inconsistent with the 1853 Act were expressly continued in force in Washington Territory. Section 2 of the Act provided for appointment of a governor who was also to perform the duties of Superintendent of Indian Affairs in the Territory. The Appropriation Act of March 3, 1853, 10 Stat. 226, 238,

authorized the President to negotiate with Indian tribes west of Missouri and Iowa 'for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands; * * *." The Appropriation Act of July 31, 1854, 10 Stat. 315, 330, authorized the use of appropriations for making treaties in several territories, including Washington, prior to July 1, 1855. [FPTO § 3–28]

16. The Act of February 22, 1889, 25 Stat. 676, admitting Washington to statehood, provided as a precondition to such statehood, that the people of the state forever disclaim all right and title to all lands owned or held by any Indian or Indian tribes and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and shall remain under the absolute jurisdiction and control of Congress. Washington accepted this requirement and incorporated it into Article XXVI of the State Constitution. Washington was admitted into the Union as a state on November 11, 1889. 26 Stat. Proclamations no. 8. [FPTO § 3–29]

17. On December 26, 1853, Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory, wrote to the Commissioner of Indian Affairs suggesting the necessity of making treaties with the Indians west of the Cascade Mountains. He pointed out that these tribes lived on different watercourses, bays and inlets of Puget Sound, and lands should be set aside for their use. On August 30, 1854, the Acting Commissioner of Indian Affairs notified Governor Stevens of his appointment to negotiate treaties with all tribes in the Washington Territory. Governor Stevens was directed that in making the treaties he should endeavor to unite the "numerous bands and fragments of tribes into tribes, * * *" and to furnish the Commissioner of Indian Affairs a skeleton map of Washington Territory, showing the location of the different tribes and bands, and the

boundaries of the regions claimed by each. In carrying out his duties as Superintendent of Indian Affairs, Governor Stevens had previously, on March 22, 1854, appointed Colonel Michael T. Simmons as Indian Agent for the Puget Sound District and had directed him to visit the various tribes in his district, to make a census of the tribes and bands, ascertaining as nearly as possible the boundaries of the territory claimed by each, and at the same time to organize the small bands into tribes and appoint chiefs for each. Governor Stevens was assisted in arranging for the treaties also by George Gibbs, a lawyer, surveyor and ethnologist, who was one of the sources of information relative to the identity and location of Western Washington tribes and who wrote an extensive ethnological report in 1854-55, and by Colonel B. F. Shaw, an interpreter. [FPTO § 3–30]

18. No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, deliberately created political entities for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and sub-chiefs. [Ex. USA–27a, pp. 14–29; Ex. USA–20, p. 28]

NEGOTIATION AND EXECUTION OF THE TREATIES

19. The principal purposes of the treaties were to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area. The United States was concerned with forestalling friction between Indians and settlers and between settlers and the government. The Indians had received constant assurances from settlers and government representatives that they would be compensated for lands which were being

settled by United States' citizens. Settlers had taken up land claims under the Donation Act even though the Indian rights had not yet been extinguished by treaties as required by the act creating the Oregon Territory. [FPTO § 3–35; Ex. USA–20, p. 24] Governor Stevens and the treaty commissioners were not authorized to grant to the Indians or treat away on behalf of the United States any governmental authority of the United States. [Ex. D–1, p. 29, *l.* 11-18; Tr. 1862, *l.* 6–13; Tr. 1864, *l.* 20 to 1865, *l.* 24]

20. At the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon harvesting anadromous fish, was that they have freedom to move about to gather food, particularly salmon, (which both Indians and non-Indians meant to include steelhead), at their usual and accustomed fishing places. [Exs. PL–15, PL–16b, PL–17c; Ex. USA–20, pp. 25–26; Ex. MLQ–1, p. 14; Tr. 2172, *l.* 3–12; Tr. 2352, *l.* 14 to 2365, *l.* 2; Ex. PL–9, pp. 28–29] The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but that the white man also would be allowed to fish. [Ex. PL–17c, p. 1e] In 1856, it was felt that the development of the non-Indian fisheries in the case area would not interfere with the subsistence of the Indians. [Exs. PL–7, PL–8]

21. It was the intention of the United States Government, in negotiating treaties with the Indians, to make at least non-coastal tribes agriculturists, although not to restrict them to that, to diversify Indian economy, to teach western skills and trades to the Indians and to accomplish a transition of the Indians into western culture. There was no intent, however, to prevent the Indians from using the fisheries for economic gain. [Ex. D–1, p. 23, *l.* 9–25, p. 23, *l.* 33 to p. 24, *l.* 25; Ex. USA–20, p. 26; Tr. 1916, *l.* 25 to 1917, *l.* 9; Treaty of Medicine Creek, art. 10, 10 Stat. 1132; Treaty of Point Elliott, art 14, 12 Stat. 927; Treaty of Point No Point, art. 11, 12 Stat. 933; Treaty with the Makahs (Treaty of Neah Bay), art. 11, 12 Stat. 939; Treaty of the Yakimas, art. 2, art. 5, 12 Stat. 951; Exs. PL–32 and PL–47, pp. 455–456; Tr. 1827, *l.*

25 to 1828, *l.* 24; Tr. 2418, *l.* 4 to 2421, *l.* 9; Tr. 2453, *l.* 22 to 2454, *l.* 13] Upon their removal to reservations, the Indians began farming, with greater success being experienced by the Puget Sound tribes than by the tribes on the ocean coast. [Ex. PL–42]

22. There is no record of English having been spoken at the treaty councils, but it is probable that there were Indians at each council who would have spoken or understood some English [Ex. D–1, p. 24, *l.* 31 to p. 25, *l.* 6; Tr. 2161, *l.* 2 to 2163, *l.* 4; Tr. 2392, *l.* 2 to 2394, *l.* 3] One Snohomish Indian who understood English helped translate the Point Elliott treaty. [Ex. PL–12; Tr. 2390, *l.* 24 to 2391, *l.* 18] Since, however, the vast majority of Indians at the treaty councils did not speak or understand English, the treaty provisions and the remarks of the treaty commissioners were interpreted by Colonel Shaw to the Indians in the Chinook jargon and then translated into native languages by Indian interpreters. Chinook jargon, a trade medium of limited vocabulary and simple grammar, was inadequate to express precisely the legal effects of the treaties, although the general meaning of treaty language could be explained. Many of those present, however, did not understand Chinook jargon. [FPTO § 3–37; Ex. USA–20, pp. 28–29; Ex. G–29a; Ex. Y–21; Tr 1886, *l.* 11 to 1887, *l.* 11; Tr. 2403, *l.* 24 to 240, *l.* 6] There is no record of the Chinook jargon phrase that was actually used in the treaty negotiations to interpret the provision "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." [Ex. USA–20, p. 26; Tr. 2372, *l.* 15 to 2374, *l.* 7] A dictionary of the Chinook jargon, prepared by George Gibbs, indicates that the jargon contains no words or expressions that would describe any limiting interpretation on the right of taking fish. [Ex. G-29a; Ex. Y–21; Tr. 2460, *l.* 10 to 2461, *l.* 1]

23. The treaty language "in common with all citizens of the Territory" was probably introduced by George Gibbs, who was a lawyer and advisor to Governor Stevens. [Ex. USA–20, p. 26; Tr. 1943, *l.* 24 to 1944, *l.* 12] There is

no discussion of the phrase in the minutes of the treaty councils, [Exs. PL–10a, PL–10b, PL–12, PL–14, PL–15, PL–16b, PL–17a, PL–17b, PL–17c] in the instructions to Stevens [Exs. PL–1, PL–34] or to the treaty negotiators, or in Stevens' letters of transmittal of the treaties. [Exs. PL–11, PL–14] There appears to be no phrase in the Chinook jargon that would interpret the term in any exact legal sense. [Ex. G–29a; Ex. Y–21]

24. Although there is no evidence of the precise understanding the Indians had of the treaty language, the treaty commissioners probably used the terms "usual and accustomed" and "in common with" in their common parlance, and the meaning of them as found in a contemporaneous dictionary most likely would be what was intended by the Government representatives. [Tr. 1946, *l.* 12–21] The 1828 and 1862 editions of Webster's American Dictionary of the English Language define the terms as follows:

> *accustomed:* Being familiar by use; habituated; inured * * * usual; often practiced.
>
> *common:* Belonging equally to more than one, or to many indefinitely * * * belonging to the public; having no separate owner * * * general; serving for the use of all.
>
> *usual:* Customary; common; frequent; such as occurs in ordinary practice or in the ordinary course of events. [Ex. PL–86]

The Indians who negotiated the treaties probably understood the concept of common ownership interest which could have been conveyed in Chinook jargon. [Tr. 2024, *l.* 2 to 2028, *l.* 3; Tr. 2048, *l.* 14 to 2049, *l.* 3] The clause "usual and accustomed [fishing] grounds and stations" was all-inclusive and intended by all parties to the treaty to include reservation and off-reservation areas. [Tr. 2851, *l.* 5–19] The words "usual and accustomed" were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental. [Tr. 2176, *l.* 1–22; Tr. 2177, *l.* 24 to 2178, *l.* 5] The restrictive sense of the term "usual and accustomed" could have been

conveyed in Chinook jargon. [Tr. 1951, *l.* 7 to 1952, *l.* 10]

25. In an extensive report on the Indian Tribes of the Territory of Washington, dated March 4, 1854, George Gibbs had noted that the right of fishery was a subject "concerning which difficulties may arise" and that the Indians would require liberty of motion for the purpose of seeking fish in their proper season. [Ex. PL–9, p. 29] Elsewhere he observed that the fisheries "are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking." [Ex. G–4, p. 186] This was a generalization, probably subject to certain exceptions. [Ex. USA–20, pp. 18–19]

26. There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians. [Ex. PL–10a, 8th page.]

27. Prior to the convening of the treaty councils Governor Stevens sent B. F. Shaw, who was later the official interpreter of the councils, to the Indian villages to explain the purposes of the councils and urge their attendance. Shaw told the Indians that the government wanted them to sell their land for a moderate sum of money and to accept such reservations and other privileges as could be agreed upon at the council. [Ex. USA–45, p. 28] While there is no record of any specific privileges discussed during these contacts, the treaty commission's prior awareness of the importance the Indians attached to fishing makes it probable that the continuance of the right to take fish was one that Shaw had in mind or discussed. [Ex. PL–9, p. 29; Ex. PL–10a, 1st and 3rd pages]

28. At the time of the treaties Indian control over fishing practices was by customary modes of conduct

rather than by formal regulations. Controls were necessary in cooperative fishing efforts which required coordination by someone who organized and directed the group effort. The construction of a weir was usually a cooperative effort, a number of men working under the direction of a leader. The entire community usually had access to the weir, the leader regulating the order of use and the times at which the weir was opened to allow upstream escapement for spawning and/or supply for upriver fishermen. Techniques such as spearing or trolling in salt water which involved individual effort were not regulated or controlled anyone else. [Ex. USA–20, pp. 19, 20] Apart from one instance when the Makahs prohibited a non-Indian from fishing on their reservation, there is no evidence at the time of the treaties that either party intended to restrict the others fishing because it was not contemplated that they would interfere with each other. [Tr. 2032, *l.* 14 to 2033, *l.* 6; Ex. PL–8; Ex. USA–20, pp. 20–21]

POST-TREATY INDIAN FISHING

29. Fish continue to provide a vital component of many Indians' diet. For others it may remain an important food in a symbolic sense — analogous to Thanksgiving turkey. Few habits are stronger than dietary habits and their persistence is usually a matter of emotional preference rather than a nutritional need. For some Indians, fishing is also economically important. Fishing is also important for some non-Indians. [FPTO § 3–38]

30. Since treaty times, Indians and non-Indians have adopted new fishing techniques and gear. Indians no longer fish from dugouts, just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and non-Indians no longer use cotton or linen nets. [FPTO § 3–38]

31. Subsequent to the execution of the treaties and in reliance thereon, the members of the Plaintiff tribes have continued to fish for subsistence, sport and commercial purposes at their usual and accustomed places. Such

fishing provided and still provides an important part of their livelihood, subsistence and cultural identity. [Exs. PL–44, p. 466; PL–45, p. 467; PL–46, p. 39; Exs. QN–2 and QN–3; Exs. H–1 and H–2; Ex. L–5; Exs. MS–2, MS–3, MS–6, MS–7, MS–8, MS–9 and MS–10; Exs. Y–13 and Y–26; USA–68; USA–69 and USA–70] The Indian cultural identification with fishing is primarily dietary, related to the subsistence fishery, and secondarily associated with religious ceremonies and commercial fishing. Indian commercial fishermen share the same economic motivation as non-Indian commercial fishermen to maximize their harvest and fishing opportunities. [Ex. F–35, p. 24 *l.* 12–23; Ex. F–40, p. 8, *l.* 2–6, p. 118, *l.* 17 to p. 19, *l.* 12; Ex. F–45, p. 17, *l.* 3 to p. 18, *l.* 2; Tr. 740, *l.* 16 to 742, *l.* 14; Tr 2566, *l.* 24 to 2567, *l.* 4; Tr. 2896, *l.* 22 to 2897, *l.* 7; Tr. 3031, *l.* 24 to 3232, *l.* 3] Indians allow non-Indians to fish on their reseration in sport fisheries for which Indians serve as guides and charge a license fee. [Tr. 2601, *l.* 10–22; Tr. 3475, *l.* 5–13; Tr. 3511, *l.* 23 to 3512, *l.* 15]

32. Some members of the Plaintiff tribes presently fish in the regular commercial fisheries of this State and the Pacific Coast. These Indians fish with the same gear as other fishermen. When fishing in the State commercial seasons, treaty Indians are not required to purchase a license or pay a landing tax. [Tr. 721, *l.* 5–9; Tr. 2489, *l.* 17–19; Tr. 2498, *l.* 12–15; Tr. 3865, *l.* 16–21; Ex. F–45, p. 14, *l.* 23 to p. 15, *l.* 4] With the exception of the full-time Indian commercial fishermen who fish in the all-citizen commercial fisheries of the State, Indian fishermen frequently have other occupations, but fish for food and to supplement their incomes. [Tr. 2600, *l.* 2-7; Tr 2602, *l.* 5–22; Tr. 2886, *l.* 3–16; Ex. F–45, p. 15, *l.* 5–12]

33. Acculturation of Western Washington Indians into western culture began prior to treaty times and has continued to the present day. Today most Indians wear traditional western clothing, speak English, utilize the western economic system and western technology, share western religious traditions and participate in the western socio-political organization. Traditional religious rites and

ceremonies are no longer widely observed by most tribes. Modern Indians share similar goals with modern non-Indians to acquire most items of American material culture. [Tr. 1991, *l.* 13 to 1992, *l.* 25; Tr. 2431, *l.* 9–16; Tr. 2439, *l.* 9 to 2444, *l.* 8; Tr. 2448, *l.* 8 to 2450, *l.* 4; Tr. 2508, *l.* 19 to 2409, *l.* 4; Tr. 2893, *l.* 7 to 2894, *l.* 15; Ex. F–35, p. 24, *l.* 12–23; Ex. D–1, p. 22, *l.* 9–25; Tr. 2507, *l.* 17 to 2508, *l.* 10; Tr. 2608, *l.* 17 to 2609, *l.* 4; Ex. F–30, Answer to Question 40 in each set of Interrogatories to Plaintiff tribes; Ex. F–40, p. 11, *l.* 22 to p. 12, *l.* 13; Ex. F–42, p. 10, *l.* 18–22; Ex. F–45, p. 15, *l.* 13 to p. 16, *l.* 7] Employment acculturation of Indians has been a major cause of the drastic decline from treaty times of the number of Indians engaged in fishing. [Tr. 1992, *l.* 5–10; Tr. 2599, *l.* 2–13; Tr. 3468, *l.* 16 to 3469, *l.* 8; Ex. F–40, p. 12, *l.* 14 to p. 13, *l.* 3] Additionally, many years of state enforcement actions against Indians exercising their claimed treaty right to fish have caused many members of Plaintiff tribes to discontinue such fishing activities at several of their usual and accustomed fishing places. [Exs. USA–20, p. 23; H–1; H–2; L–5; MS–2; MS–3; MS–7; MS–8; MS–9; MS–10]

34. Some of the Plaintiff tribes presently regulate their tribal members' fishing. [Ex. JX–2b] In general, the pattern of the Indian tribal fishing regulations is designed to achieve a certain percentage spawning escapement from their fisheries. [Tr. 1413, *l.* 12 to 414, *l.* 9; Tr. 1415, *l.* 5 to 1416, *l.* 1; Tr. 1418, *l.* 16–19] Tribal regulations generally restrict the harvest of fish in one or more of the following ways: 1) limitation on the number of fishermen; 2) separation between net sites; 3) restriction on the length of drift nets; 4) restriction on net length to certain channel widths; 5) restriction of mesh sizes; 6) weekly closed periods; 7) season dates which reflect when fish are available. [Tr. 1411, *l.* 8 to 1413, *l.* 11]

SPECIFIC TRIBES

Hoh Tribe

35. The Hoh Tribe is the present-day tribal entity which, with respect to the matters that are the subject of

this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Treaty of Olympia. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Hoh Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476. Its membership is determined in accordance with its Constitution and Bylaws approved by the Assistant Secretary of the Interior on Feburary 28, 1969. Its present membership roll was approved by a representative of the Secretary of the Interior on December 15, 1972. The tribe presently has approximately 62 members. [FPTO § 3–11; Ex. PL–55]

36. One of the earliest documentations of Hoh Indian fisheries is an 1853 account by a Russian survivor of an 1808 shipwreck. He wrote of his party's travels up the Hoh River during which they obtained salmon and fish roe from the Indians at various points along the river. At one location about 13 miles upstream the Indians refused to sell them any fish, explaining that high water had covered their fish traps. At the upper part of the river the Russians lived well on stored winter salmon which they found in the houses of Indians who withdrew from their settlements when the Russians arrived. [Ex. USA–22, pp. 5, 9–11]

37. Prior to the treaties the Hoh Indians had devised fish taking techniques adaptable for a variety of water and weather conditions. They constructed artificial falls by placing hemlock logs across the smaller streams. During periods of high water they would catch salmon below the falls with special falls nets. They observed certain rituals to assure continued fish runs. [FPTO § 3–82; Ex. USA–22, pp. 15–16]

38. Linguistically, culturally and historically the Quileute and Hoh Indians were one people who in 1855 lived along the Quillayute and Hoh river systems. Their identification as two separate tribes is a relatively recent artifact of government administration. [Ex. USA–22, p. 1]

39. In treaty times the usual and accustomed fishing

places of the Quileute and Hoh Indians included the entire Hoh river system and the Quillayute, Dickey, Bogachiel, Calawah, Soleduck, Queets and Quinault river systems. [FPTO §§ 3–83, 3–84; Exs. USA–20, p. 32; USA–22, p. 17; Exs. H–1, p. 1, *l.* 17–22; H–2, p. 1, *l.* 24 to p. 2, *l.* 5; Ex. USA–31e, pp. 185–188]

40. There are presently fifteen Hoh fishermen, five of whom fish full time and earn on an average $7,000 a year from fishing and ten part-time fishermen who are otherwise employed as loggers and who earn approximately $5,000 a year from fishing. [Tr. 3124, *l.* 23 to 3125, *l.* 19] With the exception of two fishermen, all Hoh fishermen fish on the reservation at permanent set net sites. Two fishermen fish off the reservation because they do not have permanent set net sites on the reservation. [Tr. 3121, *l.* 24 to 3122, *l.* 14; Tr. 3123, *l.* 20 to 3124, *l.* 9]

41. The only portion of the Hoh River that is within the Hoh Reservation is the south half of the river extending one mile upstream from the mouth [Tr. 3121, *l.* 21–23] The Department of Fisheries has promulgated off-reservation Indian-only fishing regulations for the Hoh River. With the exception of weekly closed periods, the regulations allow fishing down stream of the upper mouth of Nolan Creek to the Hoh Indian Reservation boundary from July 1 to November 30 annually. [Exs. JX–2a, Table 16, p. 158, App. II, p. 309; JX–2b, pp. 2–3]

42. The Hoh tribal council has adopted a fishing ordinance designating set net sites, limiting the number and length of nets, requiring daily removal of fish, regulating sales, and providing penalties for violations. [Ex. JX–2b, pp. 2–3; Tr. 3129, *l.* 7–12] Annual regulations are not adopted and estimates of predicted run size are not utilized in regulating the fishery. [Tr. 3136, *l.* 13–20; Ex. F–30, Hoh Tribe's Answer to Interrogatory No. 15] The Hoh ordinance does not make provision for emergency regulations. [Ex. F–30, Hoh Tribe's Answer to Interrogatory No. 11]

Lummi Tribe

43. The Lummi Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Point Elliott Treaty. This tribe is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Lummi Indian Reservation. Its membership is determined in accordance with its Constitution and Bylaws approved by the Assistant Commissioner of Indian Affairs on April 2, 1948, as amended April 10, 1970. It does not have a current federally approved membership roll but it presently has approximately 1,500 members. [FPTO § 3–12; Ex. Pl–56]

44. The Lummi Tribe is composed primarily of descendants of Indians who in 1855 were known as Lummi or Nook-Lummi and who lived in the area of Bellingham Bay and near the mouth of the river emptying into it. The present Lummi Tribe also includes descendants of the Semiahmoo and Samish Indians of 1855. The Lummi Indians, and the Semiahmoo and Samish Indians who were subsumed under the Lummi designation, were party to the Treaty of Point Elliott. Fourteen of the signatories to that treaty were identified as Lummi Indians. [FPTO § 3–39; Ex. USA–30, pp. 1–5]

45. Prior to the Treaty of Point Elliott, the Lummi, Semiahmoo and Samish Indians had been engaged in trade in salmon, halibut and shellfish both with other Indians and with non-Indians. [FPTO § 3–42] This trade continued after the treaty. [Ex. USA–30, p. 6] At the time of the treaty they maintained prosperous communities by virtue of their ownership of lucrative saltwater fisheries. The single most valuable fish resource was undoubtedly the sockeye, which the Lummis were able to intercept in the Straits on the annual migration of the sockeye from the ocean to the Fraser River. [Ex. USA–30, p. 11] Lummi Indians developed a highly efficient technique, known as reef netting, for taking large quantities of salmon in salt water. [Ex. USA–30, p. 11] Aboriginal Indian "reef

netting" differs from present methods and techniques described by the same term. [FPTO § 3–40] The Lummis had reef net sites on Orcas Island, San Juan Island, Lummi Island and Fidalgo Island, and near Point Roberts and Sandy Point. [Ex. USA–30, p. 23; Exs. USA–62, USA–63; Tr. 1699, *l.* 2 to 1701, *l.* 21] When nature did not provide optimum reef conditions the Indians artificially created them. [Ex. USA–30, p. 17] Reef netting was one of the two most important economic activities engaged in by these Indians, the other being the sale of dog fish oil. These Indians also took spring, silver and humpback salmon and steelhead by gill nets and harpoons near the mouth of the Nooksack River, and steelhead by harpoons and basketry traps on Whatcom Creek. They trolled the waters of the San Juan Islands for various species of salmon. [FPTO § 3–42; Ex. USA–30, pp. 6–25; Ex. G–21, pp. I–19–I–21]

46. In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay. Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay. [Exs. USA–20, p. 39; USA–30, pp. 23–26; Exs. PL–94a, b, c, d, e, t, u, v, w, x; Ex. G–26, pp. II–9 to II–13; Exs. USA–60, USA–61, USA–62, USA–63, USA–64; Tr. 1665, *l.* 4–11, *l.* 23–24]

47. Reef net locations were owned by individuals who claimed proprietary rights by virtue of inheritance in the male line. These locations constituted very valuable properties to their native owners. [Ex. USA–30, pp. 6, 20, 21; Tr. 2036, *l.* 10–16; Tr. 2039, *l.* 19 to 2041, *l.* 20] Some of the Lummi signers of the treaty were owners of reef net locations. Lummi Indians who were present at the Point Elliott Treaty Council later asserted that the Lummi signers had received assurances there that they would continue to hold the rights to their fishing grounds and stations, including their reef net locations. [Ex. USA–30, pp. 6–10; Tr. 2054, *l.* 2 to 2055, *l.* 1]

48. After the treaty the Lummi Indians continued to use their reef net locations until about 1894, when fish traps owned by non-Indians were located so as to render valueless many of the Lummi reef net locations. Some Lummis continued to use locations in the San Juan Islands from the turn of the century to the early 1920's. In approximately 1924 Lummi Indians stopped reef netting at their sites off the west coast of Lummi Island when the cannery to which they had been selling their fish closed. In 1934, when fish traps were prohibited in Puget Sound waters, Indian fishermen again had access to former locations. When a new cannery opened in 1939 Lummi Indians and non-Indians began reef netting again on the west coast of Lummi Island. However, non-Indian fishermen using the reef net technique rapidly occupied the more profitable reef net locations. [Ex. USA–30, pp. 26-27; Tr. 2097, *l.* 21 to 2102, *l.* 3; Tr. 2812, *l.* 22 to 2814, *l.* 10; Ex. PL–2, pp. 169–171, 175; Exs. L–5, p. 4, *l.* 4–7, *l.* 26 to p. 5, *l.* 9; L–6, p. 1, *l.* 29 to p. 2, *l.* 24]

49. The Department of Fisheries issues a reef net license to any non-Indian who applies and pays the fee and to any Indian who applies without a fee. The Department does not determine the site where the license is used nor does the license entitle the licensee to any site. The Department does, however, regulate reef net fishermen by time, area and distance between rows of gears. It does not regulate the number of reef nets or the separation between reef nets and reef net boats within a row.[FPTO § 3–608]

50. There are presently 43 reef nets being operated in Legoe Bay off Lummi Island, arranged in rows arbitrarily numbered from 0 to 9 running north to south. None of these is owned by Lummis. Within each row there are varying numbers of reef net gear at specific positions which are numbered from the shore outward. A number of these rows and some of the positions are vacant and have remained so for many years because the sites are not productive. [Tr. 3674, *l.* 9 to 3677, *l.* 6; Tr. 3714, *l.* 17–19; Tr. 3764, *l.* 5-20; Exs. RN–7 and RN–8] Many of the reef net operators have been fishing in the same locations for

thirty to thirty-five years. Only seven or eight positions of those occupied in 1973 were profitable over a four-year period. [Tr. 3703, *l.* 2 to 3704, *l.* 3; Tr. 3714, *l.* 10–14; Tr. 3744, *l.* 20 to 3745, *l.* 5]

51. Present day non-Indian reef net gear at Legoe Bay is located in part directly on the sites traditionally occupied by the Lummis at treaty times and thereafter. [Ex. L–7; Tr. 3743, *l.* 3–19; Tr. 2928, *l.* 3 to 2929, *l.* 11; Tr. 3756, *l.* 13 to 3757, *l.* 19; Ex. L–1; Ex. L–3; Tr. 3099, *l.* 20 to 3108, *l.*23; Ex. L–4; Tr. 3113, *l.* 3 to 3117, *l.* 1]

52. The location of the reef nets is one of the most critical factors in the success of a reef net operation. [Tr. 3710, *l.* 15-18; Tr. 3748, *l.* 22 to 3749, *l.* 5] Profitable positions are occupied permanently, unprofitable ones abandoned or operated intermittently or experimentally. [Tr. 3702, *l.* 25 to 3710, *l.* 14]

53. Since the turn of the century, the heavier volume of fish in the vicinity of Legoe Bay traveled close to shore. This has changed so that now fish must be taken in deeper water. This has been caused by the installation of traps and the present abundance of other fishing gear in the reef net area. [Tr. 3746, *l.* 20 to 3748, *l.* 20] In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including operation of the reef nets. [Exs. USA–20, p. 22; USA–52, p. 4, *l.* 25 to p. 5, *l.* 1]

54. All the reef net boats employ the same basic principal developed and used by the aboriginal Lummis, namely creation of an artificial reef to lead the migrating salmon into a net slung between two boats which is lifted when the fish enter the net. [Ex. USA–30, pp. 13–19] Modern gear incorporates numerous refinements and improvements including the addition of electric power to pull the nets. [Ex. RN–1, p. 55, *l.* 6 to p. 67, *l.* 14; Ex. RN–5, p. 15, *l.* 21 to p. 17, *l.* 9]

55. The present reef net operators occupy fixed positions at the reef net grounds in Legoe Bay and maintain a "gentlemen's agreement" among themselves. The agreement is to the effect that an occupant of a

location is entitled to maintain that location to the exclusion of all others. It further provides that no location will be yielded unless to one who agrees to purchase the equipment from the occupant. If the occupant does not desire to sell his equipment no change in occupancy of the location can occur. [Tr. 3681, *l.* 1 to 3682, *l.* 4; Tr. 3704, *l.* 4 to 3705, *l.* 10; Tr. 3717, *l.* 13–22] Reef netters do not voluntarily give up their locations or rotate to any other location. [Tr. 3771, *l.* 19–22]Members of the Reefnetters' Association do not recognize Lummi Indians as having any treaty right to occupy a position on the reef net grounds, and these Indians are, as far as these reefnetters are concerned, in no different position than a non-Indian who would seek to acquire a location. [Tr. 3717, *l.* 23 to 3719, *l.* 20]

56. In years past, the few Lummi Indians who operated reef net boats were gradually squeezed out of the reef net fishery by non-Indian pressure and by physical crowding of boats on Indian locations. [Tr. 2936, *l.* 20 to 2938, *l.* 17; Tr. 2962, *l.* 6–21; Tr. 2963, *l.* 18 to 2964, *l.* 1; Tr. 2966, *l.* 7 to 2967, *l.* 2]No present day Lummis are willing to contest any of the present occupants for possession of a reef net site. [Tr. 3008, *l.* 13–21] The Lummis are not willing to invest money and gear to occupy locations which are not economically productive. [Tr. 3007, *l.* 24 to 3008, *l.* 12] There are Lummi Indians who would be interested in participating in the reef net fishery at Legoe Bay if they could gain access to economically productive locations. [Tr. 2941, *l.* 13 to 2943, *l.* 1; Tr. 3009, *l.* 16 to 3010, *l.* 2] However, they object to having to purchase a non-Indian's fishing gear in order to occupy a good location. [Tr. 3029, *l.* 15–24]

57. Over the years the Lummi Tribe and the Department of Fisheries have often worked together to resolve differences, although never reaching total agreement. [Tr. 3014, *l.* 4–13] In spite of Lummi objections, the Department of Fisheries has opened Bellingham Bay to a heavy gill net commercial fishery which severely depletes the number of fish reaching the Nooksack River, which is

depended upon by the Lummi fishermen for a drift net fishery. [Tr. 2978, *l.* 25 to 2979, *l.* 18; Tr. 3019, *l.* 16–22]

58. At the present time, members of the Lummi Tribe engage in all types of fisheries, including gill netting, purse seining and trolling for salmon on Puget Sound, crab fishing, beach seining for all species, including herring, and drift and set gill netting in the Nooksack River. [Tr. 2974, *l.*17 to 2975, *l.* 13] Eight Lummi fishermen own and operate commercial-size fishing boats and approximately 150 members of the tribe take part in the fishery on the Nooksack River. Fishing is vitally important to the people of the tribe, both for subsistence and a livelihood. [Tr. 2976, *l.* 7 to 2977, *l.* 6]

59. The Lummi Tribe regulates both its river fishery and offshore fishery and requires its members to carry a tribal identification card and abide by tribal regulations. These fishing regulations are enforceable in tribal court and the tribe utilizes its police for enforcement. [Tr. 2977, *l.* 9 to 2978, *l.* 18] The tribe also imposes and collects a tax on its tribal fishermen. [Tr. 2981, *l.* 17 to 2982, *l.* 2] The tribe also operates a hatchery located at Skookum Creek some 15 or 20 miles from the reservation which has planted fish in the Nooksack River which will migrate to the ocean and Puget Sound. [Tr. 3016, *l.* 5–22]

Makah Tribe

60. The Makah Tribe is a party to the Treaty with the Makah. It is recognized by the United states as a currently functioning Indian tribe maintaining a tribal government on the Makah Reservation. This tribe is organized pursuant to section 16 of the said Indian Reorganization Act of June 18, 1934, and is incorporated under section 17 of that Act. 25 U.S.C. § 477. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior on May 16, 1936. It does not have a current federally approved membership roll but it presently has approximately 900 members all residing at Neah Bay, Washington. [FPTO §§ 3–1, 3–13; Tr. 2519, *l.* 15–16; Ex. PL–57]

61. Makah wealth, power and maintenance of Northwest Coast culture patterns were achieved by and dependent upon a thriving commercial maritime economy which was well established prior to 1855. [Ex. USA–21, p. 30] The Makah Indians, prior to treaty times, were primarily a seafaring people who spent their lives either on the water or close to the shore. Most of their subsistence came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal. The excess of what they needed for their own consumption was traded to other tribes for many of the raw materials and some of the finished articles used in the daily and ceremonial life of the village. A special feature of the Makah environment was a rich supply of halibut to which the Makah had access by virtue of ownership of lucrative fishing banks respected by competing tribes, a highly developed technology capable of efficiently harvesting the resource, and intensive processing and marketing of the finished product. [Ex. USA–21, pp. 11–13] At the time of the treaties, the Makahs relied more heavily on halibut than on salmon or steelhead for their diet and trade. [Tr. 1879, *l.* 3–7; Tr. 1907, *l.* 2–6] The Makah imported their basic needs such as housing materials and ocean-going canoes used for sea mammal hunting and ocean fishing because of the peculiarly rich resources available to them in their ocean territories, primarily halibut and whale. In addition to the marine products which the Makahs consumed themselves and sold to other Indians in order to buy native goods, they produced a considerable surplus for sale to whites. [Ex. USA–21, pp. 15, 18; FPTO § 3–47; Ex. PL–9, p. 35]

62. The treaty commissioners were aware of the commercial nature and value of the Makah maritime economy and promised the Makah that the government would assist them in developing their maritime industry. Governor Stevens found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights. Much of the official

record of the treaty negotiations deal with this. Stevens found it necessary to reassure the Makah that the government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits. [Ex. USA–21, pp. 36–37] Article 13 of the Treaty with the Makah, however, did prohibit the tribe from trading at Vancouver Island. [Ex. PL–41, p. 419] By his promises of kettles and fishing apparatus to the Makah, Governor Stevens clearly indicated that the treaty commissioners had no intention to restrict the Indians to aboriginal equipment or techniques. The Government's intent to aid the Makah in their whaling, sealing and other fisheries continued after the treaty. [FPTO § 3–44; Ex. PL–41, p. 419; Ex. PL–43, p. 417; Ex. USA–21, pp. 33–39]

63. At the time of the treaty, the Makah Indians maintained separate winter and summer villages, such that residents of one winter village (e.g. Baadah) summered at a specific summer village (e.g. Kiddecubbut). The treaty commissioners did not fully understand this network of summer and winter villages. Prior to, during and after the treaty some of the Makah Indians traveled from their summer villages and in the fall moved to camps which provided access to places for taking fish from the salmon runs in the streams and rivers draining into the Strait of Juan de Fuca. [FPTO § 3–46]

64. The Makah could neither read, write nor speak English. Governor Stevens and his party had the assistance of a Clallam Indian who spoke the Makah language, though Makah is totally different and unrelated to Clallam. The treaty appears to have been translated into Chinook jargon, which has a limited vocabulary and was used primarily for trade purposes, but is inadequate to convey concepts of tenure and tenancy in a legal document. Governor Stevens spoke to the Makah in English which was translated into Chinook by B. F. Shaw, the official interpreter. [Ex. USA–21, pp. 24–25]

65. The Makah's usual and accustomed fishing places prior to treaty time included the waters of the Strait of

Juan de Fuca to Port Crescent (near Port Angeles) extending out into the ocean to an area known as Swiftsure and then south along the Pacific Coast to an area intermediate to Ozette Village and the Quileute Reservation, as well as the rivers along the Strait of Juan de Fuca and down the Pacific shore starting at the Elwha River and including Lyre River, Twin River, Pysht River, Hoko River, Sekiu River, Sooes River, Waatch River, Big River, and Ozette River and Lake Ozette. [Exs. USA-20, p. 30; USA-21, pp. 19-22; Ex. USA-31e. pp. 191-197; Tr. 2521, *l.* 16 to 2522, *l.*, 3, *l.* 21 to 2523, *l.* 2] In addition to their plentiful catches of halibut, at treaty times the Makah took chinook, sockeye, chum and coho salmon at their usual and accustomed fishing places using fishing techniques which included beach seining, spearing and trolling. [FPTO § 3-48] The Makah Indians have continued to assert their use rights to areas of saltwater and freshwater after the execution and ratification of the treaty. [FPTO § 3-45]

66 In aboriginal times the Makah enjoyed a high standard of living as a result of their marine resources and extensive marine trade. With the advent of non-Indians to the area, new markets developed, Makah marine pursuits were intensified and Makah wealth increased. [Ex. USA-21, p 29] The Makah not only sustained a Northwest Coast culture, but also were wealthy and powerful as contrasted with most of their neighbors. They maintained from time immemorial a thriving economy based on commerce. [Ex. USA-21, pp. 32-33]

67. At the present time out of a tribal membership of approximately 900, there are approximately 150 persons engaged in fishing either part time or full time. There are approximately 60 Makah who are steady fishermen. [Tr. 2519, *l.* 15-16; Tr. 2520, *l.* 10-21] There are presently eight boats of commercial size fishing on the high seas. Three of these boats are gill netting in the Strait of Juan de Fuca, four are trolling, and one is tuna fishing. The commercial boats are thirty-six feet in length except that the tuna boat is fifty-four feet in length. [TR. 2523, *l.* 15 to 2524, *l.* 13]

These boats were obtained by the tribe using its resources to acquire the boats and are managed through a tribal corporation. [TR. 2524, *l.* 14-24] These commercial boats go as far as fifty miles out to sea, east to Puget Sound and south to Westport and the Columbia River. [Tr. 2524, *l.* 25 to 2525, *l.* 21] In addition to these larger boats, the remaining Makah fishermen operate small boats ranging in size down to sixteen feet. [Tr. 2524 *l.* 1-4] The Department of Fisheries, after consultation with the Makah Tribe, has adopted fishing regulations for Washington territorial waters north of Cape Alava and west of the Hoko River for an Indian-only fishery. [Tr. 2554, *l.* 17 to 2555, *l.* 8; Ex. JX-2a, App. II, Tabie 3, pp. 311-312]

68. Salmon is a staple food of the Makah Tribe today and is used for all ceremonies and potlatches. In addition to personal use, the Makah depend upon their commercial take of salmon, and logging activities, for economic survival. [Tr. 2528, *l.* 8-19]

69. The Makah Tribe has regulated its fishermen since 1937, and has promulgated written regulations for its reservation and off-reservation fisheries since 1952. [Ex. JX-2b, pp. 10-20; Tr. 2530, *l.* 24 to 2531, *l.* 5] These regulations were drafted by a fisheries committee composed of seven fishermen elected by the fishermen of the tribe and enacted by the Tribal Council. [Tr. 2519, *l.* 25 to 2520, *l.* 7; Tr. 2554, *l.* 1-8] These regulations have not been revised on an annual basis. [Tr. 2554, *l.* 9-16] In setting fishing seasons estimates of predicted run size are not utilized by the fisheries committee. [Tr. 2579, *l.*10-14] The regulations are enforced by a tribal patrolman who warns offenders, and if the offender does not cease violation, he will be taken to tribal court and his nets confiscated. The Makah fishermen carry tribal identification cards. [Tr. 2530, *l.* 24 to 2535, *l.* 25] In addition, the Makah Tribe has established a formal procedure by which it seeks advice relating to conservation from state and federal agencies as guidance in drawing up its marine fishery regulations. [Tr. 2537, *l.* 9 to 2538, *l.* 7]

70. The Fisheries and Game Departments have from time to time prevented the Makah from exercising their treaty fishing rights at usual and accustomed grounds and stations on rivers along the Strait of Juan de Fuca, [Tr. 2522, *l.* 4 to 2523, *l.* 14] and from purse seining off the mouths of the Hoko and Pysht Rivers. [Tr. 2539, *l.* 25 to 2540, *l.* 8] In addition, the state allows sport fishermen to fish at the mouth of rivers fished by the Makah. Sport fishermen fishing in Makah usual and accustomed areas are allowed by state law to fish every day of the week and take up to three fish per day per fisherman. The number of sport fishermen is increasing to the point that they seriously impede the efforts of Makah commercial fishermen in marine waters. These fishermen crowd in on Makah fishing boats when they see them taking fish. This seriously hampers the Makah boats' ability to maneuver and to continue their fishing activity. [Tr. 2543, *l.* 19 to 2546, *l.* 5] In addition, the Makah have had their nets cut, have had holes chopped in their boats and have been shot at by non-Indians. [Tr. 2540, *l.* 19 to 2541, *l.* 7]

Muckleshoot Tribe

71. The Muckleshoot Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is the successor to, and is made up principally of descendants of, tribes or bands which were parties to the Treaty of Point Elliott and the Treaty of Medicine Creek. [Ex. USA–27a, pp. i-vi; Exs. PL–23; PL–66; PL–3; PL–4; PL–41, pp. 417–418; PL–42, pp. 387-388, 392; PL–46, p. 39; Exs. USA–41a, pp. 3–672 to 3–679; USA–41b] It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Muckleshoot Indian Reservation. This tribe is organized pursuant to section 16 of said Indian Reorganization Act of June 18, 1934, and is incorporated under section 17 of that Act. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior on May 13, 1936, as amended on June 14, 1961, and March 26,

1969. [Ex. PL–58] Its present membership roll was approved by a representative of the Secretary of the Interior on December 15, 1969, and a supplemental roll was so approved on November 27, 1970. The tribe presently has approximately 386 members. [FPTO § 3–14; Exs. PL–48; PL–5; Exs. USA–54, p. 10, *l.* 24 to p. 12, *l.* 23; USA–46c; USA–46g; USA–47; USA–48; USA–56; USA–57; USA–43, pp. 13, 31; USA–44, pp. 1–2, 36; Tr. 1626, *l.* 1–16]

72. The Muckleshoot Indian Reservation was established on land ceded under the Treaty of Point Elliott, by Executive Order of the President on January 20, 1857, pursuant to authority under Article 6 of the Treaty of Medicine Creek, which was the only pertinent treaty then in effect. [Ex. USA–27a, p. vi; Ex. PL–21] The reservation drew its name from its location on Muckleshoot Prairie and not from the name of any Indian group that was placed thereon. Pursuant to authority of the Treaty of Medicine Creek and the Treaty of Point Elliott, Indians from the Green and White River areas who constituted bands which were parties to the Treaty of Point Elliott. [see Ex. PL–9, p. 42] and some Indians from the upriver portions of the Puyallup River who were party to the Treaty of Medicine Creek, were removed to and consolidated on the Muckleshoot Reservation. No aboriginal band or tribe known collectively by the name "Muckleshoot" (however spelled) existed at treaty time. Those Indians who were removed to and consolidated on the Muckleshoot Reservation thereafter became known as the "Muckleshoot Indians" or "Muckleshoot Tribe." On March 30, 1935, the Indians of the Muckleshoot Indian Reservation voted, pursuant to the provisions of the Indian Reorganization Act. 48 Stat. 988, 25 U.S.C. §§ 476 and 479, not to exclude themselves from application from that Act. That Act authorizes "the Indians residing on the same reservation" to organize as a tribal entity under the Act. The Act of June 15, 1935, 49 Stat. 378, 25 U.S.C. § 478b, provides that nothing in the Indian Reorganization Act "shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian

tribe, where such tribe voted not to exclude itself from the application of said Act." [FPTO § 3–14]

73. Acting pursuant to instructions from his superiors in the Indian Service to unite small bands of Indians in Washington Territory under a single head, Governor Stevens designated Seattle as head chief of the Dwamish Indians under which he included the Skopamish, Stkamish, and Smulkamish bands of Indians of the White River and Green River areas. These bands are named in the Preamble of the Treaty of Point Elliott. Although none of the Indian signatories to the treaty is identified with any of those three bands, Chief Seattle's signature on the treaty was treated by Stevens and the United States as being on behalf of all of the bands which Stevens had grouped as Dwamish, including the Skopamish, Stkamish, and Smulkamish. [Exs. USA–27a, pp. i–vi; PL–32; PL–66; G–4, p. 179]

74. The United States, acting by and through the Secretary of the Interior and his duly authorized delegatees, has consistently recognized the Muckleshoot Tribe as the political successor in interest to certain of the Indian tribes, bands or villages which were parties to the Treaty of Point Elliott or the Treaty of Medicine Creek. [Exs. PL–48; PL–5; Exs. USA–54, p. 10, *l.* 24 to p. 12, *l.* 23; USA–46c; USA–46g; USA–47; USA–48; Tr. 1624, *l.* 21 to 1625, *l.* 17]

75. Prior to, during and after treaty times the Indian ancestors of the present day Muckleshoot Indians caught chinook, coho, kokanee, sockeye. chum and pink salmon and steelhead which they ate fresh and cured for winter consumption and for exchange and trade. They used weirs, funnel snares, grills, set nets and spears for this purpose. They operated their weir sites so as to periodically remove lattice sections of the weir thus permitting the salmon to escape upstream to spawn. [FPTO § 3–51; Ex. USA–27b, p. 7]

76. Prior to and during treaty times, the Indian ancestors of the present day Muckleshoot Indians had usual and accustomed fishing places primarily at locations

on the upper Puyallup, the Carbon, Stuck, White, Green, Cedar and Black Rivers, the tributaries to these rivers (including Soos Creek, Burns Creek and Newaukum Creek) and Lake Washington, and secondarily in the saltwater of Puget Sound. Villages and weir sites were often located together. [FPTO § 3–53; Ex. USA–20, p. 38; Ex. USA–27b, pp. 7–16; Ex. PL–23, pp. 11–12]

77. The State's failure to recognize the Muckleshoot Tribe as a treaty tribe has limited the share of the catch which the Department of Fisheries has tried to make available to that tribe. [Tr. 3629, *l.* 8–12; Tr. 3794, *l.* 12 to 3795, *l.* 18] If it were determined that the Muckleshoot Tribe has off-reservation treaty fishing rights it would be possible to provide that tribe with a greater share of chinook and coho salmon in Lake Washington than is now allowed. [Tr. 3625, *l.* 22 to 3626, *l.* 3]

78. Before the Lake Washington ship canal was constructed in 1916 Lake Washington extended farther south and had its outlet through the Black-Duwamish Rivers. The Cedar River did not empty into the lake, but rather into Black River which no longer exists. At the junction of Cedar and Black Rivers were several winter villages and an important Indian fishery. Black River joined White River to form the Duwamish River and there was another important Indian settlement and fishery at this junction. Farther upstream White River and Green River met and on the land between the forks was the most important and largest upriver settlement and fishery. [Ex. JX–2a, p. 298; Ex. USA–27b, pp. 9–12] The Indians had at least three groups of important weir sites to intercept returning salmon on those rivers. These were destroyed by the changes wrought by the elimination of the Black River and the new flow patterns of the Cedar and White Rivers. The Black River silver salmon run was destroyed, as were some of the other spawning areas around Lake Washington. [Ex. USA–27b, pp. 10–12]

79. The Muckleshoot Tribe has promulgated regulations for its reservation and off-reservation fisheries. [Ex. JX–2b, pp. 21–23] Although the tribe has received

assistance from federal biologists in developing its regulations, the federal biologists have discussed with the tribe, but not provided it, estimates of predicted run size and recommendations of seasons or areas for fishing. [Tr. 1285, *l.* 12–17, *l.* 22–25; Tr. 1348, *l.* 5–11; Tr. 1349, *l.* 18 to 1350, *l.*1] There are presently between thirty-five and fifty Muckleshoot fishermen. [Ex. MS–8, p. 4, *l.* 5–6]

80. There has been cooperation between the Muckleshoot Tribe and the Department of Fisheries, particularly on water problems in the White River, which is one of the major factors affecting the availability of fish in the Indian fishery. [Tr. 3162, *l.* 10 to 3163, *l.* 7; Ex. f–25] Although the Department of Fisheries, pursuant to state court decisions, has not recognized the Muckleshoot Tribe as a treaty tribe, it has provided for a permit fishery for Muckleshoot Indians on Lake Washington and test fishing on the Green and Carbon Rivers. [Tr. 1093, *l.* 16 to 1094, *l.* 6; Tr. 3570, *l.* 14 to 3571, *l.* 15; Tr. 3575, *l.* 23 to 3577, *l.* 4.]

Nisqually Tribe

81. The Nisqually Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Medicine Creek Treaty. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Nisqually Indian Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934. Its membership is presently determined in accordance with its Constitution and Bylaws approved by the Assistant Secretary of the Interior on September 9, 1946. It has a membership roll approved by a representative of the Secretary of the Interior on November 3, 1965. The tribe presently has approximately 48 members. A new constitution was adopted by the tribe on June 9, 1973, to become effective upon approval by the Secretary of the Interior. The matter is currently pending before the Secretary. [FPTO § 3–15; Tr. 2635, *l.* 8–14; Ex. PL–59] The Indians who were

assigned to the Nisqually Reservation, including those identified in the treaty preamble as Nisqually and Steilacoom, were thereafter known as Nisqually Indians and were dealt with by the United States as a separate and collective entity. [Ex. USA–25, p. 25]

82. During treaty times the Nisqually Indians recognized separately and harvested the following species or races of anadromous fish: a) Tl'hwai (chum or dog salmon); b) Skowitz (coho salmon); c) Huddo (humpback salmon); d) Satsup (chinook salmon), To-walt (king or tyee salmon) were recognized as Satsup, the basis of distinction being size; e) Skwowl (steelhead). Their fishing techniques included trolling in saltwater, and nets, traps, weirs, gaffs, spears and hook and line in freshwater. Such fish were the Nisqually Indians' most important item of food. They were eaten fresh, were smoked and preserved, and were used for nonfood purposes such as glue base by the Nisqually Indians. The Nisqually Indians also identified several constellations of stars by reference to fish and fisheries. [FPTO § 3–58; Ex. USA—25, pp. 10–21a] The unpublished works of George Gibbs contain at least three notations of a fish trap or fish dam on the Nisqually River involving at least two separate locations. [FPTO § 3–61; Ex. USA–25, p. 22]

83. Dr. George Suckley, who reported information respecting salmon which he recorded from the Indians while he resided at Puget Sound between 1853 and 1856, reported that:

> "* * * the salmon known to the Nisquallies as the *skwowl*, which I consider identical with the *Klutchin* of the Clallums, * * * arrives in the bays and estuaries of Puget Sound about the middle of autumn, and towards the first of December commences to run up the larger rivers emptying into the sound. Their ascent of these streams continue through December and January. This arrival of the species in fresh water is not as simultaneous, neither do they arrive in such great numbers at any one time or in 'schools,' as is the case with the *skourtz* and several other species, but the 'run' being somewhat

more 'drawn out' affords a steady moderate supply to the Indians during its continuance."

He further recorded that, after the skwowl entered the rivers, they were taken by the Indians in nets, traps, baskets, and also by spearing. [FPTO §§ 3–55; 3–56; Ex. PL–50, p. 329; Ex. USA–25, pp. 15–16]

84. Dr. George Suckley reported on some of the uses which the Indians made of different species of salmon in 1853 and 1854. Quoting George Gibbs, Suckley reported that the dog salmon is prefered by the Indians for drying because there is but little fat upon it. [FPTO § 3–57; Ex. PL–50; Ex. USA–25, pp. 17-18]

85. At the time of the Medicine Creek Treaty upriver fisheries in the Nisqually area were normally used by the locally resident group. Saltwater fisheries and fisheries at the mouth of the Nisqually River traditionally were used by visitors as well as the local residents. Visitors might use them because they held claims to them by virtue of kin ties with the local people or they might be accorded guest privileges by virtue of friendship. [FPTO § 3–60; Ex. USA–25, p. 26] Use of the lower Nisqually fisheries by non-Nisqually was with the permission of the local people and would have been accorded automatically to people claiming descent from someone who had come from the local village or who had married into it. People with more distant kin ties to the local village or with none would be accorded fishing privileges on request if amicable relations obtained. [Ex. USA–25, p. 26]

86. The usual and accustomed fishing places of the Nisqually Indians included at least the saltwater areas at the mouth of the Nisqually River and the surrounding bay, and the freshwater courses of the Nisqually River and its tributaries, McAllister (Medicine or Shenahnam) Creek, Sequalitcu Creek, Chambers Creek and the lakes between Steilacoom and McAllister Creeks. The saltwater fisheries were shared with other Indians. [FPTO § 3–63; Exs. USA–25, p. 25; USA–31e, pp. 200–202; Exs. G–23, pp. II–18–19; G–25, p. II–4]

87. Salmon and steelhead continue to be important

to the Nisqually Indians as evidenced by continued fishing activity. [Exs. USA–25, p. 26; USA–69; USA–70] The greatest catch by species from the Nisqually River by Indians is on the chum salmon run. This run is largely unharvested by non-Indian fisheries in Washington waters because it comes through Puget Sound after the commercial fishing has been closed for the season and because chum salmon do not take the sportmen's lures or bait to any significant degree. The chum run is in the Nisqually River at the same time that steelhead are running in the river. Because of this the state has allowed no off-reservation Indian net fishery on this run. [Tr. 3633, *l.* 7 to 3634, *l.* 18; Tr. 882, *l.* 16 to 883, *l.* 25; Exs. F–58; F–59; Ex. JX–2a, App. II, p. 315] The Department of Fisheries' agreement to the prohibition is not based on any concern for preservation of the Nisqually River chum run but upon a request from the Game Department that the prohibition was necessary to preserve the winter steelhead run. [FPTO § 3–607]

88. Pursuant to an understanding between the Department of Fisheries and the Department of Game, the latter Department assumes the lead jurisdictional role over the adoption and enforcement of regulations governing fishing on rivers during the time that steelhead are primarily the anadromous fish in the river. [Tr. 221, *l.* 21 to 223, *l.* 12; Tr. 226, *l.* 11–15] On the Nisqually River the Game Department assumes lead jurisdiction under this understanding on December 1st of each year. The peak of the chum river in the Nisqually River occurs after December 1st and the predominant species in the river during December is chum salmon. [FPTO § 3–607; Tr. 2686, *l.* 5 to 2687, *l.* 11; Ex. JX–2a, Table 49, p. 215 and Table 62, p. 232; Ex. F–6, Table 20, p. 25]

89. The Game Director has testified that his Department would have no objection to the Department of Fisheries allowing the Nisqually Indians an off-reservation gill net season on the Nisqually River for chum salmon during the first weeks of December if the net mesh size is large enough to allow escapement of steelhead through it,

and the run size is sufficient. [Tr. 227, *l.* 2 to 229, *l.* 115] Subject to those conditions being satisfied, the Game Director testified that it may be possible and feasible to regulate an off-reservation Indian net fishery on the Nisqually River to take chum and at the same time conserve the steelhead run. [Tr. 232, *l.* 5 to 233, *l.* 23]

90. The Nisqually Tribe has promulgated fishing regulations for its on and off-reservation fishing areas. [Ex. JX–2b, pp. 24–26; Ex. USA–70, p. 4, *l.* 10–14] These regulations were drawn up by a fish committee composed by tribal fishermen without assistance from federal biologists. [Tr. 2644, *l.* 13 to 2646, *l.* 5; Ex. F–72] The original fishing ordinance was adopted in 1968 and annual regulations have been adopted only since 1972. [Ex. F–33, p. 3, *l.* 17–22] In setting seasons the tribe does not use estimates of predicted run size. [Tr. 2646, *l.* 6–14] There is no formal enforcement procedure and the regulations are presently not being enforced. Violations are presently handled by the fishermen themselves. [Ex. F–33, p. 17, *l.* 8-22]

91. Nisqually Indians today fish with drift and set nets. [Tr. 2646, *l.* 15–20]. There are not enough fishing sites on the Nisqually Reservation to accommodate all Nisqually Indian fishermen. [Ex. F–33, p. 8, *l.* 7–18; Tr. 2689, *l.* 21 to 2690, *l.* 14] Most members of the Nisqually Tribe live off the reservation in the near vicinity to the Nisqually valley. [Ex. F–33, p. 7, *l.* 19 to p. 8, *l.* 6] A number of set net sites are located throughout the stretch of river downstream from the reservation. [Ex. PL–53; Ex. USA–70, p. 6, *l.* 11–16] The locations for these sites change because the river course changes. [Tr. 2652, *l.* 17 to 2653, *l.* 1]

92. The Department of Fisheries has promulgated off-reservation fishing regulations for Indians on the Nisqually river. [Ex. JX–2a, App. II, Table 6, p. 315] The Department and the tribe have discussed issues concerning development of off-reservation regulations, but have not reached agreement on fishing seasons, areas, or times. [Ex. F–33, p. 12, *l.* 23 to p. 13, *l.* 5]

93. There are presently approximately fifty fishermen fishing in the Nisqually Indian fisheries, about twenty of whom fish year-round. [Ex. USA–70, p. 3, *l.* 11–14] Included are approximately twenty members of the Nisqually Tribe, seven to ten of whom fish full time. [Ex. F–33, p. 6, *l.* 14 to p. 7, *l.* 8] The Nisqually Tribe allows non-enrolled members to fish in its treaty fisheries. [Ex. F–33, p. 15. *l.*3–13]

Puyallup Tribe

94. The Puyallup Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Medicine Creek Treaty. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government. This tribe is organized pursuant to section 16 of said Indian Reorganization Act of June 18, 1934. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior March 11, 1936, as amended June 1, 1970. It does not have a current federally approved membership roll but it presently has approximately 600 members [FPTO § 3–16; Ex. PL–60]

95. The reference in the Preamble to the Treaty of Medicine Creek to the Puyallup and S'Homamish Bands of Indians was intended to encompass all those groups of Indians living on the Puyallup River, its tributary creeks, and neighboring Vashon Island. After the treaty these people, as well as any others who removed to the Puyallup Reservation, were all subsumed under the single name "Puyallup". [FPTO § 3–67]

96. At the time of the Medicine Creek Treaty communication among upriver Puyallups, people of the Green River-White River-Stuck River area and the upriver Nisquallies was relatively easy. In addition, there was considerable intermarriage and trade contact with Sahaptin-speaking peoples from east of the Cascades. [FPTO § 3–65]

97. Accounts by settlers and others prior to and contemporaneous with the treaties attest to the abundance of fish in the waters utilized by the Puyallup Indians and to the variety of techniques employed by them in taking fish. In the rivers the bulk of the salmon and steelhead was taken in nets associated with weirs, but other important taking techniques included gaffing, falls traps, river seines, and spearing. In the marine areas salmon were taken by beach seining and trolling. These fish were important to the Indians as an item of diet and subsistence, an item of trade, a medium of exchange and a base for such manufactured commodities as glue. [FPTO § 3–68; Ex. USA–26, pp. 8–16]

98. The principal fishing places of the Puyallup Indians were located in the area ceded by these Indians under the Medicine Creek Treaty as well as the area subsequently set aside pursuant to the treaty for their exclusive use as the Puyallup Indian Reservation. [FPTO § 3–73] The land set apart as the Puyallup Reservation as a result of Governor Stevens' 1856 recommendation for relocation of the reservation also was intended to encompass usual and accustomed freshwater fishig sites, and to provide access to traditional fisheries in Commencement Bay for those Indians who were brought to the reservation. [FPTO § 3–69; Ex. PL—75; Ex. USA–26, p. 21; Ex. PL–42, p. 385]

99. The usual and accustomed fishing places of the Puyallup Indians included the marine areas around Vashon Island and adjacent portions of Puget Sound, Commencement Bay, the Puyallup River and the tributary rivers and creeks. In addition, smaller creeks adjacent to but not tributaries of the Puyallup River were used [Exs. USA–20, p. 37; USA–26, p. 21; Ex. G–24, p. II–13] The Puyallup Tribe has enacted regulations applicable to the exercise of its tribal fishing rights. [Ex. JX–2b, pp. 27–34; Tr. 2872, *l.* 25 to 2873, *l.* 3] The regulations provide for a year-round four day per week fishery without annual seasons. There are limitations on open areas and amount and size of gear. Presently there are no emergency

regulations, but the tribal council is authorized to change fishing times, require catch reports and establish registration fees. Predictions of estimated run size are not used in setting the regulations. [Tr. 2879, *l.* 4 to 2880, *l.* 3; Ex. JX–2b, pp. 29–33] Penalties are provided for but there is no formal enforcement procedure. Regulations are enforced by a group of twenty-five to thirty fishermen confronting the wrongdoer and pulling his net out of the water if it is in violation of the regulations. [Ex. JX–2b, p. 33; Tr. 2874, *l.* 9–15; Tr. 2883, *l.* 15–24]

100. Fishing for salmon and steelhead continues to be important to the Puyallup Tribe. [FPTO § 3–74; Tr. 2874, *l.* 16–23] There are between thirty and forty Puyallup fishermen. [Ex. F–33, p. 35, *l.* 1–3; Tr. 2885, *l.* 13–16] These fishermen fish seasonally, mainly between August and January, and earn approximately $5,000 apiece. During the remainer of the year many are otherwise employed. [Tr. 2885, *l.* 17 to 2886, *l.* 16; Tr. 2888, *l.* 17 to 2889, *l.* 7]

101. An Assistant Director of Fisheries testified that Puyallup Indians fishing on the fall chinook run in the Puyallup River have overfished causing a reduction in run size. [Ex. F–28, p. 58, *l.* 29 to p. 59, *l.* 30; Ex. F–4] In 1973 federal biologists concurred with the Department of Fisheries' prediction that the fall chinook run to the Puyallup River would be a low run. The Department of Fisheries closed all commercial fishing under its control on that run including the Puyallup Indian net fishery. The reason for the closure was explained to a federal biologist who agreed that the Department's restriction of fishing on the Puyallup River fall chinook run was necessary for conservation. [Tr. 1394, *l.* 20–24; Tr. 3578, *l.* 18 to 3580, *l.* 20] Although a member of the Puyallup Tribe's fishery committee discussed the low fall chinook run with the federal biologist, the committee did not close the river to its fishermen. Its fishermen continued to fish in the river contrary to state regulation. [Tr. 2881, *l.* 1 to 2883, *l.* 5; Tr. 3580, *l.* 21 to 3581, *l.* 2]

102. At least prior to November, 1973, when

considering whether to authorize any net fishery for Puyallup Indians the Game Department operated on the premise that, as a result of applicable court decisions, Indian fishing anywhere on the Puyallup River was subject to the regulatory jurisdiction of the State. [Tr. 250, *l.* 10 to 252, *l.* 20]

Quileute Tribe

103. The Quileute Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which are parties to the Treaty of Olympia. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Quileute Reservation. This tribe is organized pursuant to section 16 of the said Indian Reorganization Act of June 18, 1934. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior on November 11, 1936, as amended March 11, 1949. Its present membership roll was approved by a representative of the Secretary of the Interior on December 26, 1972. The tribe presently has about 450 members. [FPTO § 3–17; Ex. PL–61; Tr. 3192, *l.* 22–24]

104. At the time of the treaty the Quileute (including the Hoh) relied primarily on salmon and steelhead taken in their long and extensive river systems. These Indians were able to take canoes far up into the foothills country by following the river system, not only to take salmon and steelhead, but also to hunt land game in the foothills. [FPTO § 3–77; Ex. USA–22, pp. 9–16]

105. The Quileute reliance on fish as a food staple is reflected in their calendar. Quileute Indian names for some months are related to fish or fishing activities. Translated into English these names and their approximate period of our calendar include the following: "Beginning of the spawning of the steelhead salmon", approximately January (32 days); "regular or strong spawning time of salmon", about February (32 days);

"time for black (chinook) salmon", September; "time for silver salmon", October. [FPTO § 3–79; Ex. USA–22, pp. 13–14]

106. An account of Quileute fishing given September 1, 1916, by Arthur Howeattle, a Quileute Indian, stated that the Quileutes used to fish in rivers, lakes and the ocean and that the fishing grounds in the river were used by individual families and those in the lakes and ocean were used in common. He stated further that fish were caught with drag nets, scoop nets and fish-traps, fish baskets, dip nets, spears, hooks and lines. [FPTO § 3–80; Ex. USA–22, p. 14]

107. Quileute aboriginal fishing gear included a stake trap stretching across a stream with open spaces at intervals in which dip nets were suspended; triangular fish traps which often could catch a canoe-load of fish at a time; and sloping dams across a river along which dip or bag nets were suspended from the downstream side into which the fish would jump in their attempts to get over the dam. [FPTO § 3–81]

108. Before, during and after treaty times, the usual and accustomed fishing places of the Quileute and Hoh Indians included the Hoh River from the mouth to its uppermost reaches, its tributary creeks, the Quileute River and its tributary creeks, Dickey River, Soleduck River, Bogachiel River, Calawah River, Lake Dickey, Pleasant Lake, Lake Ozette, and the adjacent tidewater and saltwater areas. In aboriginal tmes the Quileute Indians utilized fishing weirs where salmon were caught along the Quillayute River. In 1861 James G. Swan encountered fish weirs about a mile up from the bend of the Quillayute River near its mouth and about a mile further upstream. Along the adjacent Pacific Coast Quileutes caught smelt, bass, puggy, codfish, halibut, flatfish, bullheads, devilfish shark, herring, sardines, sturgeons, seal, sea lion, porpoise and whale. [FPTO §§ 3–78, 3–83, 3–84; Exs. USA–20, pp. 31–32, USA–22, pp. 11–21, 25–29; USA–31e, pp. 218–232; USA–53, App. I]

109. Pretreaty Quileute villages were located where

the conditions of the river were best for catching fish and, consequently, each village obtained its principal supply from a trap located nearby. The traps were built in shallow water although not necessarily at the mouths of small streams. [Exs. USA–22, p. 18; USA–31e, pp. 224–225] The fish traps or weirs used by the Quileutes were made of fine maple bows laced by spruce limbs. They entirely closed the streams in which they were built. When the Indians had enough fish for their own immediate needs and to dry for their year's supply, they would remove the weir from the river so that the fish could go up the stream to spawn. [Exs. USA–22, pp. 25–26; USA–31e, p. 222]

110. Fishing is basic to the economic survival of the Quileute people. It is the only resource which the Tribe's members have for making money on the reservation. Fish are distributed freely as gifts and are used in all kinds of ceremonies and celebrations. [Tr. 3193, *l.* 8 to 3194, *l.* 16] Because there are limited locations on their reservation and specifically only one or two places suitable for drift netting, it is necessary that the Quileutes go upstream beyond the reservation boundaries to accommodate all the fishermen. [Tr. 3192, *l.* 10–21]

111. The lowermost 2½ to 3 miles of the Quillayute River are within the Quileute Indian Reservation and the Olympic National Park. The State has no jurisdiction over fishing by Indians in these areas and has not asserted any such jurisdiction. There is, however, a sizeable state-authorized sports fishery for salmon just outside the mouth of the Quillayute River. Historically, members of the Quileute Tribe have fished with gill nets for salmon and steelhead in the Quillayute River both within and upstream from the above-described area and in the lower portions of the Soleduck and Bogachiel Rivers. There is currently an Indian net fishery for both salmon and steelhead within the reservation and national park area. Several of the locations desirable to Quileute Indians for effective set net fishing on the Quillayute River are located upstream from the Olympic National Park in waters under state jurisdiction. Since the creation of the Game

Department the Indians have been permitted to fish in these waters for steelhead only in accordance with state law which totally prohibits fishing for steelhead by means other than angling. [FPTO §§ 3–462, 3–463; Tr. 3199, *l.* 8 to 3200, *l.* 16] The Department of Fisheries has opened the upstream area of the Quillayute River, upstream to about the mouth of the Soleduck River, to net fishing by Indians for salmon from September 1 to November 30. [Ex. JX–2a, Table 17, p. 159; App. II, p. 310; Tr. 3214, *l.* 21 to 3215, *l.* 10]

112. The winter steelhead run in the Quillayute River system commences in strength about December 1 and extends in major strength in the lower portion of the system through March. The Quillayute, Soleduck, Calawah and Bogachiel Rivers are open to steelhead angling under the Washington game laws and regulations generally from about the first of December to the end of February. The portions of those rivers west of U.S. Highway 101 are generally open for an additional period until about April 30, and for an additional period during the summer season. The State licenses guides to take parties of sport fishermen (usually consisting of two fishermen per boat) along the Quillayute River system. Operators of these boats generally charge parties $60 per trip. The operators advertise to attract sport fishermen to fish that river system. [FPTO § 3–462]

113. During the period December through February the Indian catch from the Quillayute River system is predominantly, if not entirely, steelhead. During the 1971–72 run approximately twenty or thirty Indian gill net fishermen fished the Quillayute River but not the entire system. During this time of Indian net fishing, sportsmen have fished the river system both as bank fishermen and as boat fishermen. This sport fishing is mostly upstream from the majority of Indian nets, but at times Indians and sportsmen fish the same stretches of water. Agents of the Game Department have arrested Indians who have fished for steelhead outside of the reservation and national park area in any time, place, and manner other than that permitted by state law. [FPTO § 3–462]

114. Notwithstanding the Indian commercial net fishing on the Lower Quillayute River, catch statistics from punch card data of the upriver sports fishery show an increase in the sport steelhead catch in recent years. This increase could not have occurred unless increased numbers of steelhead had passed through the lower river Indian net fishery.[FPTO § 3–463]

115. At the present time there are 34 full-time fishermen among members of the Quileute Tribe. [Tr. 3192, *l.* 25 to 3193, *l.* 4] These include fishermen who gill net in the rivers and the owners of six boats which engage in off-shore fishing. [Tr. 3191, *l.* 22 to 3192, *l.* 2]

116. The Quileute Tribe has adopted fishing regulations for both on and off-reservation fisheries. [Ex. JX–2b, pp. 42–44; Tr. 3210, *l.* 11–22] The regulations adopted originally in 1941 and revised in 1973 do not provide for annual seasons and do not take run size into account. Estimates of predicted run size are not utilized in establishing fishing regulations. [Tr. 3210, *l.* 11–22; Tr. 3212, *l.* 20 to 3213, *l.* 7] The tribe does impose a tax on its commercial fishermen, the proceeds of which are for the benefit of the general tribal treasury. [Tr. 3200, *l.* 17–24]

117. The Game Department has interfered with Quileute fisheries by seizing nets and threatening arrests for any Indian net fishing for steelhead on the Quillayute River system outside of reservation or national park boundaries from December 1st through June. [Tr. 3195, *l.* 17 to 3197, *l.* 18] The Game Department has held those nets and retains them indefinitely. The Department makes no effort to bring the matter before a court for declaration of a forfeiture. [Tr. 604, *l.* 14–22] State authorities have persistently tried to stop Quileutes from shipping their steelhead to market. The result is that the Quileutes have to ship them by air. [Tr. 3194, *l.* 17 to 3195, *l.* 5]

118. Prior to October, 1973, the Game Department had never considered a regulation to authorize Quileute Indians to maintain an off-reservation net fishery for steelhead, nor had the Game Department staff advised the Game Commission of the data or supporting facts

regarding the Quileute Indian fishery. [Tr. 303, *l.* 14 to 304, *l.* 12; Ex. PL–37]

Quinault Tribe

119. The Quinault Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest of some of the Indian tribes or bands which were parties to the Treaty of Olympia. This tribe is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Quinault Reservation and is composed of the Quinault and Queets Band of Indians, and other fish-eating Indians of the Olympic Peninsula who were allotted on the Quinault Reservation. Its membership is determined in accordance with its Bylaws adopted by its tribal council on May 22, 1965, and recognized by the Bureau of Indian Affairs. It has a membership roll of 986 approved by a representative of the Secretary of the Interior on March 31, 1973. Additional applications for membership are pending. [FPTO § 3–18]

120. The usual and accustomed fishing places of the Quinault people within the case area at treaty time included the following rivers and streams: Clearwater, Queets, Salmon, Quinault (including Lake Quinault and the upper Quinault tributaries), Raft, Moclips, Copalis, and Joe Creek. Ocean fisheries were utilized in the waters adjacent to their territory. [Ex. USA–53, p. 24 and App. 1; USA–31e, pp. 205–214, 233–235A]

121. The Quinault also have important fisheries which were shared with other tribes to the south and east of the boundaries of the case area, especially Grays Harbor and those streams which empty into Grays Harbor. [Ex. USA– 53, p. 24 and App. 1 and 2; Tr. 2817, *l.* 3 to 2818, *l.* 19]

122. At treaty time fishing constituted the principal economic activity of the Quinault. Salmon and steelhead served as the principal food and as an important item of trade. [Ex. USA–53, p. 24] In the immediate post-treaty

period (1860) the government Indian agent recommended that the Quinault Indians be encouraged to open a trade in their salmon as they could be more profitably employed in that way than in agricultural pursuits. [Ex. PL–41, p. 420; Ex. PL–42, p. 391]

123. The lower portions of the Quinault and Queets Rivers run through the Quinault Reservation. There are tribally managed commercial and sports steelhead fisheries within the reservation and a non-Indian-managed recreational fishery for steelhead outside and above the reservation on these rivers. The steelhead resource on these rivers has been maintained without Game Department stocking. The Game Department has not stocked the Quinault and Queets systems because of limitations in their hatchery program and because of opposition by sportsmen's groups, among other reasons. [FPTO § 3–474; Tr. 314, *l.* 20 to 316, *l.* 15; Tr. 3475, *l.* 5–21]

124. The Quinault Tribe has had regulations on its river fisheries since 1916 and tribal fish patrolmen since 1925. [Tr. 3438, *l.* 21 to 3440, *l.* 5] The tribe has on occasion closed its waters to all fishing and prohibited certain types of gear in order to conserve fish runs. [Tr. 3440, *l.* 25 to 3441, *l.* 14; Tr. 3445, *l.* 12 to 3446, *l.* 2] The Quinault Tribe has not had off-reservation fishing regulations because few of its members fish off-reservation in the case area. [Tr. 3475, *l.* 22 to 3476, *l.* 4] Presently only 30 to 40 per cent of the on-reservation fishing sites on the Quinault River are being used. [Tr. 3455, *l.* 22 to 3457, *l.* 17] Any apparent decline in the Quinault sockeye run is probably not due to overfishing by the Quinault Tribe. [Tr. 3530, *l.* 18 to 3532, *l.* 17; Tr. 3551, *l.* 25 to 3552, *l.* 21; Exs. QN–4, QN–5, QN–6 and QN–7]

125. The Quinault Tribe and the tribal technical staff of fisheries scientists and technicians are presently engaged in a comprehensive fisheries management and enhancement program on the reservation. The program includes the production of sockeye, chum, and steelhead from eggs taken by tribal employees, and the cleaning of streams damaged by logging to recover spawning grounds

on the reservation. [Ex. QN–2 and Appendices thereto; Ex. QN–3, pp. 1–11]

126. No special off-reservation fishing season for Quinault Indians has ever been or presently is allowed by the State even though such a season was proposed to the State by tribal officials. [Tr. 3476, *l.* 20 to 3477, *l.* 22]

127. The Quinault Tribe successfully manages its river steelhead run such that both a net commercial and a hook and line sport fishery operate side by side and these uses are not incompatible under the tribal management. [Ex. QN–3, p. 8, *l.* 17 to p. 9, *l.* 14; Tr. 315, *l.* 6 to 316, *l.* 15]

128. The Quinault Tribe is, biologically speaking and from an enforcement standpoint, effectively managing its fisheries resources on the reservation, and is capable of doing so outside of the reservation. [Tr. 3488, *l.* 9 to 3490, *l.* 14; Tr. 3553, *l.* 25 to 3555, *l.* 5]

Sauk-Suiattle Tribe

129. The Sauk-Suiattle Tribe is composed primarily of the descendants of the Sakhumehu and other Indians who lived on the upper reaches of the Skagit River system in 1855. [FPTO § 3–85; Ex. USA–29, p. 12; Ex. USA–58; Ex. UPS–2] Those Indians were party to the Treaty of Point Elliott. [Ex. USA–29, p. 9; Ex. UPS–2, pp. 19–21] A Sakhumehu village was located at the confluence of the Sauk and Skagit Rivers. [Ex. USA–58] The Sakhumehu Indians are named in the preamble to the Treaty of Point Elliott; and one of the treaty signatories is identified as a Sakhumehu. At treaty time the Sauk River Indians, who were known variously as Sock-a-muke, Sakhumehu or Sock a bute, regarded themselves as a distinct and separate group and were so regarded by other Indians and by non-Indians. Their separate identity was consistently recognized in reports referring to them before, during and after the Treaty. Prior to and during treaty times these Indians intermarried to a considerable extent with the Upper Skagit and Stillaguamish Indians. After treaty times some of the Sauk River Indians continued to live along the Sauk and Suiattle Rivers where their descendants still reside. [FPTO § 3–85; Ex. USA–29]

130. No separate reservation was established for a Sauk-Suiattle Tribe in their area. They were permitted to move to reservations established in the general vicinity; and the majority who moved to a reservation moved to the Swinomish Reservation, but most remained in their aboriginal area. The Sauk-Suiattle Tribe is organized and incorporated under the State of Washington Nonprofit Corporation Act (RCW 24.03) and is not organized pursuant to any federal law. [FPTO § 3–19; Ex. Pl–64] The Tribe is recognized by the federal government, but its membership roll has not been approved by the Secretary of the Interior or his representative. [Exs. USA–43, pp. 19, 41; USA–44, pp. 2, 36] The Tribe has approximately 250 members. [Ex. F–30, Sauk-Suiattle Tribe Answer to Interrogatory 44]

131. The usual and accustomed fishing places of the Sauk River Indians at the time of the treaty included Sauk River, Cascade River, Suiattle River and the following creeks which are tributary to the Suiattle River — Big Creek, Tenas Creek, Buck Creek, Lime Creek, Sulphur Creek, Downey Creek, Straight Creek, and Milk Creek. Bedal Creek, tributary to the Sauk River, was also a Sauk fishing ground. [Ex. USA–29, p. 13; Ex. MS–10, p. 3, *l.* 1–6]

132. During treaty times the Sauk River Indians took fish with spears, dip nets, traps and weirs. They procured salmon and steelhead in their upriver region and also traveled to the saltwater to procure marine life unavailable in their own territory. They ate salmon and steelhead in both fresh and cured forms. [FPTO § 3–88] In modern times the Sauk-Suiattle Indian fishermen, numbering only about thirty, have not fished commercially and are primarily interested in a personal use fishery. [Ex. F–42, p. 5, *l.* 4–11 and *l.* 21 to p. 6, *l.* 4, p. 8, *l.* 24 to p. 9, *l.* 2, p. 10, *l.* 12–17, p. 16, *l.* 20 to p. 17 *l.* 2]

Skokomish Tribe

133. The Skokomish Tribe is, with respect to the matters that are the subject of this litigation, a political successor in interest to some of the Indian tribes or bands

which were parties to the Point No Point Treaty. It also includes descendants from some Indians to whom the Medicine Creek Treaty was applicable. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government on the Skokomish Indian Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934, and is incorporated under section 17 of that Act. Its membership is determined in accordance with its Constitution and Bylaws approved by the Assistant Secretary of the Interior on May 3, 1938, as amended January 12, 1966. Its present membership roll was approved by a representative of the Secretary of the Interior on May 22, 1973. The tribe presently has approximately 416 members. [FPTO § 3–20; Ex. PL–62]

134. The Skokomish Tribe is composed primarily of descendants of the Skokomish and Too-an-ooch who at treaty times lived in the drainage area of Hood Canal. Those two groups were named in the preamble of the Treaty of Point No Point. At that time the two names were used to describe the communities of the upper and lower portions of Hood Canal respectively. These groups were different segments of the Too-an-ooch or Twana group. [FPTO § 3–89; Ex. USA–23, p. 21] After the treaty all Indians of the Hood Canal drainage system, except the Port Gamble Reservation of Clallam Indians, have been referred to by the United States Government as Skokomish. [Ex. USA–23, p. 21]

135. Fishing was the most important food acquisition technique of the Twana Indians during treaty times, and salmonid fish (king, silver, humpback and chum salmon and steelhead) were one of their important sources of food. These fish were eaten fresh, were dried and were smoked for winter use. [FPTO § 3–90] Prior to and during treaty times the Twana Indians accumulated food surpluses with which they supplied feasts for invited guests from as far away as Carr Inlet and Vashon Island to the east and Satsop country to the southwest. [FPTO § 3–91; Ex. USA–23, p. 20]

136. Prior to and during treaty times the Twana Indians located villages for easy access to fishing stations. They took salmon and steelhead in saltwater areas by trolling, spearing and netting, and in freshwater areas by single dam and double dam weirs and similar types of traps. They maintained at least three important weir sites on the Skokomish River during the 1850's. The principal signatory of the Treaty of Point No Point for the Skokomish was in charge of an important weir on the Skokomish River. During treaty times the Twana Indians periodically removed lattice sections of their weirs, thus permitting fish to escape upstream to spawn. [FPTO § 3–92; Ex. USA–23, p. 1]

137. The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself. Saltwater trolling and spearing were less important than river fisheries. [Exs. USA–20, p. 33; USA–23, pp. 18–22; Ex. PL–42, pp. 389–390; Ex. USA–31e, pp. 238–244]

138. The Skokomish Indians, despite the fact that they could increase fishing effort on their reservation by utilization of fishing sites not in use, have not in recent years cropped the entire available harvestable portion of the coho run even when asked by the Department of Fisheries to fish harder. [Tr. 2596, *l.* 4–19; Ex. F–28, p. 5, *l.* 8–10; Tr. 3872, *l.* 13–18; Ex. PL–77; Ex. PL–81] It is possible, and in the interest of full use of the resource consistently with conservation, to allow a greater Skokomish Indian fishery, off-reservation in the saltwater areas, on the Skokomish River coho runs than the State presently allows. [Tr. 3872, *l.* 13 to 3874, *l.* 12]

Squaxin Island Tribe

139. The Squaxin Island Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to some of the Indian tribes or bands which were parties to the Medicine Creek Treaty. It is recognized by the United States as a currently functioning Indian tribe

maintaining a tribal government on the Squaxin Island Reservation. This tribe is organized pursuant to section 16 of the Indian Reorganization Act of June 18, 1934. Its membership is determined in accordance with its Constitution and Bylaws approved by the Secretary of the Interior July 8, 1965. It has a membership roll approved by a representative of the Secretary of the Interior on April 24, 1971. Its current membership is approximately 175. [FPTO § 3–21; Ex. PL–63]

140. The Squaxin Island Tribe is composed primarily of descendants of the original inhabitants of all the inlets of upper Puget Sound from South Bay on Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included within this area are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets. The Indian inhabitants of these inlets were listed separately by local group name in the preamble to the Treaty of Medicine Creek as follows and were included in that treaty: Squawksin, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish. Pursuant to the Treaty these Indians were relocated on the Squaxin Island Reservation and thereafter were dealt with by the United States as a separate and collective entity under the name "Squaxin" (spelled variously). [FPTO § 3–95; Ex. USA–24, pp. 17–18]

141. During treaty times the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing placed in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets. Customary use patterns varied according to the types of water areas, with freshwater fisheries being controlled by the residents while the deeper saltwater areas were open to anyone who traveled thereon. Their fishing techniques included trolling, stream weirs, spearing and tidal traps. These Indians continued to fish these areas following their relocation on the Squaxin Island Reservation and to rely in part on fishing for subsistence and monetary income. Salmon fishing and the

fishing areas used by their predecessor bands continue to be important to members of the Squaxin Tribe. [FPTO § 3–98]

142. Through agreement with the Department of Fisheries, the Squaxin Island Tribe has closed fishing on the small streams outside the Squaxin Island Reservation to protect the salmon spawning areas and the tribal fishermen have shifted their treaty fishing into Puget Sound marine areas under a special Fisheries Department season. [FPTO § 3–603; Ex. JX–2a, App. II, pp. 316–317] The tribe has adopted fishing regulations similar to the off-reservation regulations of the Department of Fisheries, and the tribe feels its own regulations are reasonable and necessary for conservation. [Ex. JX–2b, pp. 39–41; Tr. 1048, *l.* 17 to 1049, *l.* 7; Tr. 2488, *l.* 7–15]

143. The Squaxin Island Tribe, with the cooperation of the Department of Fisheries, maintains a rearing program for chinook and coho salmon. It has grown in three years from four floating pens, each twelve feet square, to ten floating pens, each sixty feet square, and from 250,000 to 750,000 fish. The fish, provided in large part by the Department of Fisheries, are raised by the tribe and sold commercially. Some are released into the Sound for the benefit of all fishermen. [Tr. 2485, *l.* 18 to 2486, *l.* 12; Tr. 2493, *l.* 6 to 2496, *l.* 11]

Stillaguamish Tribe

144. The Stillaguamish Tribe is composed of descendants of the 1855 Stoluch-wa-mish of the Stoluch-wa-mish River. The population in 1855 resided on the main branch of the river as well as the north and south forks. The Stillaguamish were believed to number about 200 people in 1855, but the actual number may have been over double that figure. The name Stillaguamish, under various spellings, has been used since about 1850 to refer to those Indians who lived along the Stillaguamish River and camped along its tributary creeks. [Ex. USA–28, pp. 1, 23] They were a party to the Treaty of Point Elliott and are referred to in the preamble of that treaty under the spelling "Stoluck-wha-mish". [Ex. USA–28, p. 15; Ex. PL–

65; Ex. G–4, p. 179; Tr. 2415, *l.* 22 to 2416, *l.* 9] No signatory is identified as belonging to that group, but they were designated as subordinate to Patkanam who signed the treaty as head chief for the Snoqualmoo and associated tribes. [Ex. G–4, p. 179; Ex. USA–28, pp. 15, 23]

145. No separate reservation was established for the Stoluch-wha-mish Indians. They were allowed to move to reservations established in the general area near them and some moved to the Tulalip Reservation, but the majority remained in the aboriginal area along the Stillaguamish River. The membership of the Stillaguamish Tribe is determined in accordance with the tribal Constitution and Bylaws which have been approved by the tribe but have not been approved by a representative of the Secretary of the Interior. [FPTO § 3–22; Ex. USA–28, p. 23] The Stillaguamish Tribe is not recognized as an Indian governmental entity by the federal government. Its enrollment has not been approved by the Secretary of the Interior or his representative and the tribe does not have a reservation. [Exs. USA–43, pp. 21–2 31; USA–44, pp. 2, 36] The Stillaguamish Tribe presently has about 94 members. [Ex. MS–7, p. 4, *l.* 1–2]

146. During treaty times and for many years following the Treaty of Point Elliott, fishing constituted a means of subsistence for the Indians inhabiting the area embracing the Stillaguamish River and its north and south forks, which river system constituted the usual and accustomed fishing places of the tribe. Salmon and steelhead were eaten in both fresh and cured form. These Indians had names for four or five species of salmon, steelhead and other indigenous fish. They took salmon and steelhead by spearing, harpooning, traps and weirs (with dip nets) at various places in those watercourses. The Stillaguamish Indians still consider fishing as a source of food today, and are interested primarily in a personal use fishery. [FPTO § 3–100; Exs. USA–20, p. 38; USA–28, p. 23; Ex. F–43, p. 7, *l.* 5–17; Tr. 2714, *l.* 2–17]

Upper Skagit Tribe

147. The Indian Claims Commission determined, in The Upper Skagit Tribe of Indians v. United States of America, Docket No. 92, 8 Ind. Cls. Comm. 475, 476–77, 491, that the Upper Skagit Tribe is the successor in interest to the rights of an identifiable group of American Indians identified as ten separate villages on the Upper Skagit and Sauk Rivers in treaty times and subsequently known as "the Upper Skagit Tribe". These antecedents of the Upper Skagit Tribe were signatory parties to the Treaty of Point Elliott. [Ex. G–17 (*l*), p. 477; Ex. G–4, p. 180] No separate reservation was established for the Upper Skagit Indians in their area. They were permitted to move to reservations established in the general vicinity. Most of those who moved to a reservation moved to the Swinomish Reservation, but the majority remained in their aboriginal area. The membership of the Upper Skagit Tribe is determined in accordance with articles of Association adopted in 1962. The tribe is not organized pursuant to any federal law. [FPTO § 3–23; Ex. UPS–2] No enrollment has been approved by the Secretary of the Interior or his representative. [FPTO § 3–23; Ex. UPS–2; Exs. USA–43, pp. 24, 31; USA–44, pp. 2, 36] The tribe has approximately 500 members. [Tr. 3254, *l.* 4–7]

148. At treaty time, the usual and accustomed fishing places of the Upper Skagit Tribe included numerous areas along the Skagit River, extending from about Mt. Vernon upstream to Gorge Dam. [Tr. 3272, *l.* 25 to 3276, *l.* 17] Today the tribe has about thirty fishermen, interested primarily in a subsistence fishery. [Tr. 3254, *l.* 8 to 3255, *l.* 1]

Yakima Nation

149. The historical background information concerning the Yakima Nation, as shown by the written testimony (Exhibits Y–13 and Y–26) and oral testimony of Yakima tribal members educated in Yakima history and customs by tribal elders, was not controverted in the evidence and is found by the court to be reasonable and credible factual

data regarding relevant aspects of Yakima Indian life at and prior to treaty time, including the Yakima treaty council and the intentions and understandings of the Indian representatives there present.

150. The Yakima Nation is a party to the Treaty with the Yakimas. [Ex. Y–6] It is recognized by the United States as a currently functioning Indian tribe composed of the tribes and bands consolidated into the Yakima Nation by that treaty and maintaining a tribal government on the Yakima Indian Reservation, located in South Central Washington. Its membership is determined in accordance with the provisions of the Act of August 9, 1946, 60 Stat. 968, 25 U.S.C. §§ 601–607 [Ex. Y–7] and its membership roll is kept current and is approved by a representative of the Secretary of the Interior. It presently has approximately 6,040 enrolled members. [FPTO § 3-24; Ex. Y–13, p. 2, *l.* 30 to p. 3, *l.* 12; Tr. 3292, *l.* 19 to 3294, *l.* 2]

151. In the main, at the time of the treaty, the Indians who were parties to the Yakima Treaty lived in a food gathering culture. They existed on game, fish, roots, berries and some cultivated vegetables. Of these foods fish was a major food and they landed salmon, steelhead, trout, mussels, eel, and other miscellaneous fish. Salmon, however, both fresh and cured, was a staple in the food supply of these Indians. It was annually consumed by these Indians in the neighborhood of 500 pounds per capita. Circumstances necessitated that large quantities of fish, fish oil, roots and berries be cured in adequate quantities to insure a sufficient and balanced diet for those periods of the year when the fresh supply of these commodities was not available. Quantities of fish in considerable numbers were preserved for future use through smoking and drying. The choice of the method depended on the climatic conditions and the availability of firewood. It was customary for these Indians to manufacture pemican. This was accomplished by pounding the dried strips of fish until quite fine and packing the resultant mass in containers lined with fish skin. In this process oil was used where available and the oil from male

steelhead was used for this purpose. Because of the monotony of this fish diet, variety in the kind of salmon and other fish caught was a desired goal. [FPTO § 3–102]

152. With the exception of the spear, gaff and like gear which to a great extent depended on the skill and dexterity of the individual operator, methods used by the Yakima Indians to land salmon and steelhead were very efficient. These Indians used traps, weirs, nets, gill nets, baskets, and seines to land salmon and steelhead. They were proficient in the manufacture of strong twine from native materials. [FPTO § 3–103]

153. Indians from the Yakima Nation and particularly those from the Yakima, Klickitat, Wenatchee, Columbia, Chelan, Entiat and Kittitas aboriginal groups communicated continually with the tribes on Puget Sound by the use of the Snoqualmie, Naches and Stevens Passes as weather permitted. This continual communication created bilingualism, custom interchange, intermarriage and utilization of the natural resources in the Puget Sound area. In the main this communication and intermarriage was with the tribes now considered Nisqually, Puyallup, Muckleshoot and Snoqualmie. [FPTO § 3–104] The Yakimas in the Puget Sound area were intermarried as far north as the Skokomish and controlled them to a certain extent. Gibbs in his treaty time census placed approximately 400 Yakimas in the case area. [Exs. Y–15a and Y–15b; Tr. 2132, *l.* 10 to 2133, *l.* 10]

154. At the time of the treaties the Indians of the Yakima Nation used fisheries located in the Puget Sound area for the purpose of obtaining salmon and steelhead primarily for their use. [Ex. F–35, p. 9, *l.* 10 to p. 10, *l.* 14; p. 11, *l.* 15–19; p. 13, *l.* 3–7]Some of these fish taken by Yakimas were consumed by them and some were traded to other Indians. [Ex. Y–13, p. 9, *l.* 7–9; Tr. 3299, *l.* 4–7]They took these fish there by the consent of the tribes in that region. Since there was more intermarriage and communication with those Indians now called Nisqually, Puyallup, Muckleshoot, and Snoqualmie, fisheries in their area of residence were more commonly used by members of the

Yakima Indian Nation. These fisheries in the area of this case's inquiry included the waters of the Snoqualmie, Snohomish, Green, Puyallup, Nisqually, Stuck, Duwamish, White, Carbon, and Black Rivers and their tributaries [FPTO § 3–105]

155. There had been little non-Indian contact with the Yakimas prior the the treaty negotiations. [Ex. Y–26, p. 7, *l.* 4 to p. 8, *l.* 24] The Indians who were subsumed into the Yakima Nation spoke three different languages, Sahaptin, Salish and Chinookan and had many dialects within the two principal language groups. [Ex. Y–26, p. 7, *l.* 9–13] The treaty negotiations were translated from English or one of these three groups or numerous dialects into Chinook jargon [Ex. Y–26, p. 9, *l.* 9–10; Ex. D–1, p. 24, *l.* 26–30] which has a limited vocabulary and contained none of the words "citizens", "territory", "state", "regulations", "commercial", and "usual and accustomed". [Ex. Y–21; Ex. G–29(a); Tr. 3393, *l.* 11 to 3394, *l.* 1] This jargon was used principally for trade purposes and was inadequate to convey the legal concepts involved. [FPTO § 3–37]

156. At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising. [Ex. Y–13, p. 8, *l.* 6–15; Ex. Y–26,p. 8, *l.* 29 to p. 9, *l.* 8; Tr. 3295, *l.* 16 to 3297, *l.* 8] The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty. [Ex. Y–13, p. 8, *l.* 16–23]

157. After the treaty was concluded, the Yakima Indians continued to fish as they had. During territorial times officials of the United States and Washington Territory took the position that the off-reservation fisheries were those the Yakima Indians had exercised at treaty or pretreaty times. These officials took the position that the words of the treaty reserved to the Yakima Indians "the right to enjoy all of these fisheries as they had

heretofore." [Ex. Y-23, p. 10] The Supreme Court of Washington Territory not only sustained this interpretation of the treaty but took notice as a matter of common knowledge that the Yakima Indians were "tenacious" in adhering to these past customs and traditions. [Ex. Y-23, p. 10]

158. The Yakima Indians have continued to assert their off-reservation fishing rights, [Tr. 611, *l.* 21 to 612, *l.* 4 and *l.* 14 to 615, *l.* 15] including fisheries in the case area. [Tr. 3321, *l.* 10-18] The salmon and steelhead landed were consumed or sold commercially. [Ex. Y-13, p. 9, *l.* 13-16] Arrests of Yakima Indians in the case area since 1966 have caused Yakima fishermen to decrease their fishing effort in that area. The Yakima Nation has not encouraged its fishermen to fish in the case area as time and money limitations would not allow the tribe to protect its fishermen from conviction though the tribe's efforts had been successful as regarded other state arrests. [Ex. Y-13, p. 9, *l.* 15 to p. 10, *l.* 7]

159. The Yakima Nation has promulgated fishing regulations for its members in areas east of the Cascade Mountains but has no fishing regulations within the case area. [Ex. JX-2b, pp. 54-61; Tr. 3302, *l.* 22-24] The Yakima off-reservation fisheries in the Columbia river area are regulated. Prior to 1953, and thereafter in areas where the fishing was not intensive, regulation was by Indian leaders at the site. [Ex. Y-13, p. 10, *l.* 12 to p. 11, *l.* 1; Tr 3307, *l.* 12 to 3308, *l.* 19] Since 1953 the Yakima Nation has regulated by written regulations. [Ex. Y-13, p. 11, *l.* 4-12] These regulations provide for annual review, emergency closures, off-reservation enforcement and identification cards. [Tr. 610, *l.* 6 to 611, *l.* 18; Tr. 3291, *l.* 15 to 3292, *l.* 22] Untended fishing gear is identified by tags issued by the Yakima Nation. [Tr. 3328, *l.* 25 to 3329, *l.* 6] The Yakima Nation, through its Tribal Council and its Fish, Wildlife, Law and Order Committee which has an annual budget currently exceeding $400,000.00, gathers biological and other information with assistance from federal biologists, and holds meetings with its fishermen

and others interested before setting seasons or passing other conservation regulations. [Ex. Y-13, p. 2, *l.* 5-24, p. 11, *l.* 13-16; Tr. 1618, *l.* 3 to 1619, *l.* 6; Tr. 3300, *l.* 8 to 3301, *l.* 10] The tribal regulations are enforced by a large law and order department. [Ex. Y-26, p. 2, *l.* 10-29]

160. The Yakima Nation expects its fishermen to respect the regulations of the tribes in the case area. [Ex. Y-13, p. 11, *l.* 19-24] Should further regulation be necessary the Yakima Nation has expressed its intent to confer with other tribes in the area for the purpose of joint regulation, but if the latter did not protect the fishery then the Yakima Nation's expressed intention is to enact conservation regulations of its own covering the case area. [Tr. 3303, *l.* 18 to 3305, *l.* 5] It is likewise the expressed policy of the Yakima Nation in its scheme of regulation to provide for commercial, subsistence and ceremonial landings of salmon and steelhead by net where the fishery will sustain the pressure. Where in the tribe's opinion the fishery will not sustain the pressure, it is the announced policy of the tribe to provide for the following priorities: 1) ceremonial landings; 2) subsistence landings; and 3) commercial landings. [Tr. 956, *l.* 1 to 957, *l.* 17] The Yakima Nation has had successful experiences in joint tribal regulation on the Columbia River [Tr. 3329, *l.* 7-23] and joint regulation with the state and federal government on the Klickitat River. [Ex. Y-13, p. 11, *l.* 25 to p. 12, *l.* 4]

161. Yakima landings for at least ceremonial and personal use in the case area can take place without jeopardizing the continued existence of the fish resource. [Tr. 957, *l.* 25 to 958, *l.* 12; Tr. 959, *l.* 13 to 960, *l.* 5]Yakima tribal regulation of Yakima fishermen at usual and accustomed places in the case area is a matter of genuine interest to the tribe. [Tr. 295, *l.* 1-9; Tr. 960, *l.* 6-23]

162. The Yakimas continue as a religious rite not only the first salmon ceremony but the basic, undying salmon culture existing in this northwest area, and this religious concept of the interdependence and relatedness of all living things is a dominant feature of their lifestyle. [Ex. Y-13, p. 7, *l.* 1-23; Tr. 3297, *l.* 9-15; Tr. 3352, *l.* 17 to 3353, *l.* 2; Tr. 3402, *l.* 7-10]

163. The Yakima Indians have been and continue to be very dependent on anadromous fish to sustain their way of life. [Ex. Y-13, p. 13, *l.* 25 to p. 14, *l.* 2; Ex. Y-10, pp. 31-36; Ex. Y-12, pp. 12-16] They live close to the poverty level and have not reached economic or social parity with non-Indian citizens of the State of Washington. [Ex. Y-13, p. 4, *l.* 13 to p. 5, *l.* 20; Ex. Y-10, pp. 16-26; Ex. Y-9, pp. 2-8; Ex. Y-8, pp. 1-4] Anadromous fish are vital to the Indians' diet with approximately 2,000 of the enrolled members fishing for personal consumption. Approximately four hundred tribal members fish commercially for the most part in the Columbia River area, with only about five Yakima commercial fishermen in the case area. [Tr. 3340, *l.* 5-11]

GENERAL FISHIERIES CONSERVATION AND MANAGEMENT

164. A great many of the biological, fisheries management, and fisheries harvest facts relevant to the issues in this case are set out in Exhibits JX-2a and JX-2b, which are an extensive Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsula Drainage Areas of Western Washington dated May 14, 1973, prepared for this case by staff biologists of the Washington Department of Fisheries, the United States Fish and Wildlife Service, and the Washington Department of Game. The contents of said report are hereby incorporated by reference as Findings of Fact herein. [FPTO § 3-400]

165. On June 16, 1973, the United States exercised its right to terminate the recognition given to Canadian fishermen to fish in the contiguous zone (established by 16 U.S.C. §§ 1091-1094) off the coast of Washington south of Carroll Island located at approximately 48° north latitude. (Cf. Ex. JX-2a, § 2.12, pp. 100-101) [FPTO § 3-401]

166. The principal river systems, marine waters and Indian reservations in the case area are depicted on the base map (Exhibits JX-1a and 1b and JX-2a, p. ii) There

are numerous lesser streams that are important producers of salmon and steelhead. Many of these are depicted on Exhibit F-71. [FPTO § 3-400; Ex. JX-2a, § 1.2, pp. 9-12; Tr. 749, *l.* 24 to 774, *l.* 18; Tr. 3592, *l.* 11 to 3593, *l.* 8]

167. Under Washington State law the protection and management of those fish which the State has classified as food fish is under the jurisdiction of the Department of Fisheries headed by a director who is appointed by and serves at the pleasure of the Governor. Salmon are classified as food fish under current Washington law. The Defendant Thor C. Tollefson is the Director of the Fisheries Department, and as such is vested with the authority to exercise all of the powers and duties of that department, including the authority to issue regulations pursuant to state laws and to enforce said laws and regulations. [FPTO § 3-25; Ex. JX-2a, § 2.5, p. 67]

168. Under Washington law, the protection and management of those species of fish which the state has classified as game fish is under the jurisdiction of the Department of Game which consists of the State Game Commission and the Director of Game. [FPTO § 3-26; Ex. USA-39, p. 1; RCW 77.04.020] The Game Commission is the entity which has the authority to adopt rules and regulations governing the time, place and manner of taking game fish. [Ex. USA-39, p. 8; RCW 77.12.040] The Game Commission consists of six part-time commissioners having the qualifications prescribed by RCW 77.04.040 appointed for staggered six-year terms by the Governor. Three commissioners must come from west of the Cascade Mountain summit and three from the east of that summit. The director is appointed by and serves at the pleasure of the Commission. Defendant Carl Crouse is the Director of the Department of Game. Steelhead are classified as game fish under current Washington law. [FPTO § 3-26] In 1925 the state legislature declared steelhead a game fish when taken in fresh water. Previously state fisheries legislation had defined "salmon" as including steelhead. After 1925 the State imposed progressively greater restrictions on the commercial dealings in steelhead and in

1933 steelhead came under the full protection of the State Game fish regulations. [Ex. JX–2a §§ 2.3.1 and 2.3.2, pp. 60–63; Ex. PL–2, pp. 164, 168; Ex. G–15, p. 3, *l.* 25–32]

169. Fisheries management takes into consideration both the resource itself and the objectives and needs of the societies which control and seek to utilize it. The commercial, sport and Indian fisheries are managed for different use objectives and user interests. Accordingly, the objectives of fisheries management vary in accordance with the purposes and constituency for which the particular fishery is being managed. Commercial fisheries are managed to achieve a maximum sustained yield in terms of food and economic profit, whereas sport fisheries are managed to obtain a maximum sustained recreational experience and a high yield of personal use food and "trophy" product. The Indian tribes have as their primary use objectives the fostering of Indian economic well-being, the preservation of Indian cultural heritage and way of life, and the provision of a significant element of Indian diet. [Ex. JX–2a, § 2.1.0, pp. 47–48]

170. Although the need for management of the fisheries resource, and the methods used, depend upon biological analyses, the actual techniques, like the ultimate objectives, involve political and economic considerations. [Ex. JX–2a, § 2.2.5.3, p. 58] Similarly, economic and political considerations are also used to determine who will harvest varying portions of the resource. The Department of Fisheries recognizes that Indians are a user group with legitimate interests in the fisheries. [Tr. 799, *l.* 2 to 801, *l.* 6; Ex. PL–89] One method, which is favored by some fisheries biologists, of providing an acceptable measure of balance between resource users is to limit entry into the commercial salmon fisheries. However, the Washington legislature has not authorized this. [Ex. PL–89]

171. The anadromous fishery resource is both perishable and renewable. Thus, while an over-harvest would impair its renewability, an under-harvest during a limited time it is available would result in an irreplaceable

waste of the resource. [Ex. JX–2a, § 2.1.0, p. 47] In addition to being wasteful, over-escapement of fish on the spawning ground can impair the renewability of the resource by causing a condition called "superdeposition" where the last fish that comes in and spawns either spawns directly over the first brood of eggs that were in the redds, or digs them up. Superdeposition can destroy eggs outright and also increase the susceptibility to disease of the eggs remaining. [Tr. 859, *l.* 21 to 860, *l.* 15] Salmon and steelhead frequently spawn in the same areas of the various river systems. [FPTO § 3–453]

172. Managing the commercial fishery for maximum sustained profit requires, among other things, that the harvest occurs near the time when the available "crop" has obtained maximum bulk and quality. These do not necessarily coincide in time and place. Thus the proper time for commercial harvest corresponds most nearly to the relatively brief period of time when the fish are full grown and returning to or entering their natal stream to spawn. Net fishery seasons permit the efficient taking of mature or nearly mature fish for commercial purposes during this time period only. [Ex. JX–2a, § 2.1.1, p. 48]

173. Managing sport fisheries for maximum sustained recreation requires providing ample opportunities for fishing. Long seasons, economically and geographically accessible waters, and high catches per individual effort all increase recreational yield. Feeding and growing salmon in the ocean and Puget Sound are of greatest recreational value because they are vulnerable to sport gear over long periods. On the spawning migration route from their saltwater feeding areas, full-grown salmon are available to anglers for only a short period of time. Feeding activity of these latter fish diminishes or ceases as they complete their saltwater migration period. The efficiency of angling gear is them measurably decreased. In some Puget Sound areas where are in or approaching their natal estuary, the catch rate is commonly one-tenth that of the ocean fishery. In contrast to salmon, steelhead actively feed throughout their entire migration route and are readily available to

sport gear in freshwater areas. They are not generally taken by sport gear in saltwater. [Ex. JX–2a, § 2.1.2, pp. 48–49]

174. Management for Indian objectives is closer to commercial management than to sport inasmuch as pursuit of an economic livelihood and the efficient procurement of a food supply are major purposes. In addition, salmon and steelhead have special significance in the religious and cultural mores of the Indian people. Because of traditions, treaty provisions, and location of Indian communities, the Indian fisheries are largely place-oriented. Management for Indian fishery objectives must consider this factor. [Ex. JX–2a, § 2.1.3, pp. 49–50]

175. The Department of Fisheries has not regarded the salmon sport fishery in Puget Sound and on the ocean as a major regulatory concern, because, as compared with the commercial net fisheries, the sport fisheries do not need to be managed on a day-to-day basis. [FPTO § 3–581]

176. Among the plaintiff Indian tribes only a few today are active in marine fisheries. The Makahs and Quileutes have troll fisheries off the coast. The Makahs also pursue both troll and gillnet fishing in the Strait of Juan de Fuca. The Lummi Indians use gill nets in Puget Sound. The Squaxin Island Indians conduct gill net fisheries in the saltwater inlets of the mainland near their reservation. [Ex. JX–2a, § 3.3.6, p. 128] Indian river fisheries are currently exercised at the mouths and varying distances upstream from the mouths of coastal and Puget Sound rivers. Among the rivers so utilized are the following: Nooksack, Skagit, Stillaguamish, Green, Puyallup, White, Nisqually, Skokomish, Sekiu, Hoko, Sooes, Waatch, Ozette, Quillayute, Hoh, Queets and Quinault Rivers. [Ex. JX–2a, § 3.3.7, p. 129] Indian river fisheries take place in confined areas where there are concentrated passages of fish which may require careful regulation to protect the run. [Ex. F–28, p. 8, *l.* 10–15] Where escapement requirements thought necessary by the Department of Fisheries have been achieved, it has been

by stringent control of harvest near or in the parent streams. [Ex. JX–2a, § 2.6.2.0, p. 73]

177. From a broad biological and managerial standpoint, conservation of fish resources means to protect and improve the habitat that produces the resource, to manipulate stocks of fish to achieve necessary spawning escapement so as to maintain, perpetuate and enhance the resource, and to put the harvestable portion of the resource to beneficial use. [Tr. 1049, *l.* 12–19; Tr. 1472, *l.* 1–9] This concept of conservation must be considered in the light of the entire regulatory pattern because all harvesting regulations that restrict time, place and manner of taking fish are interrelated in their application to competing user groups. [Tr. 1055, *l.* 4 to 1056, *l.* 8; Tr. 1480, *l.* 6–12; Ex. F–27, p. 4, *l.* 30 to p. 5, *l.* 1; Tr. 1476, *l.* 9–16]

178. Assuring proper spawning escapement is the basic element of conservation involved in restricting the harvest of salmon and steelhead. Once that has been achieved, the regulations on time and manner of fishing are designed to facilitate the harvest of the excess and distribute it among users in a manner consistent with meeting use objectives of the people who are going to harvest. [Tr. 1160, *l.* 17 to 1165, *l.* 3; Ex. F–28, p. 35, *l.* 30 to p. 36, *l.* 8]

179. Under the present complex harvest scheme used by the State to manage the fish resource, regulation has three main purposes: 1) to preserve the fish stocks; 2) to attain the maximum sustained yield; and 3) to provide an orderly fishery. To accomplish these purposes, all the runs and races of fish that spawn in the various streams of the Puget Sound and coastal areas should be recognized. In order to regulate effectively, the State finds it desirable to have: 1) accurate catch and escapement statistics on all races; 2) a forecast of run size; 3) estimates of the number of spawners that can be accommodated in the streams used for spawning; and, 4) information on the number of units of gear, their efficiency, and the fishing time needed to make the catch. [Ex. JX–2a, § 2.2.5.0, pp. 54–55]

180. Regulations designed to preserve fish stocks by limiting the harvest to ensure run survival can be grouped into two major categories: 1) those designed to protect selected portions of a stock of fish, and 2) those designed to limit the size of the take. Net restrictions, closed areas, closed seasons and size and weight limits are examples of regulations designed to protect selected portions of a fish stock. Limitations by quota in a very few special situations, limitation of the number of fishing units, and limitation of gear efficiency are examples of regulations designed to limit the size of catch. [Ex. JX–2a, §§ 2.2.5.0, 2.2.5.1, 2.2.5.2, pp. 55–57]

181. It is necessary for the fishing activity of Indians and non-Indians to be regulated in order to assure that conservation of the fishery resource is achieved. [Ex. F–28, p. 4, *l.* 14–23; Ex. F–35, p. 24, *l.* 12–26; Tr. 3465, *l.* 22 to 3466, *l.* 9] Observance of fishery regulations is important to the achievement of conservation of the resource. A regulation is more likely to be observed if it is simple to understand, reduces conflicts between interest groups, appears fair to, and wins the confidence of, the fishermen. For this reason, regulations which have as their purpose the attainment of an orderly fishery can be helpful in achieving conservation. [Tr. 1092, *l.* 17 to 1093, *l.* 15]

182. Salmon run sizes fluctuate from year to year, and it is generally necessary for the conservation of a particular salmon run that the regulation of the harvest on that run take into account the run's size. Catch fluctuations generally correspond with run size fluctuations. [Ex. F–28, p. 17, *l.* 3 to p. 18, *l.* 2; Tr. 1067, *l.* 10–19; Tr. 1373, *l.* 13 to 1374, *l.* 2; Tr. 3583, *l.* 6 to 3585, *l.* 6] In order to take run size into account, regulations will be more effective if they are based on estimates of predicted run size, adopted annually, and provide for emergency clauses so that as the runs return the regulations can be made to reflect their actual condition. [Tr. 1374, *l.* 10–16] Conversely, spawning escapement should be a fixed number of fish and should not fluctuate with varying run sizes. [Tr. 1070, *l.* 5–23; Tr. 1419, *l.* 25 to 1420, *l.* 6; Tr. 1446, *l.* 19–25]

183. The State does not limit the number of sport fishermen, either resident or nonresident, who may fish for either salmon or steelhead or the number of commercial fishermen who may fish for salmon in waters under its jurisdiction. [Ex. JX–2a, § 2.2.5.2, p. 57; Tr. 172, *l.* 14–19] In 1971 nearly four times as many persons obtained Washington punch cards to sport fish for salmon as obtained them to sport fish for steelhead. [Ex. JX–2a, § 3.2.7, p. 125, § 3.5.4, p. 137]

184. The State of Washington, by statute and regulation, has set aside the steelhead for the use and benefit of a special interest category of persons. Its limitations on the means by which, the purpose for which, and the numbers which any person can take of this species are designed to promote the use of this fish solely as a recreational attraction for residents of the state and non-resident tourists. [FPTO §§ 3–428, 3–436, 3–469; Tr. 112, *l.* 11–23; Tr. 1652, *l.* 3–13]

185. At the present time, the Department of Fisheries cannot completely control the ocean harvest of chinook and coho salmon because most of these fish are caught in waters beyond the state's jurisdictional three-mile limit. [Tr. 1144, *l.* 18–25; Tr. 3208, *l.* 11–13; Tr. 3505, *l.* 11 to 3506, *l.* 5; Tr. 3941, *l.* 21 to 3942, *l.* 2; Ex. F–32, p. 20, *l.* 9–13] A restriction on the ocean troll fishery in Washington waters probably would not greatly increase the number of chinook salmon returning to Puget Sound because Puget Sound chinook salmon migrate north out of the Strait of Juan de Fuca. [Ex. JX–2a, Fig. 7, p. 241] Canadian fishermen, fishing outside Washington territorial waters, are harvesting an estimated 65 per cent of Puget Sound-origin chinook and over 50 per cent of Puget Sound-origin coho salmon. [Ex. F–28, p. 13, *l.* 7–15; Ex. F–32, p. 11, *l.* 4 to p. 12, *l.* 1; Tr. 3603, *l.* 1 to 3604, *l.* 2] Seventy-five per cent of the ocean catch of Olympic Peninsula-origin chinook salmon occurs off the coast of British Columbia and southeastern Alaska. [Ex. JX–2a, § 1.6.2, p. 29] Ninety per cent of the ocean catch of Puget Sound-origin chinook salmon occurs off the coast of

British Columbia and southeastern Alaska. [Ex. JX–2a, § 1.6.3, p 29–30] Fifty per cent of the ocean catch of Olympic Peninsula-origin coho salmon occurs off the coast of British Columbia. [Ex. JX–2a, § 1.6.7, p. 33].

186. Exhibits F–7 through F–17 show the average annual distribution of catch in all waters of salmon from rivers on which there are Indian fisheries in the case area, excepting the Quinault and Queets Rivers, for all species in the period 1965–1970 and for pink salmon in the odd years from 1959 to 1969. [Exs. F–7 through F–17; Ex. F–28, p. 32, *l.* 3 to p. 33, *l.* 9; Tr. 1180, *l.* 20–23] On an average the following percentages of harvest from the respective stocks in these rivers during this period occurred in waters outside the territorial jurisdiction of the State of Washington: chinook, 58.9%; coho, 55.3%; pink, 29.4%; chum, 2.6%. [Ex. F–7] Other than control over fish landings in the State, there are no fish management regulations or practices which the State of Washington can unilaterally employ to effectively control fishing beyond its territorial waters. [Exs. F–32, p. 20, *l.* 9–13; F–28, p. 12, *l.* 19 to p. 13, *l.* 6]

187. Gill net fishing of the type and operation utilized by the Plaintiff tribes is not an inherently destructive means of harvesting salmonids (including steelhead), and it may be regulated and controlled sufficiently to prevent over-harvesting. [FPTO § 3–472; Ex. USA–36, p. 5, *l.* 18 to p. 6, *l.* 13] The amount of fish taken in nets may be regulated by regulation of net length, the type of the net, mesh size, the place of fishing and periods for taking. Net fisheries and hook-and-line fisheries can be regulated, from total prohibition to total permission, with all degrees of restrictions in between. [FPTO § 3–438]

188. From a biological standpoint one of the standards for determining the amount of fishing time to allow an Indian tribe is the anticipated impact of the tribe's fishery on the run. This is influenced by the number of fishermen and amount of gear that will participate. [Tr. 3840, *l.* 15 to 3841, *l.* 10.] It is estimated

by the Department of Fisheries that the following numbers of fishermen fish in the Indian, sport and commercial fisheries in the case area: Indian 794; sport 283,650; commercial 6,600. [Tr. 3645, *l.* 2 to 3649, *l.* 17]

189. Because Indian tribes sometimes sell their fish directly to out-of-state buyers, state catch records of Indian catch obtained from fish buyers in the State of Washington will not necessarily show the entire commercial catch taken by Indian fishermen. [Tr. 3478, *l.* 17 to 3479, *l.* 5; Tr. 3502, *l.* 19 to 3504, *l.* 2]

190. Historically, limitations on the Indians' catch were controlled by: 1) the needs of the relatively small human population; 2) the efficiency of the Indians' fishery as affected by natural phenomena; and, 3) tribal custom and religious commandments. More recently, individual Indian tribes have established written regulations controlling the taking of fish by their members. Others have practiced limitations without formal written regulations. [Ex. JX–2a, § 2.10.4, p. 97] From time to time each of the Plaintiff reservation tribes has enacted written fishing regulations. These regulations deal with the times, places and manner of fishing. Examples of current tribal regulations are included in Exhibit JX–2b. [FPTO § 3–651] Other examples are contained in Exhibits L–9 and QN–1. [Ex. JX–2a, § 2.10.4, p. 97; Tr. 2997, *l.* 2–15; Tr. 3487, *l.* 18–22]

191. Since 1967 the United States Bureau of Indian Affairs has issued identification cards, or approved the issuance of tribal identification cards, co-signed by an authorized Bureau official and tribal chairman, to persons who establish to the satisfaction of both the Bureau official and the tribe that they are members of a BIA-recognized Indian tribe which the Bureau recognizes as having off-reservation fishing rights pursuant to any of the treaties listed in Paragraph 1 above. [FPTO § 3–650; Exs. USA–46c, 46d, 46e, 46f, 46g, 47 and 48; Exs. PL–5 and 48; Ex. USA–54, p. 4, *l.* 18 to p. 9, *l.* 23] Regulations issued by the Secretary of the Interior and published in the Code of Federal Regulations (at 25 CFR Part 256)

require that such cards be carried, and be shown on demand to state, federal or tribal enforcement officers, by any Indian exercising treaty fishing rights outside of Indian reservations. The regulations provide that such cards will be prima-facie evidence that the authorized holder is entitled to exercise the treaty fishing rights specified thereon. In 1967 the Bureau of Indian Affairs notified state authorities, including the Department of Fisheries and the Department of Game, of the procedures concerning the issuance of such cards and has furnished them facsimiles of the BIA cards. The Bureau of Indian Affairs maintains lists of all persons to whom such BIA cards have been issued. Upon specific request from state authorities concerning the Indian status or tribal membership of specific individuals, the Bureau has advised state authorities of the information it has on such status. [Exs. USA–46c, 47, 48 and 54, p. 4, *l.* 18 to p. 9, *l.* 23; Tr 1585, *l.* 20 to 1586, *l.* 15; Tr. 1588, *l.* 1–14; Tr. 1601, *l.* 2–9]

192. Tribal fishing regulations are not technically reviewed for their content in terms of conservation goals prior to the time of or as a condition for their approval by the Bureau of Indian Affairs. However, the Bureau has asked the federal Bureau of Sport Fisheries and Wildlife to work with Bureau of Indian Affairs' staff and with the tribes in the review of tribal regulations before they become effective, so that there is some biological input. [Tr. 1607, *l.* 3 to 1611, *l.* 2]

193. Enforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians. [Tr. 2623, *l.* 6 to 2633, *l.* 22; Tr. 2694, *l.* 12–23; Tr. 2854, *l.* 24 to 2865, *l.* 6; Tr. 2876, *l.* 21 to 2878, *l.* 4; Tr. 3004, *l.* 25 to 3012, *l.* 8; Tr. 3014, *l.* 4–13; Tr. 3017, *l.* 9 to 3022, *l.* 3]

194. In dealing with fishing by members of the

Plaintiff tribes in a manner different from that expressly provided in their respective regulations, both the Game Department and Department of Fisheries have seized nets and other property of those members and have released, confiscated and attempted to prevent the sale and transportation of anadromous fish which are under their respective regulatory jurisdictions and which have been caught by those members. [FPTO §§ 3–5, 3–7]

195. Both the Fisheries and Game Departments have, on several occasions, disposed of or retained for unreasonably long periods of time (often extending over longer periods than one year) boats, nets, whether attended or unattended, or other property of members of the Plaintiff tribes and fish taken from the nets of such members. The tribal members have not been notified of the institution of any proceedings for, or acquisition of, judicial confiscations or forfeitures of said items by the State. [Tr. 604, *l.* 14 to 605, *l.* 18; Tr. 625, *l.* 4 to 627, *l.* 5; Tr. 2623, *l.* 6 to 2633, *l.* 22; Tr. 2657, *l.* 14 to 2659, *l.* 10; Tr. 2687, *l.* 12 to 2688, *l.* 16; Tr. 2876, *l.* 21 to 2878, *l.* 4; Tr. 3195, *l.* 17 to 3198, *l.* 16; Tr. 3204, *l.* 9 to 3205, *l.* 19]

196. (This Finding of Fact also may be, in part, a Conclusion of Law.) As applied to Plaintiff tribes and their members, the restrictions imposed by each of the following state statutes and regulations are broader than are necessary for the preservation of the fishery resource: RCW 75.08.260, RCW 75.12.060, RCW 75.12.070, RCW 75.12.160, RCW 77.08.020, RCW 77.12.100, RCW 77.12.130, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, RCW 77.16.060, WAC 220–20–010, WAC 220–20–015(2), and WAC 220–47–020.

197. The court has fully considered defendant Department of Fisheries' proposed Findings of Fact 111-115, 118-122, 125, 126, 129, 133 and 137, joined in by defendant Department of Game. These proposed Findings of Fact, which to some extent connote Conclusions of Law, generally reflect opinions, conclusions and judgments of Fisheries' officials regarding the requirements and procedures of an efficient management program for anadromous

fish. While most of these proposals appear to be reasonable, general policies or goals, in many instances their factual or legal validity cannot be determined in vacuo, but must await specific factual situations for application. On the present record, this court is not satisfied that these proposed Findings of Fact either are or are not established. Therefore, subject to the continuing jurisdiction retained in this case, the court reserves ruling on the above-specified proposed Findings of Fact at this time.

DEPARTMENT OF FISHERIES POLICIES AND PRACTICES

198. The Fisheries Department has broadly summarized its objectives as follows:

> "1. To conserve and, where possible, expand the primary fishery resources;
> "2. To promote optimum use of the fisheries resource by fishermen (commercial, sport, and Indian), the fishing industry, and general public;
> "3. To encourage harvesting of the sustainable yield of fish in a manner that provides the greatest return to the economy;
> "4. To develop public understanding of the fishery resource, its environment, and the philosophy governing exploitation of the resource, and to maintain public respect for the law."

The Department manages and regulates the harvest of the salmon resource for each of the three distinctive fisheries which it recognizes, i.e., commercial, sport and Indian. The differences in use objectives of these three fisheries dictate that separate management policies be applied to each. [Ex. JX-2a, § 2.5 pp. 67-68] Typically, the special treaty Indian fisheries are the last of the user groups to take from the run. [FPTO § 3-601]

199. In regulating the various salmon fisheries, the Department of Fisheries compiles and examines daily catch reorts, and compares those reports with reports in previous years. If the comparison and other indicia of run size should indicate that the particular run is larger than

the Department's predicted run size, the Department generally extends its seasons; if the comparison shows a smaller run, the department takes emergency action to restrict the length of its seasons. [FPTO § 3-580]

200. The Department of Fisheries begins planning its commercial salmon regulations in December preceding the season which opens the following summer. Regulation proposals are prepared in January and it is at that time that it is desirable to have information on the Indian fishery to be undertaken in the forthcoming season. [Tr. 1079, *l.* 7 to 1082, *l.* 18; Tr. 1088, *l.* 19 to 1089, *l.*2; Ex. F-5]

201. A principal method of limiting the commercial take from the salmon runs is limitation on the number of days when fishing is permitted. The Department attempts to provide that the number of days permitted is at the same point in a run, relative to its peaks and low points, such that, if the commercial fishermen in the North Sound are given their days during the time when the run is at its peak in those areas, the Indian fishermen in the rivers are being given their days during the run's peak in the rivers. [FPTO § 3-585] The Department of Fisheries feels it can regulate both commercial and sport fisheries to increase returns to Indian river fisheries to some extent. [Tr. 894, *l.* 24 to 895, *l.* 25] For example, the Department of Fisheries has closed East Pass at Vashon Island to commercial fishing. The result of this action has been to increase the salmon run available to treaty Indians in the Puyallup River by further restricting commercial fishing in the Sound. [FPTO §§ 3-583; 3-599]

202. It is the policy of the Department of Fisheries where there are mixed stocks of fish, one stock of which is in abundance, that it is sometimes in the interest of proper utilization of the total fishery resource to allow a harvest on the mixed stocks in order to prevent waste or overescapement of the abundant stock, even though this harvest may take some fish from a stock which has no harvestable surplus. In such case a value judgment must be made as to the proper regulatory balance to be stricken. [Tr. 863, *l.* 16 to 865, *l.* 16] Puget Sound, and the

Columbia River to the extent fish are bound for different tributaries, both have fisheries on mixed stocks. [Tr. 846, *l.* 23 to 847, *l.* 7]

203. Wastage of fish and potential harm to other species and to the spawning stock of the same species may occur as a result of overescapement of salmon at spawning grounds. The Department of Fisheries believes that it is not properly managing the salmon resource if fish in excess of the number needed for spawning escape to the spawning grounds. The Department has some capability to utilize the treaty Indian River net fisheries so as to harvest fish which would be surplus to spawning needs. It has utilized this capability in conjunction with the Muckleshoot, Nisqually and Skokomish Tribes. Weather and the physical conditions of the stream limit this capability. [FPTO § 3–605]

204. The Department of Fisheries has authority to impose limitations on the time, place and manner of sport and commercial fishing for salmon in the off-shore areas within the three-mile limit, the Strait of Juan de Fuca and Puget Sound which will effectively increase the size of salmon runs through the usual and accustomed fishing places of the Plaintiff tribes. [FPTO § 3–615]

205. The Department of Fisheries recently has been given power to authorize the moving of fishing gear to places where the Department wants to harvest surplus fish in the rivers and to limit the entry into the fishery so authorized. [FPTO § 3–611]

206. Within the last few years the Washington Department of Fisheries has authorized special limited gill net fisheries for chinook salmon and limited entry purse seine fisheries for coho salmon in marine waters of Carr Inlet, including the milling area off the mouth of Minter Creek, to crop surplus chinook and coho salmon returning to the Department's Minter Creek Hatchery. The extent of the surplus is influenced by limitations imposed on prior marine fisheries to assure adequate escapement to other South Sound streams and is evaluated when it appears at the Minter Creek mouth area. The authorized fishery is

then monitored daily to determine its proper duration. Participation in the Minter Creek purse seine fishery is determined by a drawing open to any licensed purse seiner who applies. The Department of Fisheries has neither requested any of the Plaintiff tribes to join in that fishery nor considered the question of whether unlicensed treaty Indians should be allowed to participate in the fishery. At least one of the Plaintiff tribes has members who operate in a marine fishery closer to Minter Creek than many of the non-Indian applicants for the drawing. [Tr. 839, *l.* 16 to 840, *l.* 13; Tr. 3780, *l.* 21 to 3787, *l.* 3; Ex. JX–2a, Table 31, pp. 192–193; JX–2a, App. II, Table 7, pp. 316–317; JX–2a, App. III, pp. 323, 328] Treaty Indian commercial net fisheries can be and have been authorized in areas which the State has designated as salmon preserves without jeopardizing conservation needs. [Tr. 837, *l.* 22 to 839, *l.* 15]

207. Although the Department of Fisheries believes that the approximately 239 smaller streams in the case area which collectively provide a significant part of the salmon production could not sustain an Indian commercial gill net fishery, it has not studied or considered whether it is necessary to prohibit an Indian spear, gaff, dip net, or hook and line subsistence or other fishery in those streams or an Indian net or troll fishery in their estuaries. [Tr. 3828, *l.* 5 to 3832, *l.* 23]

208. A management plan to meet obligations to provide to treaty Indians in the case area the treaty-secured right to take fish must include other treaty Indians who are not Plaintiffs in this case. [Tr. 3624, *l.* 4–15]

209. The Department of Fisheries takes the position that the treaty tribes hold a distinct treaty right to fish at usual and accustomed places outside their reservation, the quantum of which has never been adequately defined. [FPTO § 3–6] After the 1968 decision of the United States Supreme Court in Puyallup Tribe v. Department of Game, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689, the Department of Fisheries began to set special seasons for

various treaty tribes which provide for fishing for salmon by net at some off-reservation usual and accustomed fishing places. Some of the regulations permit Indian set gill nets on rivers, even though State statutes prohibiting use of such gear have not been changed. Fisheries attempts to set these seasons at times when there are significant numbers of fish in the Indian fisheries. [FPTO § 3-613; Ex. F-27, p. 3, *l.* 23-32] These regulations cover only seven of the treaty tribes in seven specific areas within the case area. [Ex. JX-2a, App. II, pp. 306-317] Indian net fishing which is confined geographically (similar to the limits provided by reservation boundaries on current on-reservation net fishing) may be regulated and controlled to prevent over-harvesting, assuming that some power of effective regulation exists to limit fishing as to time and amount of gear and enforce the limitation effectively. [FPTO § 3-472]

210. The Department of Fisheries has undertaken to augment the volume of fish available to treaty Indians fishing at the usual and accustomed places outside reservation boundaries by at least the following actions:

a) The Department considers the interest of the Indian fishery when formulating its regulations;

b) The Department attempts to determine how many Indians will fish, what their effort will be, and what the estimated take of the Indian fishery will be;

c) The Department has adjusted the number of days when the commercial fleet can fish;

d) The Department has closed certain areas to non-Indian fishing in the marine waters, such as in East Pass, and opened certain areas closed to commercial fishing to Indian commercial fishing, such as South Sound Preserve;

e) The Department has increased its planting efforts in those streams where Indian fisheries occur; and,

f) The Department has carried on stream improvement work. [FPTO § 3-599; Ex. JX-2a, § 2.2.5.1, pp. 55-56; Fig. 18, p. 254; App. II, Table 7, Squaxin Regulations, p. 316]

In some areas the Department of Fisheries' hatchery-reared plants of salmon have contributed significantly to Indian catches of salmon. [Ex. JX-2a, Table 29, pp. 181-187; Fig. 43, p. 279; Ex. F-19; Ex. F-28, p. 59, *l.* 31 to p. 60, *l.* 15; FPTO § 3-606]

211. The Department of Fisheries' hatchery system usually receives salmon in excess of its propagation needs. It is the Department's policy to provide numbers of these fish which are fit for human consumption to economically-depressed Indian people. Indian tribal representatives are contacted when these fish are available and it is their responsibility to see that these fish are distributed to the respective tribal members. In 1972, 256,194 pounds of salmon which had returned to the Department's hatcheries were provided to Indian people. [Ex. F-28, p. 39, *l.* 31 to p. 40, *l.* 11, p. 65, *l.* 17-27; Ex. F-20; Tr. 1095, *l.* 1 to 1096, *l.* 2]

212. For about the past decade, although there have been occasional disagreements about enforcement of Department regulations, the Department of Fisheries has in general had a cooperative relationship with several of the Plaintiff tribes. [Tr. 1006, *l.* 7-17; Tr. 2536, *l.* 20-24; Tr. 3014, *l.* 4-13; Tr. 3163, *l.* 3-7; Ex. F-33, p. 12, *l.* 23 to p. 13, *l.* 5; Ex. F-28, p. 60, *l.* 30 to p. 66, *l.* 11; Ex. F-24; Ex. F-25; FPTO §§ 3-603; 3-604] In addition to informal cooperation between the Department of Fisheries and Indian tribes, the Department has taken into account recommendations of Indian tribes through its administrative hearing process. [Tr. 991, *l.* 18 to 992, *l.* 5]

213. The Department of Fisheries' enforcement practices are governed by RCW 75.08. As described by the Chief of the Department's Fisheries Patrol, the enforcement policies and practices are to be applied equally to Indians and non-Indians without discrimination. [Ex. USA-37, p. 3, *l.* 24 to p. 4, *l.* 4] Unattended and unidentified fishing gear found fishing in violation of State law will be confiscated. The officer seizing the gear should make out a fact sheet regarding the incident, a description of the gear, and the disposition of the gear.

Then the gear is to be held in a warehouse in Seattle until sufficient quantities are on hand to make auction of it practicable. The gear then will be sold at auction after the required statutory notice has been given. The proceeds from the sale will go to the State general fund. [Ex. USA-37, p. 4, *l.* 5 to p. 5, *l.* 25] In the case of attended gear, a citation or arrest will be issued. The gear will be seized and held as evidence to be disposed of by the court. [Ex. USA-37, p. 6, *l.* 22 to p. 7, *l.* 17] If there are fish in the gear, the fish will be sold to the highest bid of a commercial fish buyer. The fish ticket is then to be held as evidence and if the person is later acquitted, the proceeds of the sale of the confiscated fish are to be turned over to him by court order. [Ex. USA-37, p. 14, *l.* 20 to p. 15, *l.* 14]

214. During certain times of the year the taking of pink and sockeye salmon from certain waters of the State of Washington and of British Columbia, Canada, is regulated in accordance with regulations prescribed by the International Pacific Salmon Fisheries Commission pursuant to treaties between the United States and Canada. The provisions of these regulations are approved by said International Commission and forwarded to the respective governments for adoption as domestic regulations. These regulations as they apply to waters of the State of Washington are usually promulgated and enforced by the Director of the Department of Fisheries as state regulations. However, under the applicable International treaties and statutes of the United States enacted pursuant thereto, the United States has both the authority and the obligation to enact the International Commission's recommendations as domestic federal regulation and directly enforce them if the State of Washington does not do so. The International Commission has no arrest or enforcement jurisdiction. While the Commission's jurisdiction is limited to protection of pink and sockeye salmon, its regulations which limit the types of gear which may be used or the times during which certain types of gear may be used in Convention waters have a coincidental effect on the taking of coho, chum and

chinook salmon which are present during the times that such regulations are in force. The waters to which such internationally prescribed regulations apply include some of the usual and accustomed fishing places of some of the treaty Indian tribes. [FPTO § 3-589; Ex. JX-2a, § 2.13, pp. 101-103; Ex. USA-19]

215. In regulating the American and Canadian net fisheries on pink and sockeye salmon bound for the Fraser River system, the International Pacific Salmon Fisheries Commission has attempted, pursuant to provisions of the applicable treaty, to provide an equal take to the Canadian and the American commercial fishermen in the Strait of Juan de Fuca, Northern Puget Sound and the Strait of Georgia; such that when it appears that, for example, the Canadians have taken significantly more fish than the Americans, the Commission will adjust its regulations to permit Americans to catch up. All harvesting on Fraser River stocks is intended to take only so much as will not damage the run. While some tributaries to the Fraser River have shown an underescapement as a result of the fishing efforts in the Straits and elsewhere, the regulation of Fraser River stocks by the International Commission is generally regarded by fisheries biologists as well managed. [FPTO § 3-590; Ex. JX-2a, § 2.13, p. 102]

216. Under guidelines established by the U.S. State Department at the instance of the Department of the Interior, the U.S. Commissioners on the International Pacific Salmon Fisheries Commission have sought recently in their activities on the Commission to protect the treaty fishing rights of one or more of the Plaintiff tribes. As a U.S. Commissioner on that Commission, the Director of the Fisheries Department has attempted unsuccessfully to obtain Canadian agreement to a greater number of fishing days for the Makah Indians on the Fraser River sockeye and pink salmon runs. The Director has taken unilateral action to provide more fishing days for the Makahs. [FPTO § 3-591]

217. The regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow

all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply. [See Ex. JX–2a, App. III]

218. The State and the Director of Fisheries have, by statute and regulation, totally closed a substantial number of the usual and accustomed fishing areas of Plaintiff tribes to all forms of net fishing while permitting commercial net fishing for salmon elsewhere on the same runs of fish. [See Ex. JX–2a, App. III]

DEPARTMENT OF GAME POLICIES AND PRACTICES

219. The stated purpose of the Game Department is: "To preserve, protect, perpetuate, and enhance wildlife through regulations and sound continuing programs to provide the maximum amount of wildlife-oriented recreation for the people of the State." [Ex. JX–2a, § 2.7, p. 89; Tr. 111, *l.* 12 to 114, *l.* 1] The Department and the Game Commission consider this their ultimate purpose in formulating policy, establishing regulations and managing the fish resources under their jurisdiction. [FPTO § 3–428] The state's steelhead fishery laws and regulations are designed to preserve the resource, provide orderly sport harvest and prevent commercialization of the steelhead. [FPTO §§ 3–430; 5–456; Ex. JX–2a, § 2.2.5.5, p. 59] The Game Department views its responsibilities as a state agency to be to protect and perpetuate the wildlife resources under its jurisdiction and where the species can be used consistently with such perpetuation, to use them for recreational enjoyment. [Tr. 112, *l.* 11–23] The Director believes it would be an abdication of his responsibilities to allow any off-reservation net fishing for steelhead by Indians except as may be ordered by a court. [Tr. 264, *l.* 10–22; Tr. 251, *l.* 4–10; Tr. 314, *l.* 5–13]

220. The Game Commission defines "conservation" as "wise or prudent use." In determining what is wise or prudent use of the fish resource, the Game Commission consults experts in the Game Department and the general public. [FPTO § 3–429]

221. The Director of the Game Department believes that an Indian net fishery for steelhead would be detrimental to the recreational fishery but not necessarily detrimental to the resource itself. [Tr. 288, *l.* 6 to 289, *l.* 8]

222. Prior to the United States Supreme Court decision in Department of Game v. Puyallup Tribe, (*Puyallup II*), 414 U.S. 44, 94 S.Ct. 330, 38 L.Ed.2d 254 (1973), when dealing with the claimed treaty fishing rights of Indian tribes, including the Plaintiff tribes, the Game Department took the position that, except for exemption from license fees when fishing in their ceded area, [FPTO §§ 3–478, 3–489; Ex. G–16, p. 4, *l.* 1–3] the Indian treaties do not grant to any Indian citizen or tribe any privileges or immunities greater than those which the Department recognized as being held by non-Indian citizens, [FPTO § 3–2] and that under the Constitutions and laws of the United States and of the State of Washington, the Department was required to regulate Indian fishing activities outside federal and Indian reservations to the same extent and in the same manner as it regulated fishing activity by all other classes of citizens. [FPTO § 3–3; Tr. 577, *l.* 2 to 588, *l.* 5] The Department had taken the position that state law prohibits it from considering recommendations in favor of Indian net fishing at off-reservation usual and accustomed places. [FPTO § 3–432] On the basis of that law, its own view of conservation, and its belief that as a matter of policy net fishing for Indian subsistence or economic need is not a wise or prudent use of the steelhead resource, [FPTO §§ 3–431, 3–432] the Department had refused to attempt to regulate fishing in waters subject to its jurisdiction so as to accord members of the Plaintiff tribes any opportunities to take, at their claimed off-reservation usual and accustomed fishing places, by any means other than angling, a fair and equitable portion of the anadromous fish runs that are subject to its regulatory jurisdiction, consistent with adequate escapement for spawning and reproduction. [FPTO § 3–4]

223. The policies and practices of the Game Department with respect to nets, boats and other gear which may be seized by its agents in the course of their law enforcement duties are:

a) When an unattended net is seized and the owner is not immediately identifiable, the net is marked and stored in Game Department facilities, but no specific written record is made of each seized net; the nets themselves and the written summaries constitute records of seized gear;

b) It is within the seizing officer's discretion whether to send the seized gear to Olympia or to keep it in the regional office where it was seized;

c) The only Game Department accounting of seized nets is a periodic check which results in a record of the number of nets which have been seized and the dates of seizure;

d) When there are only two or three fish seized with the gear, no record of the disposition of those fish is kept;

e) The Department has never asked a court to declare forfeiture of seized, unattended nets;

f) When the Department has seized boats or motors, they have been kept as evidence against an identified defendant;

g) Property is seized for the purpose of introduction as evidence in court;

h) If a person is acquitted of a charge, his gear is returned, but no restitution is made for fish which have been seized with the gear because the fish are rendered valueless due to the passage of time and the delay in court actions. They are disposed of to charitable or public institutions;

i) It is contrary to policy to seize a net which has not been seen engaged in illegal use. [FPTO § 3–479; Ex. USA–38, p. 4, *l.* 17–30]

224. Prior to February, 1972, a wildlife agent of the Game Department, acting in his official capacity and under color of state law, seized several unattended fishing gill nets from the Quillayute River and its tributaries. The State and the Game Department have been on notice since

at least February, 1972, that specifically identified members of the Quileute Tribe have asserted under oath that nets belonging to them, descriptions of some of which nets were given, were taken by unknown persons from specifically described locations on the Quillayute River at approximately the times which the wildlife agent says he seized the aforementioned nets. No judicial proceeding to declare a confiscation or forfeiture of these nets has been instituted nor have the nets been returned to the claimed owners thereof. [Tr. 625, *l.* 4 to 627, *l.* 5]

225. Prior to *Puyallup II*, the Game Department took the position that laws enacted by the state legislature need not be shown reasonable and necessary for conservation of the fishery in order to be binding on treaty Indians fishing at off-reservation usual and accustomed places, beyond the fact that said laws must have the same degree of reasonableness to apply to Indians as is constitutionally required to apply them to other citizens in the exercise of state police power. [FPTO § 3–485]

226. Prior to *Puyallup II*, the Game Department had never given consideration to the claimed treaty fishing rights of any of the Plaintiff tribes as an interest to be promoted in the Department's regulatory, management and propagation programs. [FPTO § 3–486] It had never considered permitting an off-reservation fishery for steelhead by Indians using any method other than angling, whether solely for Indian dietary consumption, for Indian cultural or ceremonial use, for sale or barter by the individual for his economic well-being, or for tribal economic development, processing, or sale of fish as a tribal enterprise. [FPTO § 3–487]

227. The Game Department has no idea where the Indians' usual and accustomed fishing places are and has never attempted to determine where they are. [Tr. 252, *l.* 21 to 254, *l.* 21] The recently retired Chief of Game's Wildlife Management Division testified as to his belief, and Game's policy, that every place in the State was a place where Indians commonly fished. [Tr. 620, *l.* 5–20]

228. At its meeting on October 2, 1972, the Game

Commission considered the question of whether to change its regulations so as to permit net fishing by any Indians at off-reservation usual and accustomed places under claim of treaty rights. The Game Department did not notify any of the Plaintiff tribes or the United Staes in advance that it would consider this question at that meeting. The Department did not file with the Washington Code Reviser, pursuant to RCW 34.04.025 and 34.04.010, a notice that it was going to consider the matters regarding Indian off-reservation net fishing which were listed on the agenda for, and were considered at, that meeting. In addition to legal advice from its attorney, the Commission considered only the facts and data presented by the Chief of its Fisheries Management Division, Mr. Clifford Millenbach. [FPTO §§ 3–440, 3–441]

229. Mr. Millenbach's preparation for the October 2, 1972, meeting was heavily predicated on his belief that the Department's consideration of an Indian net fishery was tied specifically to the Puyallup River rather than all rivers of the State. [Tr. 348, *l.* 5–12; Tr. 354, *l.* 3–8] Prior to his presentation Mr. Millenbach did not discuss the facts and data or recommendations he presented with any of the Plaintiff tribes and had not consulted with any of those tribes concerning their fishing practices or techniques. He had not estimated how many Indians would fish, how many fish would be in the coming run in the Puyallup River, or what specific level of escapement would be best for that run. He believed that the Commission was then considering a change in its regulations which at that time absolutely prohibited such fishing. [FPTO § 3–440]

230. Mr. Millenbach's October 2, 1972, recommendation to the Game Commission that it not allow an off-reservation Indian net fishery for steelhead was influenced heavily by his belief that state law prohibited him from recommending an authorization for such a fishery. [TR. 349, *l.* 5–10] The Commission, upon advice from its attorney, considered the facts and data presented by Mr. Millenbach as informative only, since the Commission believed that state law prohibited it from

passing a regulation which authorized off-reservation net fishing for steelhead by treaty Indians. [Tr. 1635, *l.* 12 to 1638, *l.* 13] In recommending that the Commission not authorize such net fishing by treaty Indians the Game Department, a) did not consider the ultimate use which such Indians would make of the fish taken; and, b) did not know how many Indians or nets would fish if such fishing were allowed, although its Director expected there would be many Indians fishing on many rivers. [FPTO § 3–440] The result of this consideration was the Commission's determination not to provide a regulation. The Game Commission asserted that this consideration and action by it constituted fulfillment of the following mandate of the Washington State Supreme Court in Department of Game v. Puyallup Tribe, 80 Wash.2d 561, 571, 497 P.2d 171, 178 (1972):

> "We hold that it is incumbent upon the Department of Game to provide, annually, regulations for a Puyallup Indian net fishery of steelhead when it is determined by the department, upon supporting facts and data, that an Indian net fishery would not be inconsistent with the necessary conservation of the steelhead fishery."[FPTO § 3–441]

231. The Game Department asserted that the Game Commission's action on October 2, 1972, concerning off-reservation Indian net fishing, was not an "order", "rule", or "regulation" as those terms are used in the Washington Administrative Procedure Act. RCW 34.04.025, RCW 34.04.010, RCW 77.12.040, RCW 77.12.050, or RCW 77.12.060. The Department describes the Commission's action as "an order of policy for conservation" and states:

> "What we were considering was whether an Indian net fishery would be inconsistent with the conservation of steelhead. We determined that Indian net fisheries, the establishment of Indian net fisheries would be inconsistent with conservation." [FPTO § 3–441]

The Director of the Game Department understands the result of the October 2, 1972, and August 20, 1973,

meetings of the Game Commission was a "closure" of Indian net fishing outside reservation boundaries. [Tr. 252, *l.* 7–20]

232. The facts and data submitted to the Game Commission at its meetings on October 2, 1972, and August 20, 1973, by the Game Department staff were inadequate to enable the Commission to determine whether or not an Indian net fishery on the Puyallup River or on any other river in the state would be inconsistent with the necessary conservation of the steelhead resource. [Tr. 349, *l.* 16 to 361, *l.* 3; Ex. PL–37; Ex. G–18]

233. The sportsmen's catch of winter steelhead on the Puyallup River for 1969-1970, the season immediately preceding the remand trial in Department of Game v. Puyallup Tribe, was an abnormally low 5,615 fish. [Ex. JX–2a, Table 62, p. 232; Ex. USA–3, p. 3] Although sportsmen's catches of winter steelhead on the Puyallup River the following year were 10,656, [Ex. JX–2a, Table 62, p. 232; Ex. USA–2, p. 2] the Director of the Game Department believes that the steelhead run has not, in any year since 1970, reached a magnitude that would justify the Commission's allowing any net fishery by treaty Indians on that river, even under his understanding of the Game Department's obligation under the Washington Supreme Court's May 4, 1972, decision in Department of Game v. Puyallup Tribe, 80 Wash.2d 561, 571, 497 P.2d 171 [Tr. 265, *l.* 11–20; Tr. 340, *l.* 8–14]

234. At its August 20, 1973, meeting to consider whether to allow an off-reservation net fishery for treaty Indians the Game Commission was informed by the Chief of the Game Department's Fishery Management Division, Mr. Millenbach, that the Puyallup River steelhead run is normally between 16,000–18,000 fish annually, that the sport catch is usually around 12,000–14,000 annually and that a spawning escapement of 25% to 50% is needed. The Commission was advised by its staff that because of this data the steelhead fishery "cannot withstand a commercial fishery on the Puyallup River." When one

Commissioner asked Mr. Millenbach if he felt the time would ever come when there would be sufficient steelhead for a net fishing season for the Puyallup Indians, the latter replied that it was the staff's view that the recreational fishery was then harvesting the resource and that this generally will hold true. They foresaw a regular yearly increase in sports fishermen. After receiving this data and recommendation the Commission refused to allow any Indian net fishery for steelhead. [Ex. G–18, pp. 4 and 10]

235. The Game Department has very limited data on the total number of fish in steelhead runs. It does not formally estimate or predict the sizes of future steelhead runs, but does make general comments on relative abundance. The large number of factors which influence eventual survival of steelhead currently make the capability of the Game Department to predict the size of steelhead runs extremely difficult. By examining the current water flow and planting records for the steelhead which will be returning in the coming year, and by examining spawning ground counts for the brood year (when available), the Department estimates whether the coming steelhead runs in named rivers will be greater or smaller than in prior years. [FPTO §§ 3–458, 3–459]

236. The Game Department would be able better to manage the steelhead resource if its facts and data were specific as to individual river systems, but budget limitations of the Game Department preclude the acquisition of this data at this time. [FPTO § 3–473] As its catch statistics and escapement data come to cover longer periods and become more accurate, Game will become better able reliably to protect the steelhead runs and to provide for a more efficient harvest of the resource. [FPTO § 3–433]

237. The Game Department has not determined whether steelhead spawners in excess of the amount a river system could sustain would be harmful to the run. [FPTO § 3–468] The Game Department is aware that planting of pre-smolt size steelhead may create an adverse

competition with natural stocks which would not otherwise occur with smolt size plants. [FPTO § 3–444]

238. Steelhead punch cards are used by the Game Department to compile catch data on the time and river in which the fish have been caught. The Department estimates annual steelhead catch by multiplying the catch reported on returned punch cards by a factor designed to compensate for unreturned cards. The Department requires treaty Indians to have a free steelhead punch card when angling outside reservation boundaries. [FPTO § 3–439]

239. There are considerable fluctuations in the percentages of steelhead runs taken by fishermen from year to year. The Department considers that a generally beneficial escapement percentage for steelhead is 25 to 50%. [FPTO §§ 3–464, 3–458]

240. The Game Department's steelhead planting program has grown from a relatively insignificant contribution in the 1940's to a significant contribution to steelhead fisheries since 1951. The Game Department in early 1973 was producing three million winter steelhead smolts and 1.5–2 million summer steelhead smolts in its hatchery program. The Department plants steelhead in approximately 60 rivers currently, these generally being the major rivers. Mr. Millenbach estimates generally a "five per cent return" from steelhead plants in Washington State rivers. Not all river systems sustaining natural steelhead runs are planted. Not all planted rivers have been subject to marking experiments. In determining where to plant steelhead and how much to plant, the Game Department considers the relative size of the river system, the punch card records of sports catch in previous years, the Department's capacity to produce steelhead smolts and the amenability of the river system to sport fishing. The capacity to produce smolts is considered as the most decisive factor. It is a general policy of the Game Department to plant at least 20,000 steelhead smolts in each planted river. This policy is a result of the Department's determination that such a volume of

planting is necessary to encourage a sufficient level of sport fishing to utilize the resulting augmented run. [FPTO § 3–445] In the opinion of the Game Department, its steelhead planting program can be used to reestablish decimated runs when other environmental conditions are adequate. [FPTO § 3–470]

241. The Game Department steelhead seasons vary from river system to river system, due to the fact that the spawning period begins earlier in the smaller systems and that steelhead runs in different systems vary in quantity and timing. The Department attempts to protect steelhead spawning areas throughout the river environment, although it does permit fishing in some river areas where steelhead spawn. The Department has set upstream deadlines, above which no one may fish, in order to provide an undisturbed area for spawning. There is no downstream deadline. The Game Department permits fishing for steelhead in all marine areas within its regulatory jurisdiction. Saltwater steelhead fisheries are insignificant. Most are located on Whidbey Island at Bush Point and Lagoon Point. [FPTO § 3–450]

242. The peak months of the winter steelhead run in Washington are December and January; the peak months for summer steelhead are July and August. [FPTO § 3–455]

243. The Game Department has no recorded statistics indicating whether fishing on spawning grounds by means of drift nets, drag nets, dip nets, set nets, gill nets, or purse seines will cause "prespawning mortality" as that term was used in State v. Moses, 79 Wash.2d 104, 117, 483 P.2d 832 (1971); but Game believes, based on observations, that such activities would cause prespawning mortality. [FPTO § 3–452]

244. From a conservation standpoint it makes no difference whether a fish is caught by sportsmen on a hook and line or by an Indian in a net. Assuming a regulated fishery in both instances it is possible to rebalance the numbers caught and maintain conservation. [Tr. 413, *l.* 1 to 416, *l.* 6; Tr. 448, *l.* 11–19]

245. Experience with the Fraser River fisheries demonstrates that with proper regulation of net fisheries salmon and steelhead resources can be preserved despite the existence of a gill net fishery with an asserted capability of 98% efficiency if unregulated. [Tr. 400, *l.* 18 to 407, *l.* 8.]

246. The steelhead resource has been preserved even with commercial net fisheries for steelhead on Indian reservations which are entirely unregulated by the State. [Tr. 256, *l.* 19 to 257, *l.* 8; Tr. 266, *l.* 15 to 267, *l.* 19; Tr. 427, *l.* 24 to 428, *l.* 10; FPTO § 3–466]

247. The Game Department has not undertaken any studies to determine the effect on steelhead of the Fisheries Department's recent special treaty Indian net fishing seasons for salmon. The Game Department is unaware of any studies which reliably conclude that an on-reservation Indian net fishery for steelhead which is unregulated by the State has caused a decrease in the steelhead run. [FPTO § 3–456]

248. The Game Department, pursuant to state law, has never considered permitting or authorizing any of the Plaintiff tribes to take part in the management or propagation of any anadromous fisheries under its regulatory jurisdiction. [FPTO § 3–437]

249. According to Game Department reports the statewide Indian catch, including the on-reservation catch, from the 1970-1971 winter steelhead run was less than 20% of the total catch. [Tr. 393, *l.* 13 to 394, *l.* 9]

250. As one basis for its conclusion that a hook and line fishery is the wisest use of the steelhead resource, the Game Department relies on a study which concluded that a steelhead fisherman contributes approximately $60.00 in general benefit to the economy of the State of Washington for each fish caught. [FPTO § 3–469; Ex. G–12]

251. There are presently about 145,000 licensed steelhead fishermen in the State of Washington. The present law and regulations authorize these fishermen to take 30 fish per man per season with sports gear. [Tr. 310, *l.* 3–13] The actual take totals approximately 250,000

steelhead per year. [Tr. 310, *l.* 24 to 311, *l.* 3; Exs. USA–2 through USA–11] Due to the nature of steelhead fishing, one could not maintain a family on a steelhead catch based on a hook and line fishery. [Tr. 4024, *l.* 5–14]

252. At the time of the treaties and for many years thereafter neither the Indians nor the non-Indian citizens treated steelhead any differently from salmon in terms of the purpose and means of their harvest. [Ex. USA–20, p. 6; Ex. USA–26, p. 62; Ex. PL–2, p. 164; Ex. JX–2a, §§ 2.3.1 and 2.3.2, pp. 61, 63]

253. The Game Department has received federal financial assistance in the amount of 50% under the Anadromous Fish Conservation Act, 16 U.S.C. §§ 757a–757f for construction and operation of its steelhead hatcheries. [FPTO § 3–442; Tr. 237, *l.* 8–16]

Based on the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

1. Jurisdiction is vested in this Court by virtue of:

a. 28 U.S.C. § 1345, in that the United States brings this action on its own behalf and on behalf of certain federally-recognized Indian tribes in connection with its administration of Indian affairs;

b. 28 U.S.C. § 1331, in that the matter in controversy involves the fishing rights of each of the Plaintiff tribes which in each case have a value in excess of $10,000, exclusive of interest and costs, and are claimed to exist and to be secured under the Constitution, laws and treaties of the United States.

c. 28 U.S.C. § 1343(3) and (4), in that the Plaintiff tribes allege that Defendant State of Washington, and its Department of Fisheries and Game have, under color of state law, regulation, custom and usage, deprived them of rights secured to them in the treaties cited in paragraph 1 and under the Constitution of the United States, and those tribes seek equitable relief for that deprivation.

d. 28 U.S.C. § 1362, as to the following Indian tribes each having a governing body duly recognized by the

Secretary of the Interior in that this action is brought by each on its own behalf alleging violations of its rights under the Constitution, laws and treaties of the United States: Hoh Tribe, Lummi Tribe, Makah Tribe, Muckleshoot Tribe, Quileute Tribe, Quinault tribe, Skokomish Tribe, Squaxin Island Tribe, Yakima Nation. [FPTO § 1]

2. Defendant Washington Reef Net Owners Association, an unincorporated association, is a proper party in accordance with Rule 24(b), Federal Rules of Civil Procedure, as the representatives of its members who are individuals engaging in such form of commercial fishing operations at various points in lower Puget Sound and in the San Juan Islands, claimed by the Plaintiff Lummi Tribe as among its usual and accustomed fishing places. [FPTO § 3–27]

3. Each of the Plaintiffs has standing to maintain the claims asserted in this action. [FPTO § 7]

4. An actual controversy exists between each of the Plaintiffs on the one hand and each of the Defendants on the other, as to the nature and extent of the claimed treaty fishing rights of the Plaintiff tribes and the attempted regulation thereof by the State Defendants, except that the controversy between the Defendant Reef Net Owners Association and the Plaintiffs is limited to the effect of the treaties on the reef net operations of members of the Association. [FPTO § 3]

5. Declaratory judgments are properly sought pursuant to 28 U.S.C. §§ 2201 and 2202 and this Court may grant such relief. [FPTO § 4]

6. Venue is properly laid in this Court under 28 U.S.C. § 1391(b) in that all Defendants reside within the Western District of Washington. [FPTO § 6]

7. This case is limited to the claimed treaty-secured off-reservation fishing rights of the Plaintiff tribes as they apply to areas of the Western District of Washington within the watersheds of Puget Sound and the Olympic Peninsula north of Grays Harbor, and in the adjacent offshore waters which are within the jurisdiction of the State of Washington. The subject matter of this case is

limited to the application of those rights to the anadromous fish which are in the waters described, including such fish as are native to other areas. [FPTO § 5]

8. Within the jurisdictional limits of the applicable statutes, and the subject matter described above, this case calls upon the Court to exercise the traditional equity powers entrusted to the Federal District Courts in declaring in clear and certain terms the special reserved nature of the treaty tribes' fishing rights and in fashioning just and appropriate relief which is comprehensive enough to protect the tribes' rights and to permit exercise of such of the State's police power as is necessary.

9. The recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government.

10. Absent a contrary congressional determination, the recognition by the executive branch of the Federal Government, acting through the Secretary of the Interior and his delegatees as the official charged by federal statute with the administration of Indian affairs, of the Plaintiff Muckleshoot Tribe as a political successor in interest to tribes or bands which were parties to the Treaty of Point Elliott or the Treaty of Medicine Creek is binding upon the State of Washington and its agencies and officials.

11. By its enactment of legislation (P.L. 90–530, 82 Stat. 882) providing for the disposition of judgment funds awarded to the Muckleshoot Tribe, Plaintiff herein, by the Indian Claims Commission in Indian Claims Commission Docket No. 98, Congress has recognized that tribe as the successor in interest to Indians who were parties to the Treaty of Point Elliott and the Treaty of Medicine Creek.

12. By its enactment of legislation (P.L. 92–30, 85 Stat. 83) providing for the disposition of judgment funds awarded to the Upper Skagit Tribe, including the allied Suiattle-Sauk Band, by the Indian Claims Commission in Indian Claims Commission Docket No. 92, Congress has

recognized that that tribe and band were parties to the Treaty of Point Elliot and has directed the Secretary of the Interior to prepare current rolls of the present-day lineal descendants of members of that tribe and band.

13. By its enactment of legislation (P.L. 93-134 approved October 19, 1973) providing for the future disposition of other judgment awards awarded by the Indian Claims Commission, Congress has authorized the Secretary of the Interior to determine the persons and Indian entities who are the present-day successors in interest to tribes which the Indian Claims Commision has found ceded lands to the United States pursuant to Indian treaties. Under this legislation the Secretary of the Interior has the authority to determine the present-day representative of the Stillaguamish Tribe which was awarded a judgment in Indian Claims Commission Docket No. 207 for lands ceded pursuant to the Treaty of Point Elliott.

14. The Plaintiff Muckleshoot Tribe is one of the holders of the right of taking fish secured to Indians by the Treaty of Point Elliott and the Treaty of Medicine Creek and it may authorize its members to exercise the right within the limits elsewhere prescribed herein with respect to the scope of the right.

15. Upon approval of their respective membership rolls and structures of organization by the Secretary of the Interior, the Plaintiff Upper Skagit Tribe, Plaintiff Sauk-Suiattle Tribe and Plaintiff Stillaguamish Tribe are each a holder of the right of taking fish secured to Indians by the Treaty of Point Elliott and each may authorize its members to exercise the right within the limits elsewhere prescribed herein with respect to the scope of the right.

16. Each of the Plaintiff tribes holds a right under one or more of the treaties cited in paragraph 1 of the Findings of Fact herein to fish at usual and accustomed places outside of reservation boundaries.

17. Admission of the State of Washington into the Union upon an equal footing with the original states had no effect upon the treaty rights of the Plaintiff tribes. Such

admission imposed upon the State, equally with other states, the obligation to observe and carry out the provisions of treaties of the United States.

18. Treaties with Indian tribes must be construed liberally in accordance with the meaning they were understood to have by the tribal representatives at the treaty council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

19. The treaty clauses regarding off-reservation fishing at usual and accustomed grounds and stations in common with other citizens secured to the Indians' rights, privileges and immunities distinct from those of other citizens.

20. The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exist in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.

21. The right secured by the treaties to the Plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking, except to the extent necessary to achieve preservation of the resource and to allow non-Indians an opportunity to fish in common with treaty right fishermen outside reservation boundaries.

22. The passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties but have merely affected the limits which may be placed upon its exercise in order to preserve the fish resources which are necessary to the continued and future enjoyment of the right.

23. The State's police power to regulate the off-reservation fishing activities of members of the treaty tribes exists only to the extent necessary to protect the fishery resource. This power does not include the authority to impair or qualify the treaty right by limiting its exercise to State-preferred times, manners or purposes except as such limitation may be necessary for preservation of the resource and protection of the interests of all those entitled to share it. This power does not include the power to determine for the Indian tribes what is the wisest and best use of their share of the common resource.

24. The Stevens treaties do not prohibit or limit any specific manner, method or purpose of taking fish. The treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource.

25. The exercise of a treaty tribe's right to take anadromous fish is limited only by the geographical extent of the usual and accustomed fishing places, the limits of the harvestable stock, the tribe's fair need for fish, and the opportunity for non-Indians to fish in common with Indians outside reservation boundaries.

26. The only method providing a fair and comprehensive account of the usual and accustomed fishing places of the Plaintiff tribes is the the designation of the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs. Changes in water course do not impair the geographical scope of the usual and accustomed fishing places. Although no complete inventory of all the Plaintiff tribes' usual and accustomed fishing sites can be compiled today, the areas identified in the Findings of Fact herein for each of the Plaintiff tribes in general describe some of the freshwater systems and marine areas within which the respective tribes fished at the time of the treaties and wherein those tribes, as determined above, are entitled to exercise their treaty fishing rights today.

27. Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state.

28. The phrase "in common with" operates only to limit the exercise of the tribes' right to a share of the resource which will be consistent with preservation and maintenance of the resource and with the reasonable harvest by others of such fish as are not reasonably needed by the tribe, as set forth in the *Final Decision* of the court, pages 342–343.

29. Excepting tribes entitled to self-regulate fishing by their members (See *Final Decision*, pages 340–342), the right of a treaty tribe to take anadromous fish may be regulated by an appropriate exercise of state police power. To be appropriate, such regulation must:

a) Not discriminate against the treaty tribe's reserved right to fish.

b) Meet appropriate standards of substantive and procedural due process; and

c) Be shown by the State to be both reasonable and necessary to preserve and maintain the resource. When State laws or regulations affect the volume of anadromous fish available for harvest by a treaty tribe at usual and accustomed places, such regulations must be designed so as to carry out the purposes of the treaty provision securing to the tribe the right to take fish.

30. In order for a regulation to be reasonable and necessary for conservation, it must, when considered in the context of the total regulatory plan, be designed to preserve or maintain the resource.

31. To meet appropriate standards, regulations that affect the harvest by the tribes on future runs must receive a full, fair and public consideration and determination in accordance with the requirements of the Washington Administrative Procedures Act and regulations thereunder.

32. In order for regulations not to discriminate against treaty Indians, the Department of Fisheries' harvesting plan must provide for an opportunity for treaty Indians to take, at their off-reservation usual and accustomed fishing places, a share of the harvestable fish as set forth in the *Final Decision*, pages 342–343.

33. If any person shows identification (as set forth in the *Final Decision*, pages 341–342) to establish that he is exercising the fishing rights of a treaty tribe and if he is fishing in a usual and accustomed place, he is protected under federal law against any state action, unless the state has established that such action is an appropriate exercise of its police power.

34. The protection of the treaty rights of the Plaintiff tribes to take fish at their usual and accustomed places must be an objective of the State's regulatory policy co-equal with the preservation and propagation of fish runs for other users. Before it can restrict the treaty rights of the Plaintiff tribes to take fish at their usual and accustomed places, the State and its regulatory agencies must treat such treaty rights as an obligation and interest to be promoted in the State's regulatory, management and propagation programs.

35. In order to accord the treaty rights of the Plaintiff tribes and their members the appropriate protection required by paragraph 34 herein, the State and its regulatory agencies may not restrain the exercise of said rights by:

a) Use of a state statute or regulation of broad applicability instead of one specific as to time, place, species and gear; and

b) Prohibition of harvest by the tribes on future runs prior to a full, fair and public consideration and determination of specific need conducted in accordance with the requirements of the Washington Administrative Procedure Act and regulations thereunder.

36. The Plaintiff tribes having a federally-recognized tribal government have jurisdiction (in conformity with their tribal constitutions or other applicable tribal rules or

federal statutes) to enact and enforce regulations relating to the exercise outside reservation boundaries by their members of fishing rights secured to said tribes by treaty. However, the tribes cannot enlarge the right beyond that secured in the treaty.

37. Regulation of off-reservation Indian treaty fishing by the United States, the State, or the Plaintiff tribes does not preempt the regulation by any of the other two. Jurisdiction of each entity to regulate is unimpaired by the exercise of another entity's regulatory jurisdiction. With respect to matters over which there may be multiple jurisdiction, the extent of exercise or nonexercise of regulatory jurisdiction by the entity having primary interest in the matter may be relevant to the appropriateness of another entity's exercise of its jurisdiction. Also the exercise of federal or tribal regulatory control may affect the finding of "necessity" which is required for the validity of any state exercise of its police power to preserve the resource.

38. The application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the reasons that, a) they have not been established to be necessary to preserve and maintain the resource; b) they operate to discriminate against the tribes' treaty right to fish; c) they have been adopted and enforced in violation of appropriate standards; and, d) they have been adopted and enforced in derogation of the meaning and purposes of the treaty provision at issue in this case.

39. The state laws and regulations pertaining to game fish which reserve the entire harvestable portion of a species of fish for a special interest and purpose discriminate illegally against the treaty Indians.

40. Regulations of the Director of Fisheries providing for special seasons and limitations applicable to the taking of fish by the members of certain treaty tribes do not fully protect the treaty fishing rights of the Plaintiff tribes in that they:

a) Do not apply to all of the usual and accustomed fishing places of said tribes;

b) Do not extend recognition of the treaty rights to all of the Plaintiff tribes;

c) Do not provide adequate opportunity for said tribes to take their proper share of the fish.

41. The following State statutes and regulations are specifically found not to meet the standards governing their applicability to the Indian exercise of treaty fishing rights and therefore may not lawfully be applied to restrict members of tribes having such rights from exercising those rights: RCW 75.08.260, RCW 75.12.060, RCW 75.12.070, RCW 75.12.160, RCW 77.08.020, RCW 77.12.100, RCW 77.12.130, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, RCW 77.16.060, WAC 220-20-010, WAC 220-20-015(2) and WAC 220-47-020.

42. In its consideration on October 2, 1972 and August 20, 1973, of whether an Indian net fishery would be inconsistent with the necessary conservation of the steelhead fishery, the Department of Game and the Game Commission did not accord the Puyallup Tribe or other treaty tribes a hearing in conformity with due process of law or the Washington Administrative Procedure Act, RCW Chapter 34.04, and applicable provisions of the Washington Administrative Code.

43. The seizure and damage, destruction, disposition or unreasonably long detention of fishing gear and other property of members of the Plaintiff tribes by the Defendants or their officers, employees, or agents without any judicial determination of confiscation or forfeiture is an unlawful deprivation of the rights of said members under the Fourteenth Amendment of the Constitution of the United States and the treaties listed in paragraph 1 of the Findings of Fact herein.

44. The continued retention of fishing gear and other property belonging to the members of the Plaintiff tribes and seized pursuant to the laws and regulations which are herein declared to be in conflict with the treaty rights of said tribes is unlawful and such property or its value must

be returned to its owner, if known; otherwise to the tribe whose reservation is nearest to the place of seizure.

45. The Lummi Tribe continues to hold treaty-secured rights to fish with reef net gear in its usual and accustomed places, including Legoe Bay off Lummi Island, which rights are distinct from, and have priority over, any privilege of use and occupation of such places by members of the Defendant Washington Reef Net Owners Association.

46. The Plaintiffs are unable to be a party to criminal cases brought for the violation of the state statutes and regulations challenged in this action and are without an adequate remedy at law or any remedy at law whatsoever fully to assert and adequately to enforce and protect the fishing rights reserved and secured to the Plaintiff tribes by the treaties involved in this case. The individual members of the Plaintiff tribes are without an adequate remedy at law to redress or prevent unlawful interference with their exercise of fishing rights reserved and secured by said treaties because: a) the treaty rights that are asserted are unique and the damages which have been or will be sustained are not susceptible of definite monetary determination; and, b) in the case of criminal prosecutions said members have no remedy at all except at the risk of suffering arrests, seizure of property, fines, imprisonment and confiscation of property involving a multiplicity of legal proceedings.

47. The Plaintiffs are entitled to injunctive relief against the continuation and repetition of acts or omissions declared by these Conclusions of Law to be in violation of the treaty-secured rights of the Plaintiff tribes and their members.

48. This Court should retain continuing jurisdiction of this case to grant such further relief as may be found by the court to be appropriate on motion of any party hereto and to assure compliance with the Judgment Decree entered herein.

DECLARATORY JUDGMENT AND DECREE

This judgment and decree is based upon the Findings of Fact, Agreed Facts, Conclusions of Law and Decision of the Court entered in this case, all of which by this reference are hereby made a part hereof as though set forth in full herein, and close and detailed consideration by the Court. No language herein shall be interpreted as superseding the Decision of the Court, which shall control if in any respect it appears to be in conflict with any Finding herein.

In order clearly to delineate the off-reservation fishing rights held by certain Indian entities in this district under treaties made with the United States, it is hereby

Ordered, adjudged and decreed that the right of each of the plaintiff tribes in this case to harvest anadromous fish in waters within the Western District of Washington, outside the boundaries of Indian reservations and areas of exclusive *federal jurisdiction*, is declared to be as follows:

A. *Definitions*

All definitions contained in the Glossary of Terms of the Joint Biological Statement (Exhibit JX–2a) are hereby incorporated by reference. In addition and specifically for the purposes of interpreting all provisions of this decree, the following definitions shall be controlling:

1. *Anadromous fish:* Any fish which spawns or is artificially produced in freshwater, reaches mature size while rearing in saltwater and returns to freshwater to reproduce, and which spends any portion of its life cycle in waters within the Western District of Washington.

2. *Adequate production escapement:* In an approximate number of anadromous fish, that level of escapement from each fishery which will produce viable offspring in numbers to fully utilize all natural spawning grounds and propagation facilities reasonable and necessary for conservation of the resource, as defined in the Decision of the court.

3. *Harvestable stock:* The approximate number of anadromous fish which is surplus beyond adequate

production escapement and Indian needs as defined in the Decision; that is, the number remaining when the adequate production escapement and Indian needs are subtracted from the run size.

4. *To preserve and maintain the resource:* Upon a full consideration of (a) the history of State anadromous fish management, (b) the level of catch within the Western District of Washington in recent years, (c) the quality of freshwater and artificial production environments, (d) the most recent facts and data concerning anadromous fish production potential, (e) the potential for interspecific competition, and (f) the prospects for improvement of anadromous fish production, to perpetuate the runs of anadromous fish at least at their current level.

5. *Run:* A group of anadromous fish on its return migration, identified by species, race and water of origin.

6. *State:* The State of Washington, its agents, officers, agencies, assigns and subdivisions.

7. *Stevens' treaties:* Those treaties identified in the Findings of Fact and Conclusions of Law as having been negotiated between Isaac I. Stevens, for the United States, and certain Indian tribes and bands who lived in Washington Territory during the 1850's.

8. *Treaty Tribe:* One of the Indian entities described in paragraph 10 below, or any other entity entitled to exercise treaty fishing rights under the treaties construed herein within the Western District of Washington.

9. *Usual and accustomed places:* Those areas in, on and around the freshwater and saltwater areas within the Western District of Washington, which were understood by the Indian parties to the Stevens' treaties to be embraced within the treaty terms "usual and accustomed" "grounds," "stations" and "places."

B. Treaty Fishing Rights

10. Each of the plaintiff tribes listed below is a Treaty Tribe. The list given below is a declaration only as to those 14 Indian entities which have been represented on the plaintiff side in this case. A Treaty Tribe occupies the

status of a party to one or more of the Stevens' treaties and therefore holds for the benefit of its members a reserved right to harvest anadromous fish at all usual and accustomed places outside reservation boundaries, in common with others:

Hoh Tribe of Indians;
Lummi Indian Tribe;
Makah Indian Tribe;
Muckleshoot Indian Tribe;
Nisqually Indian Community of the Nisqually Reservation;
Puyallup Tribe of the Puyallup Reservation;
Quileute Indian Tribe;
Quinault Tribe of Indians;
Sauk-Suiattle Indian Tribe;
Skokomish Indian Tribe;
Squaxin Island Tribe of Indians;
Stillaguamish Tribe of Indians;
Upper Skagit River Tribe;
Confederated Tribes and Bands of the Yakima Indian Nation

11. The right of a Treaty Tribe to harvest anadromous fish outside reservation boundaries arises from a provision which appears in each of the Stevens' treaties and which, with immaterial variations, states:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * * .

12. It is the responsibility of all citizens to see that the terms of the Stevens' treaties are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the councils, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

13. From the earliest known times, up to and beyond the time of the Stevens' treaties, the Indians comprising

each of the treating tribes and bands were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year around use, both for themselves and for others through sale, trade, barter and employment. With the advent of canning technology in the latter half of the 19th Century the commercial exploitation of the anadromous fish resources by non-Indians increased tremendously. Indians, fishing under their treaty-secured rights, also participated in this expanded commercial fishery and sold many fish to non-Indian packers and dealers.

14. The taking of anadromous fish from usual and accustomed places, the right to which was secured to the Treaty Tribes in the Stevens' treaties, constituted both the means of economic livelihood and the foundation of native culture. Reservation of the right to gather food in this fashion protected the Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farm lands, compulsory education, technical assistance and pecuniary rewards offered in the treaties. Settlement of the West and the rise of industrial America have significantly circumscribed the opportunities of members of the Treaty Tribes to fish for subsistence and commerce and to maintain tribal traditions. But the mere passage of time has not eroded, and cannot erode, the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold.

15. The treaty-secured rights to resort to the usual and accustomed places to fish were a part of larger rights possessed by the treating Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to their existence than the atmosphere they breathed. The treaty was not a grant of

rights to the treating Indians, but a grant of rights from them, and a reservation of those not granted. In the Stevens' treaties, such reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings betwen private individuals. The reservations were in large areas of territory, and the negotiations were with the tribes. The treaties reserved rights, however, to every individual Indian, as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved for exercise "in common with citizens of the Territory."

16. The Stevens' treaties do not reserve to the Treaty Tribes any specific manner, method or purpose of taking fish; nor do the treaties prohibit any specific manner, method or purpose. Just as non-Indians may continue to take advantage of improvements in fishing techniques, the Treaty Tribes may, in exercising their rights to take anadromous fish, utilize improvements in traditional fishing methods, such for example as nylon nets and steel hooks.

17. The exercise of a Treaty Tribe's right to take anadromous fish outside of reservation boundaries is limited only by geographical extent of the usual and accustomed places, the limits of the harvestable stock and the number of fish which non-treaty fishermen shall have an opportunity to catch, as provided in the Decision of the Court.

18. Because the right of each Treaty Tribe to take anadromous fish arises from a treaty with the United States, that right is preserved and protected under the supreme law of the land, does not depend on State law, is distinct from rights or privileges held by others, and may not be qualified by any action of the State.

19. The treaty phrase "in common with" does not secure any treaty right or privilege to anyone other than the Treaty Tribes, nor does that phrase qualify any Indian's treaty right to fish, except as provided in the Decision of the Court.

20. Except for tribes now or hereafter entitled to self-regulation of tribal fishing, as provided in the Decision of the Court, the right of a Treaty Tribe to take anadromous fish may be regulated by an appropriate exercise of State power. To be appropriate, such regulation must:

a. Not discriminate against the Treaty Tribe's reserved right to fish;

b. Meet appropriate standards of substantive and procedural due process; and

c. Be shown by the State to be both reasonable and necessary to preserve and maintain the resource. When State law or regulations affect the volume of anadromous fish available for harvest by a Treaty Tribe at usual and accustomed places, such regulations must be designed so as to carry out the purposes of the treaty provision securing to the Tribe the right to take fish.

21. If any person shows identification, as provided in the Decision of the Court, that he is exercising the fishing rights of a Treaty Tribe and if he is fishing in a usual and accustomed place, he is protected under federal law against any State action which affects the time, place, manner, purpose or volume of his harvest of anadromous fish, unless the State has previously established that such action is an appropriate exercise of its power.

22. The application of currently effective laws and regulations of the State of Washington specified in the Conclusions of Law which affect the time, place, manner and volume of off-reservation harvest of anadromous fish by Treaty Tribes is unlawful for the reasons also stated in the Conclusions of Law.

23. All Findings of Fact and Conclusions of Law pertinent to the nature, scope and effect of the fishing rights of the Treaty Tribes are specifically incorporated by reference herein.

24. The court retains jurisdiction of this case for the life of this decree to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law and in implementation of this decree.

25. Appointment of a Master, technical experts and an Advisory Committee on Treaty Right Fishing will be considered and determined as provided in the Decision of the Court.

26. Plaintiffs' application for an injunction will be considered and determined upon hearing thereof at the earliest practicable date following entry of this judgment and decree.

RULINGS ON FISHERIES' QUESTIONS PER RECONSIDERATION MOTION

1. Is the state or its officers authorized to arrest a member of one of plaintiff tribes fishing in contravention of state law outside the area of his tribe's usual and accustomed fishing grounds, enumerated in this Court's Findings of Fact or as determined in a subsequent proceeding in this Court, even though such individual may prove, in his defense in any criminal proceeding resulting from his arrest, that such area in which he was fishing is a usual and accustomed fishing ground of his tribe?

A. Yes. In the hearings of March 5 and 6, 1974, the court directed each plaintiff tribe to determine and report to Fisheries and Game, in advance of a particular run or season, the names of tribal members who expect to fish in the period in question, the amount and type of gear to be used, and the usual and accustomed locations where such fishing will be conducted. After a reasonable time for compliance, any tribal member fishing in a location other than as reported by his tribe, is acting in violation of the orders and decision of this court. If such tribal member is also fishing in violation of state law, he or she is subject to state arrest and criminal prosecution; provided, that if the defendant proves he was fishing at a usual and accustomed ground or station of his tribe, although not previously designated as such, it shall be a defense to any such prosecution.

2. Can the state meet its burden of proving the necessity for a state regulation of an off-reservation Indian treaty fishery by showing that:

(a) The off-reservation catch, other than fish needed for personal food or ceremonies, of the tribe or tribes for which regulation is sought is in excess of 50% of the harvest taking place by all fishermen in the area of the tribe's or tribes' usual and accustomed fishing ground; and
(b) such regulation is necessary for conservation?

A. No. While the showing specified in the question might be sufficient on a particular run of fish in a particular stream or area, it would be necessary to further show how the particular take affected the total take of all treaty right fishermen at all usual and accustomed grounds and stations. The State must regulate non-Indian fishing in marine areas to assure, as far as possible, that an adequate number of harvestable fish reach the Indian fisheries.

3. What is the status of a tribe pending its compliance with the Court's requirements to identify and certify its fishermen and to provide the state with fish catch statistics?

A. During the period pending compliance with the identification and certification requirements regarding the fishermen and tribal catch statistics reports, each tribe shall provide its fishermen with such credentials as are reasonably practicable, and a tribe, if otherwise qualified, will be entitled to self-regulation status.

4. Is the state or its officers authorized to arrest a member of one of plaintiff tribes fishing in contravention of state law without identification as required by the Court's opinion, even though such individual may prove, in his defense in any criminal proceeding resulting from his arrest, that he is a member of one of the plaintiff tribes?

A. The answer to this question is similar to the answer to question No. 1 above. In its Final Decision #I, the court required each tribe to provide its members with proper identification. Failure of an individual tribal fisherman to have such identification on his person when fishing, or when going to or from a fishing site, will cause him to be subject to state authority.

5. In proving regulations to the Court or in establishing findings before a special master:

(a) What specific elements must the state show to satisfy the requirement that the state prove in advance that its regulations are necessary for conservation?

(b) What specific elements must a tribe show to satisfy the qualifications that its fishing regulations will not adversly affect conservation?

A. (a) Final Decision #I prescribes the applicable standards and elements required for the state to show a specific regulation is necessary for conservation. These include requirements that the state utilize run size predictions, valid escapement goals, the least restrictive regulation of tribal fishermen and that the state view the entire run as a divisible resource. Experience with actual proposed regulations may disclose other specific elements which must be shown in advance of enforcement of state regulations against treaty right fishermen.

(b) Tribes shall promptly prepare regulations and submit them to Fisheries and Game, who will examine the proposed regulations for alleged inadequacies. The parties will confer with a view toward agreement; failing that, proposed regulations will be reviewable by the court on application of either party.

6. If the state can show that it is necessary for conservation to restrict off-reservation treaty fishing on a threatened run of a species destined for one river, but that other runs of the same species destined for other rivers are abundant enough to permit harvesting by treaty and non-treaty fishermen in accordance with the opinion of the court, may the state restrict the treaty off-reservation fishery on the threatened run even though non-treaty fishermen fishing on mixed runs will incidentally impact the threatened run? (See F.F. 202)

A. The state would not necessarily be allowed to operate in the manner set forth in the question. Various other factors may be involved. The state must explore alternatives to fishing on mixed stocks, consistent with the goal of full harvest of the resource.

7. Do fish caught by a member of one of the plaintiff tribes in the all citizen fishery count toward the off-reservation 50% share of his tribe? (See F.F. 32)

A. Fish caught by a member of one of the treaty tribes while fishing in the all-citizen fishery, at a usual and accustomed fishing place of the tribe, will be included in the tribe's off reservation share of the harvest. If a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share.

8. If a plaintiff tribe meets the qualifications and conditions for self regulation, may the state adopt that tribe's off-reservation fishing regulations, or other regulations approved by the Court, and enforce the same, i.e., is there pre-emption or concurrent jurisdiction between the state and the tribe? (See C.L. #37)

A. As stated in Conclusion of Law No. 37, the state and treaty tribes have concurrent jurisdiction with regard to regulation of the fishery resource. If, however, the treaty tribe is self-regulating, the state has only limited jurisdiction with regard to such tribe. The state can adopt regulations of a self-regulating tribe, but only if state promulgation is consistent with requisite administrative procedures. Furthermore, before any particular state regulations can be enforced against any treaty right fisherman, the state must additionally satisfy the requirement of showing the specific regulation is reasonable and necessary for conservation. Upon satisfaction of these requirements, self-regulating tribes must adopt state regulations found reasonable and necessary for conservation, as directed in Condition (a) at page 32 of FD #I. Also the state has authority to monitor the fishing activities of self-regulated tribes and to report alleged violations of valid state regulations to tribal authorities and, if appropriate action is not taken by the tribe, to the court for determination.

9 and 10—There are no questions so numbered.

11. May the state adopt and enforce, as its own regulation the regulation of a plaintiff tribe, which has not qualified to be self-regulating, without independently proving to the Court that such regulations are necessary for conservation?

A. The answer to this question is similar to the answer to question 8 above, except that with respect to non self-regulating tribes, the state may enforce properly promulgated regulations which have been established to be reasonable and necessary for conservation.

12. Where two or more Indian tribes have treaty rights to fish in the same off-reservation area, how is the off-reservation 50% treaty share to be calculated?

A. The division among tribes of the Indian off-reservation share of the harvest shall be determined by the tribes fishing in the same usual and accustomed places. The only concern of the state would be to determine (a) whether the total harvest by all tribes exceeds 50%, and (b) whether any tribe or group of tribes will cut into escapement when fishing as the tribes had planned.

13. Where two or more Indian tribes have treaty rights to fish in the same off-reservation area and the state, being unable to prove in advance the necessity of its regulations for conservation, adopts the regulations of one of the treaty tribes entitled to fish there, may the state enforce its regulation as to all treaty fishermen entitled to fish there?

A. State enforcement of fishing regulations adopted from either self-regulating or non self-regulating tribes is covered by the answers to questions 8 and 11 above.

14. Does a plaintiff tribe, which qualifies as a self-regulating tribe, have authority to enforce its off-reservation fishing regulations against persons who are not members of such tribe?

A. No. A self-regulating tribe has authority only over its own members. However, the tribes should report apparent misuse of the fishery to the state if a non-Indian is involved or to the tribe of a treaty right fisherman, and if appropriate action is not taken, such report should be

brought to the court for such action as the court finds appropriate.

15. If a tribe does not qualify as a self-regulating tribe and the state is unable to prove in advance the necessity of its regulations for conservation, does it necessarily follow that treaty fishing in the tribe's off-reservation usual and accustomed fishing area must be unregulated?

A. If a member of a non self-regulating tribe is alleged to be guilty of misuse of the fishery, such incident shall be reported to his tribe for adjudication, and failing prompt and appropriate action there, the matter should be brought to court for such action as the court finds appropriate.

16. How does the "alternative means" requirement in paragraph number 6 on page 36 of the Court's Opinion relate to the percentage share plan for off-reservation fisheries in paragraph 7 on pages 36–37 of the same?

A. The precise answer to this question is difficult because paragraph 6 on page 36 has been taken out of context and contrasted with the "sharing equally" concept. Taken together, in context, this language means that the state may not allow an overharvest by non-treaty fishermen, and then justify restriction of treaty right fishing by the requirements for spawning escapement necessary for conservation. Because of the locations of their usual and accustomed fishing places, treaty Indians are usually the last user group to harvest the resource. Because also the number of non-treaty right fishermen greatly exceeds the number of treaty right fishermen, the state must generally regulate the harvest by non-treaty right fishermen in order to assure, insofar as possible, that an adequate number of fish reach usual and accustomed fishing grounds to provide both the Indian tribal share of the harvest and the necessary spawning escapement.

17. For the purpose of exercising treaty fishing rights, may an Indian only be enrolled in one tribe?

A. Yes. The practicalities of regulatory enforcement require that any treaty right Indian, eligible for enrollment

in more than one tribe, may be certified and identified for fishing purposes by only one tribe.

18. Does the 1937 Convention between the United State and Canada (50 Stat. 1355), which establishes the International Pacific Salmon Fisheries Commission with jurisdiction to regulate the harvest of pink and sockeye salmon in the Strait of Juan de Fuca and northern Puget Sound, modify the Stevens treaties, so that plaintiff tribes which have usual and accustomed fishing grounds within the convention waters must fish in conformity with the regulations promulgated by the Commision and enforced, pursuant to 16 U.S.C. § 766d, by the State of Washington? (See F.F. 214)

A. In the opinion of this court, the 1937 convention does not explicitly or implicitly modify the Stevens' treaties. However, this court believes that treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission.

19. Are salmon runs, e.g., Deschutes River and Minter Creek, which are entirely artificially propagated, as distinguished from wild salmon runs which are artificially augmented, excluded from any calculation of the treaty fishermen's off-reservation 50% share as defined in the Court's opinion?

A. No. However, this ruling is subject to further consideration of the artificial propagation issue during pretrial and trial of the environmental issues.

20. Can a person who is not an enrolled member of a particular treaty tribe exercise, or assist in the exercise of, the treaty fishing right of, or on behalf of, a member of such tribe?

A. A treaty right fisherman may secure the assistance of other tribal fishermen with off-reservation treaty fishing rights in the same usual and accustomed places, whether or not such fishermen are members of the same tribe or another treaty tribe. A treaty right fisherman may also be assisted by his or her spouse (whether or not possessing individual treaty rights), forebears, children, grandchildren and siblings.

PROPOSED AMENDMENTS AND RULINGS THEREON

21. The Court's Opinion, Judgment and Decree be amended to require that the identification cards issued by the tribes, as required in the Court's Opinion, contain thereon the holder's tribal enrollment number.

A. There being no objection by plaintiffs, the amendment is adopted.

22. The Court's Opinion, Judgment and Decree be amended to require unattended gear to be marked by an identification tag issued by the tribe, as is required by the Yakima Tribe. (See F.F. 159)

A. The principle that unattended gear be marked by an identification tag is adopted; however, the specific type of tag to be used will be later determined by the court unless the parties can agree thereon.

23. Finding of Fact No. 101 be amended to include: Hatchery returns of fall chinook salmon to the Department of Fisheries Puyallup Hatchery were 22 fish as of the week of September 15, 1973. At a corresponding time in 1972, there was a return of 115 fall chinook salmon. The projected return of Puyallup River fall chinook salmon to the Puyallup Hatchery for the 1973 run was 132 fish, which compares with the previous all time low of 241 fish during a twenty year period commencing in 1953. (Tr. 4213, *l.* 21 to 4214 *l.* 23)

A. Denied. The data specified in the first two sentences are correct, but incomplete and out of context and therefore misleading. The first figure in the last sentence is a speculative estimate rather than established fact and therefore contrast to an actual prior year figure is also misleading.

24. Finding of Fact No. 96 and Conclusion of Law No. 41 be amended to delete RCW 75.08.260 from the list of specific statutes and regulations declared to be unlawful [Note: This statute makes violation of fishery statutes and regulations a gross misdemeanor. If it cannot be applied to treaty fishermen in instances where fishery regulations have received prior approval by the Court, Fisheries is

without any enforcement of its valid regulations. Fisheries has no authority of its own to make violation of its regulations unlawful. That power rests with the legislature.]

A. Denied, subject to modification as set forth in paragraph 6 of the injunction entered March 22, 1974.

25. Findings of Fact Nos. 153 and 158 be amended to delete references to the fact therein stated that the Yakimas sold commercially fish taken by them in the case area, and to add the following:

At the time of the treaties the Indians of the Yakima Tribe used fisheries located in the Puget Sound area for the purpose of obtaining salmon and steelhead for their subsistence and trade with other Indians. [Tr. 3299, *l.* 4–7; Ex. F–35, p. 11, *l.* 15–19, p. 13, *l.* 3–7; Ex. Y–13, p. 9, *l.* 8–14].

A. After consideration in context of FD #I and the record, denied.

26. Conclusions of Law be amended to add the following Conclusion:

The Yakima Tribe's treaty right to fish within the case area is subject to the consent of other treaty tribes in whose usual and accustomed fishing places the Yakima Tribe also fished at treaty times. (See F.F. 153)

A. After consideration in context of FD#I and the record, denied.

27. The Court's Opinion, Judgment and Decree be amended to indicate that the Quinault and Yakima Tribes do not meet Condition (a) [tribal off-reservation fishing regulations] of the Qualifications and Conditions established by the Court in its opinion to enable these tribes to be self-regulating, and, therefore, said tribes may not self-regulate their members' off-reservation fishing until such time as all the conditions established by the Court are met. [See F.F. 124 and 159].

A. Denied as to the Quinault Tribe; the required regulation was filed with the Court March 18, 1974. Denied as to the Yakima Nation, effective when that tribe adopts a regulation comparable to that filed by the Quinault Tribe.

28. The Court's Opinion, Judgment and Decree be amended to provide a method for the state to enact emergency regulations necessary for conservation. [See F.F. 199]. Such provision should recognize the provisions of the Washington Administrative Procedures Act for enactment of emergency regulations and provide a prompt method for judicial review, specifying the requisite notice and hearing requirements. Such procedure should enable the state to act within a twenty-four hour period.

A. Denied, except as the subject is now covered by paragraph 19 of the Injunction entered March 22, 1974.

INJUNCTION

Plaintiffs have moved the court for an injunction against defendants. The court has already determined that plaintiffs are entitled to injunctive relief against the continuation and repetition of acts and omissions which are in violation of the treaty-secured rights of the plaintiff tribes and their members. Defendants and plaintiffs have all submitted motions, memoranda, and have made oral argument to the court concerning general and specific questions and problems which will or may arise as the court's Final Decision #I is implemented. The court is of the firm opinion that the decision must be implemented as rapidly and as orderly as is practicable and consistent with conservation and protection of the anadromous fish resource, the rights of the Indian tribes, and the lawful exercise of state police power. In order to facilitate that implementation, it is necessary and desirable to define with specificity the obligations of the parties under the decision, making allowance for special practical problems and circumstances which a court of equity must heed.

Of utmost and immediate importance for protection of the fishery resource is the fashioning of an interim program for the lawful exercise of state police power over persons within state jurisdiction. The facts before this court indicate no reason for delaying an implementation of the rights of the plaintiff tribes to take fish as guaranteed to them in their treaties with the federal government, and

assuring an equitable apportionment of the state's fish harvest between treaty Indian and non-treaty fishermen. By adopting a flexible interim program, these goals all can be met. The court recognizes, of course, that such an incipient program must be flexible enough to accommodate the needs of all parties and the practical realities which exist as a new approach to fisheries management is effectuated.

The parties have raised a number of issues and questions concerning details and timing of the decision's implementation. Many such inquiries can be answered only as situations arise. Others are answered by defining the obligations of the parties in this injunction. The court has already appointed a special master to assist it in resolving future matters which arise under the decision and in implementing it.

Without attempting to anticipate each and every problem or question which may arise, the basic obligations of the parties, together with means for resolving future matters, can be set forth to guide the conduct of all parties, plaintiff and defendant. Accordingly, the court recognizes that successful performance of many duties imposed upon defendants by this injunction will depend upon plaintiffs' cooperation, good faith efforts, and compliance with requirements set forth in Final Decision # I.

It is not intended that anything in this injunction shall be construed to limit or qualify in any manner Final Decision # I or the right of the parties as set forth in that decision. All terms used in this injunction shall have the meanings set out in Final Decision # I. As used herein, the term "Final Decision # I" means the final Decision in this cause entered on February 12, 1974, as modified by the Orders entered March 22, 1974, including the Findings of Fact, Conclusions of Law and Decree entered February 12, 1974 which were made a part of said Final Decision # I.

Therefore it is hereby

Ordered, adjudged and decreed that the State of Washington; Thor C. Tollefson, Director, Washington

State Department of Fisheries; Carl Crouse, Director, Washington Department of Game; The Washington State Game Commission; the Washington Reef Net Owners Association, their agents, officers, employees, successors in interest; and all persons acting in concert or participation with any of them ("defendants") are permanently enjoined and restrained to obey, to respect and to comply with all rulings of this court in its Final Decision # I and with each provision of this injunction, subject only to such modifications as may be approved as a part of an interim program.

1. Defendants shall:

a. fully and fairly recognize each of the plaintiff tribes as a tribe holding all rights described and declared as to it in Final Decision # I and accord to each the tribal rights and powers recognized as to it in that decision;

b. fully observe and to the best of their ability carry out the provisions and purposes of the treaties cited in paragraph 1 of the Findings of Fact;

c. conform their regulatory action and enforcement to each and all of the standards set forth in Final Decision # I;

d. recognize the fishing rights in the case area of any treaty tribe not a party to this case to the full extent declared in Final Decision # I as to the plaintiff tribes and perform all acts and duties set forth in this injunction with respect to such additional treaty tribe upon the agreement of defendants or determination by the court that the tribe is a treaty tribe.

2. Defendants shall not interfere with or regulate or attempt to regulate the treaty right fishing of members of the Yakima Indian Nation or Quinault Tribe or any other treaty tribe during any period for which said tribe has been or is hereafter determined pursuant to Final Decision # I to be entitled to self-regulate such fishing by its

members without any state regulation thereof; provided however that monitoring by the state as stated as a condition for self-regulation may be exercised by the state and in case of a threat to the resource, the defendants may apply to the court for the exercise of regulatory authority;

3. Defendants shall not interfere with or regulate or attempt to regulate the treaty right fishing of members of any treaty tribe during any period not covered by paragraph 2 above as to such tribe unless the state first shows to the satisfaction of such tribe or this court that such regulation conforms to the requirements of Final Decision # I and this injunction.

Provided that notwithstanding any other provisions hereof the state may adopt and enforce provisions contained in a duly enacted off-reservation fishing regulation of any tribe when:

a. the tribe or tribes affected or this court determines that state assistance in the enforcement of such provisions is necessary for conservation; or

b. the tribe has entered into an agreement under which the state may apply the provisions contained in such tribal regulation against the persons exercising the treaty fishing rights of such tribe.

4. Except as otherwise provided in this injunction, defendants shall not enforce any state statute or regulation not conforming to the above against any individual fishing at his tribe's usual and accustomed fishing place who identifies himself by a tribal membership certification carried on his person. Any person exercising a treaty fishing right must have his identification as specified in paragraph 5 of this injunction on his person or risk lawful arrest by defendants, although it may later be determined or asserted as a successful defense in a criminal prosecution that such person was exercising a federally protected Indian treaty right to fish.

5. Identification sufficient to require application of paragraph 4 above shall be:

a. until June 1, 1974, for plaintiff tribes other than the Sauk-Suiattle, Upper Skagit and Stillaguamish Tribes, any identification which has been issued or authorized pursuant to the provisions of 25 C.F.R. § 256.3;

b. for any of the Sauk-Suiattle, Upper Skagit or Stillaguamish Tribes until the membership roll and organizational structure of said tribe is approved by the Secretary of the Interior or his delegate, but not beyond one year from the date of this injunction, any identification card signed by the tribe's tribal chairman certifying the person's membership in the tribe; and

c. in all the cases after the dates specified in a and b above, only identification which includes the name, tribal affiliation, enrollment number (where applicable), and a photograph of the holder and is certified by an authorized representative of the tribe or the Bureau of Indian Affairs.

6. Except as otherwise provided in this injunction, defendants shall not apply or enforce any of the following statutes or regulations to regulate, limit or restrict the exercise of the fishing rights of a treaty tribe as declared in Final Decision # I: RCW 75.08.260, RCW 75.12.060, RCW 75.12.070, RCW 75.12.160, RCW 77.08.020, RCW 77.12.100, RCW 77.12.130, RCW 77.16.020, RCW 77.16.030, RCW 77.16.040, RCW 77.16.060, WAC 220-20-010, WAC 220-015(2), WAC 220-47-020. Defendants may apply RCW 75.08.260 and RCW 77.16.240 with respect to those statutes and regulations which meet the requirements of paragraph 3 of this injunction.

7. In order for this court to determine that a state statute or regulation is reasonable and necessary for conservation, defendants must demonstrate that:

a. the specific statute or regulation is required to prevent demonstrable harm to the actual conservation of fish, i.e., it is essential to the perpetuation of a particular run or species of fish;

b. the measure is appropriate to its purpose;

c. existing tribal regulation or enforcement is inadequate to prevent demonstrable harm to the actual conservation of fish;

d. the conservation required cannot be achieved to the full extent necessary, consistent with the principle of equal sharing between treaty and non-treaty fishermen expressed in paragraph 14 of this injunction, by restriction of fishing by non-treaty fishermen or by other less restrictive alternative means or methods.

8. The court finds that the state has the responsibility for conserving the resources and accordingly, the state defendants shall diligently and vigorously, as far as circumstances permit, enforce their applicable statutes and regulations in order to safeguard the fish resources in the state from depletion or destruction due to unlawful fishing by persons subject to the state's jurisdiction.

9. The state defendants shall begin immediately, and shall continue expeditiously, to revise and to reorganize their regulatory action and enforcement so as to conform the same to all requirements of Final Decision # I and this injunction.

10. The state defendants shall publish any state treaty right fishing regulations which may be adopted after being shown to be in conformity with the requirements of Final Decision # I and this injunction, separate and apart from other state fishing regulations or as a separate and plainly labeled part thereof readily distinguishable from other fishing regulations.

11. The state defendants shall not adopt regulations or enforce any statutes or regulations affecting the volume of anadromous fish available for harvest by a treaty tribe at usual and accustomed places unless such regulations are designed so as to carry out the purposes of the treaty provisions securing to the tribe the right to take fish.

12. Except as otherwise provided by paragraph 19 hereof, the state defendants shall not adopt or enforce any regulations that affect the harvest by the tribe on future runs unless there first has been a full, fair and public consideration and determination in accordance with the requirements of the Washington Administrative Procedures Act and regulations under it.

13. The state defendants shall not regulate or restrain the exercise of treaty fishing rights of plaintiff tribes and their members by use of a state statute or regulation of broad applicability instead of one specific as to time, place, species and gear.

14. The state defendants shall not adopt or enforce any regulation which effectively limits the harvest by treaty tribes on future runs unless the state's regulatory scheme provides an opportunity for treaty tribes and their members to take, at their off-reservation usual and accustomed fishing places, by reasonable means feasible to them, an equal share of the harvestable number of each species of fish that may be taken by all fishermen; *provided* that for the present time defendants shall not be required to achieve mathematical precision in so allocating the fish;

Provided further that in order to approach more nearly the principle of equal sharing, the fish which Indian treaty fishermen shall have an opportunity to catch shall include not only an equal share of the total number of fish of any species which are within the regulatory jurisdiction of the State of Washington but shall also include an additional amount or quantity of fish which shall be determined by agreement of the parties or by approval of this court, to reflect the substantially disproportionate numbers of fish, many of which might otherwise be available for harvest by Indian treaty right fishermen, cuaght by non-treaty fishermen in marine areas closely adjacent to, but beyond the territorial waters of the state, or outside the jurisdiction of the state although within Washington waters;

And provided further that additional adjustments to permit the opportunity for treaty or non-treaty fishermen to harvest more or less than an equal share of any species of fish in the same or a subsequent year may be made by agreement of the parties, or by application by any party to the court for its direction or approval to compensate or allow for:

a. unexpected conditions or circumstances;

b. run size predictions, which, in spite of defendants' best efforts to achieve accuracy, were incorrect;

c. emergency regulations adopted in accordance with the provisions of this injunction;

d. historical fisheries of particular importance to Indians;

e. alteration or destruction of usual and accustomed fishing places, or environmental conditions, which limit the present day opportunity of treaty fishermen to take fish at such places;

f. measures shown by the state to be reasonable and necessary to assure as nearly as possible that there is a full a harvest as possible consistent with Final Decision #I.

15. Where the fish allocated to Indian treaty fishermen must be divided among two or more tribes having usual and accustomed fishing places through which the fish will pass, responsibility for such division shall rest with the tribes involved.

16. The state defendants shall immediately and expeditiously, consistent with availability of funds, begin to gather data and otherwise increase their technical capability to make run size predictions, establish escapement goals, and otherwise to increase their ability to manage the fisheries under their jurisdiction and control in a manner fully consistent with Final Decision #I.

17. The state defendants shall, as soon as practicable in advance of every fishing season, determine on the basis of the most current and reliable information available to them from their own technical staffs, other sources such as the treaty tribes and the United States Fish and Wildlife service, as accurately as possible the number of harvestable fish that may be taken during a particular fishing period which amount or quantity shall exclude such fish as are required for adequate production escapement and the estimated number of fish which will be needed by the tribes for traditional tribal ceremonies and personal subsistence consumption by tribal members and their immediate families. In carrying out this duty defendants

may request treaty tribes to submit to the Departments of Fisheries or Game reasonably accurate estimates of (1) the type, location and amount of fishing gear expected to be used and anticipated time for its use; (2) the number or quantity of fish they intend and expect to take at their usual and accustomed fishing grounds for traditional ceremonial needs and for consumption by tribal members and their families; (3) the number or quantity of fish they intend and expect to take on their reservations; and (4) reports of catches of fish by tribal members as to both on and off-reservation treaty fishery for the purpose of establishing escapement goals and other purposes which are reasonable and necessary conservation purposes.

18. The state defendants shall make available to a treaty tribe upon its request at the earliest practical time, such raw or processed data as they have available from time to time relative to the expected size, timing and condition of fish runs in the case area and the current level of harvest and escapement.

19. In order to accommodate unforeseen circumstances as readily as possible, consistent with conservation necessity, defendants may utilize procedures for making emergency regulations affecting taking of fish under this jurisdiction and control; *provided* that they shall adhere in every respect to the requirements of the Washington State Administrative Procedures Act and the regulations under it, and that the approval of such emergency regulations by this court where otherwise required by Final Decision #I and this injunction or the consent of all affected tribes has been obtained; *provided*, however, that emergency regulations are enforceable by the state upon filing with the court and service upon the tribes affected (or their counsel of record, if any) a copy of such regulations and a statement of facts and circumstances of the emergency on which the regulation is based. Any such tribe may respond and seek immediate court review. Requests for emergency consideration by this court will be given priority and determined speedily.

20. Plaintiffs and defendants shall submit, either

jointly or separately, on or before July 15, 1974, for the court's approval, a program to implement the interim plan for state regulation to be effective until defendants have an opportunity to implement fully all aspects of Final Decision #I, but no longer than one year from the date of submission or any extensions granted by leave of this court for good cause, and such regulations shall be, to the extent possible and practicable, consistent with the spirit of Final Decision #I, provided that all parties will be expected to adopt a flexible, reasonable approach in recognition of the special problems of defendants in implementing a new regulatory scheme and the fact that many of the tribes are only beginning to develop and exercise their full regulatory capabilities. Accordingly, the court will not expect or insist upon absolute compliance with the letter of Final Decision #I in reviewing and approving the interim plan.

21. Defendants shall in no manner limit, restrict or inhibit the time, place, manner, volume or purpose of the disposition by a member of a plaintiff tribe of fish harvested according to his rights and the rights and powers of his tribe, as declared and adjudged in Final Decision #I, or interfere with any person purchasing, attempting to purchase, transporting, receiving for shipment, processing or reselling, fish taken pursuant to the exercise of such rights.

22. Game defendants may submit to this court a plan for determining the identity and origin of fish classified by state law as game fish which are purchased by fish buyers within the State of Washington and for monitoring and obtaining statistics and records from such fish buyers in order that trafficking in game fish now lawfully taken by treaty Indian fishermen consistent with Final Decision #I in this case, and in violation of state law, can be detected promptly and appropriate action taken.

23. With respect to any item of fishing gear which has been seized or damaged or (as provided below) has been claimed to have been seized or damaged, by any of the defendants pursuant to statutes, regulations, orders,

practices, procedures, or actions declared and adjudged unlawful in Final Decision #I and which had not been judicially ordered forfeited or confiscated prior to February 12, 1974, the defendant having control, or who has been claimed to have control, of such gear shall:

a. provide all plaintiff tribes a complete list of gear so seized;

b. return such gear to the owner or his delegate on or before July 1, 1974; or if the ownership is unknown or in dispute as of July 1, 1974, return such gear to the tribe whose reservation is nearest the place of seizure or as otherwise directed by order of the court; and

c. on or before July 1, 1974, provide this court and all plaintiffs a full accounting as to each such item of gear and the disposition thereof.

24. Any member of any plaintiff tribe shall be entitled to invoke the continuing jurisdiction of this court as provided in paragraph 25 to make a claim to the return of gear allegedly seized or damaged by any one of the defendants, or of its fair market value, or diminution of value of gear returned under paragraph 23 which is not substantially in the same condition as immediately prior to seizure, if:

a. the claim arises from an act of the defendants after September 18, 1967;

b. he notifies the state Attorney General in writing of his claim on or before May 31, 1974 or within 30 days after the return of gear under paragraph 23 for claims for diminution of value; and

c. his notice describes in such detail as is possible under the circumstances, the time, place and manner of seizure or damage, the identity of the offending persons and the size, character and value of the gear.

As to any such notice, the state Attorney General shall provide a response to the claimant and shall report its contents with his accounting of July 1, 1974. If the response disputes the claim of seizure or damage by the defendants, the state shall accord the member an

opportunity to be heard on his claim and to inspect any fishing gear or other property of the type claimed that is in its possession, for purposes of attempting to identify it as claimant's property. Any dispute over the fact of such seizure or damage or over the value of such property which is unresolved sixty days after the notification submitted pursuant to a above, may be referred to either party to the court as provided in paragraph 25.

25. The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:

a. whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #I or this injunction;

b. whether a proposed state regulation is reasonable and necessary for conservation;

c. whether a tribe is entitled to exercise powers of self-regulation;

d. disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;

e. claims to returns of seized or damaged fishing gear or its value, as provided for in this injunction;

f. the location of any of a tribe's usual and accustomed fishing grounds not specifically determined by Final Decision #I; and

g. such other matters as the court may deem appropriate.

In order to invoke such jurisdiction, the party shall file with the clerk of this court and serve upon all other parties (through their counsel of record, if any) a "Request for Determination" setting forth the factual nature of the request and any legal authorities and argument which may assist the court, along with a statement that unsuccessful efforts have been made by the parties to resolve the matter, whether a hearing is required, and any factors which bear on the urgency of the request. Any party shall have an opportunity to respond to, join in, or supplement the request within seven days of its service or such other

time as may be directed by the court. The court may then decide the matter, hold a hearing, or refer the request to the special master to hear evidence and legal argument, as soon as is practicable. If the matter is referred to the special master, he shall have authority to summon witnesses, issue subpoenas, hold hearings, and take such evidence as may be introduced and such as he may deem necessary to call for. The master shall, with all convenient speed, submit to the court, with copies to all parties (through their counsel of record, if any), a report of his factual findings, conclusions of law based upon them where necessary, along with his recommended disposition and reasons in support of it. The parties may submit to the court exceptions to the master's report. The master's report shall be subject in whole or in part to consideration, revision or approval by the court and in every case the court shall make the final determination. This injunction shall not alter or deprive the parties of any right to bring motions and other matters before this court as provided in the Federal Rules of Civil Procedure.

26. Defendants shall submit to the court and all parties on July 1, 1974 and each three months thereafter until further order of this court a progress report concerning those matters which they are ordered to perform by this injunction, stating in reasonable detail the actions taken to carry out the provisions of paragraphs 9 and 16 of this injunction and any other pertinent matters affecting fulfillment of the terms of this injunction and/or Final Decision #I.

INTERIM PLAN AND STAY ORDER PENDING FINAL DECISION ON APPEAL

The court having considered the need for an interim plan and having considered the interim proposal, now hereby orders that the following interim plan shall be in effect and shall be binding upon all parties to this litigation except as to tribes determined to be self-regulating. In making this order the court does so

reserving jurisdiction to make further modifications if the court deems them necessary and further orders a stay of portions of the injunction, final decision No. 1 and the decree of February 12, 1974.

The court now, therefore, orders, adjudges and decrees:

(1) Effective June 1, 1974, all off-reservation fishing areas in the case area are closed to Indian treaty fishing except to the extent that tribes adopt and file with the court and the defendants tribal regulations for the fishing activities of their members and specifying the areas to be opened to fishing by tribal members. Indians who engage in fishing activities not in accordance with those tribal regulations shall be subject to the same provisions of the state law as non-Indians engaging in fishing activities.

(2) The biologists of the defendants and biologists for the tribes shall meet to formulate general principles to be utilized as guidelines to be flexibly applied in the adoption of specific fishing regulations.

(3) The tribes, prior to filing with the court tribal fishing regulations, shall give the defendants an opportunity to meet with and confer with tribal representatives on the subject of such fishing regulations.

(4) The defendants are authorized to adopt and enforce with the tribes' approval tribal regulations as state regulations as to members of the tribe in question without the necessity of proving the need for conservation under the provisions of the decision.

(5) The defendants will make significant reductions in the non-Indian fishery, as are necessary to achieve the utltimate objectives of the Court's decision without requiring mathematical precision, but in making such reductions will do so consistent with the concept of permitting the full harvest of fish.

(6) The defendants will monitor the fish catch and the results and statistics from such monitoring shall be used in considering the regulatory pattern for the following year.

(7) The parties shall exchange all available data

concerning size, timing and condition of fish runs in the case area and the current level of harvest and escapement in response to reasonable requests for the same to assist the parties in carrying out their responsibilities.

The court further orders, adjudges and decrees that any portion of Final Decision No. 1, the Decree of February 12, 1974, and the Injunction of March 22, 1974, which is in conflict with the Interim plan is hereby stayed subject to subsequent orders of this court.[1]

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[1]In the original order, in sixteen paragraphs the court listed specific portions of Final Decision #I, the Decree of February 12, 1974 and the Injunction of March 22, 1974 to be stayed. In summary, these primarily dealt with two major subjects:

(1) requirements that state statute and regulations concerning the exercise of fishing rights must be established to be reasonable and necessary for conservation and must be promulgated consistent with administrative and procedural due process before they may be lawfully applied to treaty right fishermen; and

(2) the obligation of the state and its agencies to develop and enforce statutes and regulations relating to both treaty right and non-treaty right fishermen in a manner that will assure that the opportunity to harvest the anadromous fish resource at tribal off-reservation usual and accustomed fishing places is "shared equally," as that concept is defined in Final Decision #I, by the respective user groups.

Testimony in U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974)

Testimony of JAMES E. LASATER,
Assistant Director in Charge
of Management, Washington
Department of Fisheries
July 9, 1973 + August 30-31, 1973 + Sept. 14-17

A. My name is Jasper Elton Lasater and I reside at Route 8, Box 344G, Olympia, Washington.

Q. Where are you employed and what is your title?

A. I am employed by the Washington Department of Fisheries and my title is Assistant Director of Fisheries.

Q. What is your educational background?

A. I have a bachelor of science degree in fisheries from the College of Fisheries at the University of Washington. I took two quarters of post graduate studies to get several fisheries courses unavailable to me while getting my bachelor's degree. I have completed seminar courses in natural resources management at the University of California and at Penn State.

(1974 TR 434 lines 2-13)

Q. Is there a problem in ensuring that salmon native to areas fished by treaty Indians escape the ocean fishery?

A. Yes. The offshore fishery for chinook and coho salmon is taking a major portion of the harvest of those species and has led to severe restriction of the fishery in Puget Sound. Figures used by the United States in negotiating with Canada this year show that Canadian fishermen are taking approximately 83 percent of Puget Sound chinook salmon and approximately 65 percent of the coho.

(1974 TR 446 lines 7-15)

Q. Why not just set a fixed quota for the Indian catch?

A. The fixed quota system would provide for a fixed standard. The fixed quota, however, does not meet sound conservation practices. On years when the run is low, the quota catch may very well exceed the number of fish available for harvest and the quota of fish will be taken directly from necessary spawning escapement. For instance, this year we expect a very small run of chinook salmon to return to Puget Sound from international waters. We have closed the commercial fishery and reduced the sport fishery. An Indian commercial net fishery with a fixed quota on this run could be expected to reduce the spawning escapement below necessary or desirable levels, and that would be unsound conservation. Furthermore, a fixed quota will be unfair to fishermen, both Indian and non-Indian, and may well be unfair to the state. On a year when the run is low and the Indian quota will take the entire harvest, the all-citizen fishery then must be entirely shut down to meet spawning escapement goals. On a year when the run is very good, the Indian will be fixed to a quota which will be low on that year and the all-citizen fishery will have a bountiful harvest and the Indian will only catch his fixed quota.

(1974 TR 448 lines 13-32)

Q. Why are commercial reservation catches to be included in calculating the Indian fair share catch?

A. There are a number of reasons.

1. The reservation catch on a stream could be increased to the point that it took the entire harvest and the state would still owe the Indians a share which it could not possibly deliver.
2. Catches taken off-reservation would be taken to the reservation and sold from there, or simply reported as being taken on the reservation at the time of sale. There would be little chance of proving otherwise and the fishery would be unmanageable.
3. There would be an incentive to over fish, which the state could not control, and spawning escapements would suffer. As the run diminished, accordingly the productivity of the river would be reevaluated downward and the calculated fair share diminished. Salmon management would suffer, the Indian share would suffer and relations between the state and the Indians would impaired.
4. Indians with a reservation would have a great advantage over those without. The treaty fishery would then have different values for different treaty tribes, which is not fair on the face of it, and relationships between the tribes and the state and the tribes would suffer.

(1974 TR 471 line 28 - 472 line 17)

Q. Do you know of examples of poor management by Indian tribes?

A. Yes, one example is the catch of sockeye from the Ozette River. The Ozette River flows from Ozette Lake to the Pacific Ocean in the extreme northwest corner of the State. The area is unpolluted and, since few sockeye salmon are taken by the Washington ocean troll fleet and net fishing for salmon in the ocean is not allowed, virtually the entire run enters the river. Little fishing had gone on for some time due to the remoteness of the area which had led to abandonment of Indian residence in the area. Indians once again began net fishing for sockeye salmon in the Ozette River and in 1948 the catch was about 4,000 salmon. Catches rose to over 17,000 salmon and by 1952, one cycle of salmon later, had fallen to about 3,000 salmon. As is illustrated in Exhibit F-22, catches have continued to decline and now number less than 500 salmon annually. The Ozette River salmon run was grossly overfished by Indians on the Ozette

reservation, and continued fishing of the remnant run left is preventing its recovery.

The Quinault River sockeye run is managed by the Quinault Indian tribe. The spawning tributaries above Lake Quinault and the lake are in relatively their native state. It is true that the river and its tributaries shift about considerably which does affect spawning, but the river has always done so by its nature. Even though regulated by the tribe, sockeye salmon catches on the average have steadily declined over the years. Exhibit F-23 illustrates Quinault sockeye catches since 1936. Prior to 1950, catches exceeded 200,000 on two years. Prior to 1957, catches exceeded 100,000 salmon on eight years. Since 1956 the catch has never reached 100,000 salmon. Exhibit F-4 shows the catch of chinook salmon by Puyallup Indians and the return of adults to the Puyallup hatchery. The very large catch in the early 1960's precipitated the Puyallup court case and was followed by a period of no fishing so that the run might be re-built. Then the Puyallup Indians and the Federal Government claimed that Indians could fish as they chose within the boundaries of the old reservation and catches of chinook rose markedly in 1971 and 1972. About 1,000 chinook salmon are required by the Puyallup Washington State salmon hatchery. Keeping in mind that the catch or hatchery take in one year affects the return of salmon 3 and 4 years later, it can be seen that the large catches in the 60's is related to a poor hatchery return with no Indian fishing following 1965. The run was recovering following the closure of the river to fishing in 1966, as can be seen by the steady increase in the hatchery escapement in 1967, 1968, 1969 and 1970. The increase in the Indian catch in 1971 and 1972 has once again dropped the hatchery run below a level needed for hatchery operation. Since hatchery chinook salmon have a higher survival rate than do wild fish, over-fishing has a much greater impact on wild fish. The wild stocks of salmon have

suffered severely from over-fishing by Puyallup Indians. As is shown in Appendix III, Table 5 of the Joint Biological Statement, in 1971 the Department of Fisheries set one day each week of fishing from August 15 through September 18 to protect the expected poor chinook run. In that year Puyallup Indians sold chinook salmon on 31 days prior to September 18. Both the hatchery and wild segments of the run were over-fished. Once a chinook run is fished to a low level it takes a minimum of three cycles, or 12 years, to expect recovery. The Puyallup Indians effectively undid the recovery of the chinook stocks of the Puyallup River from the previous over-fishing.

(1974 TR 491 line 2 - 492 line 25)

The Department and Indians have a broad common interest in salmon which has enabled us to stay in communication with, know as individuals, and work with most Indian tribes. The following examples are not exhaustive but provide an overview of programs whereby the department works with Indian tribes.

1. **Salmon eggs provided for educational purposes**

   Example — The Skokomish Indian people, through guidance provided by a fisheries biologist from Small Tribes Organization of Western Washington, Inc., have developed a small educational salmon egg-hatching station on their reservation. The Washington Department of Fisheries has provided the chum eggs necessary for this small educational hatchery since its beginning, approximately 3 years ago. In 1972, the department provided 100,000 eggs for this station.

2. **Hatchery releases of juvenile salmon made at such locations as to provide maximum harvest by Indian fisheries**

Example — Two Department of Fisheries-operated salmon hatcheries are located within Hood Canal's drainage system. The George Adams Salmon Hatchery is located on a tributary of the Skokomish River immediately above the Skokomish Indian Reservation, while the Hoodsport Salmon Hatchery is located at Hoodsport on a small tributary of Hood Canal. Both hatcheries produce coho and chinook salmon. The Hoodsport Hatchery has also been able to develop relatively small pink and chum runs.

In order to reduce the numbers of adult salmon which have returned to these two stations in excess of the department's propagation requirements, the department has developed a program highly beneficial to the Skokomish Reservation Indian fishermen.

Coho eggs for both stations are taken at the George Adams Hatchery while fall chinook eggs, for both stations, are taken at the Hoodsport Hatchery. River flows at time of coho entry into the Skokomish River are such that coho escapement to the hatchery is ensured. Thus, maximum harvest effort on both chinook and coho is beneficial to the Indian fishery without damaging the resource.

This management procedure resulted in approximately 21,800 coho being caught by Skokomish Indian Reservation fishermen in 1970. Of those coho caught of hatchery origin, 50% were estimated to have been produced by the Hoodsport Hatchery. An additional 12,700 fall chinook were caught while only 1,356 fall chinook were allowed to escape to the George Adams Hatchery. With George Adams' fall chinook eggs ensured from Hoodsport Hatchery, this relatively small escapement has not been cause for concern in the past.

3. **Hatchery production released into non-hatchery streams**

   Example — One of the few rivers on which an Indian reservation is located in Puget Sound, which does *not* have a salmon hatchery on it, is the Nisqually River. However, to supplement the natural production of this river, the Department of Fisheries has made hatchery releases into this stream from its hatcheries located elsewhere. In 1971, 5,865 lbs. of fall chinook fry and 27,419 lbs. of coho yearlings of state hatchery-reared fish were released into the Nisqually River. This program was continued in 1972 and is programmed for 1973.

   These plants will increase the number of salmon returning to the Nisqually River above those which are produced naturally, thereby increasing the number of salmon available to be caught by the Nisqually Indian fishermen.

4. **Hatchery production releases into barren areas**

   Example — The headwaters of the Klickitat River originate on or above the Yakima Indian Reservation. Construction of fish passage facilities in the upper river at Castile Falls has opened an additional 20 miles of spawning and rearing area. Spring chinook and coho salmon juveniles have been and are being released into the upper river to take advantage of this potential production area and in an attempt to establish a natural run above the fishways.

   Any additional production realized from this program directly benefits the Yakima Indian dip net fishery located on the Klickitat River near its mouth as well as all Columbia River fishermen, Indian and non-Indian, both commercial and sport.

5. **Salmon runs developed where none existed previously**

Example — Several low-water upstream migration blocks occurred naturally in the Klickitat River (RM 2.2) prior to 1955 when the last fishway at these lower falls was completed. Due to these falls, only spring chinook were able to migrate into the Klickitat River prior to this time. Spring chinook, migrating upstream during high-flow periods, were able to negotiate the falls. In 1945 and 1951, respectively, fall chinook and coho were introduced into the Klickitat River in anticipation of the fishways being completed and used by these species.

In 1950, construction on the Klickitat River Salmon Hatchery was begun. Construction was completed in 1954. A total of 4,551,542 salmon juveniles consisting of spring chinook yearlings, fall chinook yearlings, and coho yearlings were released by this station in 1972. The 1971 Klickitat River Indian dip net fishery reported catch was 289 spring chinook, 2,466 fall chinook, and 4,055 coho.

6. **Cooperate State-Indian fresh-water rearing programs**

Example — The Tulalip Indian Reservation contains an ideal fresh-water rearing pond of approximately 2-½ surface acres with a direct outlet into Tulalip Bay. An agreement between the Department of Fisheries and the Indians was reached in the fall of 1970 for this pond to be used to rear coho salmon juveniles with the state supplying the fish and feed while the tribe supplied the necessary manpower and need. The fish were provided to the tribe in February, approximately 3 months prior to their normal release period. Natural spawning area is not available at this rearing location, and the eggs are

not needed by the Skykomish Hatchery. Thus, total harvesting effort is allowed on the reservation (Tulalip Bay) after the adult fish have passed through an extensive commercial net and sport fishery conducted by both Indian and non-Indian fishermen.

In 1971, 28,333 lbs. of coho yearlings, 50% of the Skykomish Hatchery coho production, were released from this pond. In 1973, an evaluation of the comparative production success of this program was begun by marking approximately 50,000 coho juveniles at the Skykomish Hatchery. These fish are to be released (along with 450,000 other coho juveniles) into this pond to again be fed and released as yearling coho in the spring of 1973. Indian peole were hired to mark these fish with funds supplied through the Bureau of Sport Fisheries and Wildlife and with equipment and facilities supplied by the Department of Fisheries. In 1973, 25% of the feed costs for this program will be supplied by the Tulalip Indian Tribe.

7. **Cooperative State-Indian salt-water rearing program**

Example — The department has cooperated fully with the Squaxin Island Indian mariculture program since its inception several years ago. The department has provided the chinook which the Squaxins rear in their salt-water ponds. In exchange, the Squaxins have released a specific poundage of relatively large salt-water reared chinook which have contributed to the local sport fishery at a very high rate. These delayed release and large chinook (2-to-3 per pound as compared to 100 per pound normal hatchery release size) tend to remain in Puget Sound and enter sport fishery catches.

In 1972, 6,000 lbs. of fall chinook were provided to the Squaxins. A total of 17,500 lbs. of

chinook is presently being released by the Squaxins for the department. These fish have been marked and the catches will be evaluated in the continuing program of enhancing Puget Sound sport fisheries.

8. **State-Federal cooperative salmon plantings into reservation waters**

The Bureau of Sport Fisheries and Wildlife operates the Quilcene Salmon Hatchery on the Olympic Peninsula. The hatchery facility programs several plantings into rivers running through Indian reservations. One example is the White River (Muckleshoot Reservation), a major tributary of the Puyallup River.

However, due to disease organisms which are specific to the area of the Quilcene Hatchery, the Department of Fisheries does not want these fish released into inner Puget Sound rivers. Therefore, rather than simply bar this transfer of fish, the Department of Fisheries releases salmon juveniles into the White River from its Puyallup Hatchery. In turn, the Quilcene Hatchery releases an equal poundage of young salmon into the streams of our choice of the Olympic Peninsula.

9. **Hatchery surplus salmon carcass giveaway programs**

The department's hatchery system usually receives salmon in excess of its propagation needs, especially coho salmon. It is the department's policy to provide numbers of these fish, which are fit for human consumption, to our economically-depressed Indian people.

Indian tribal representatives are contacted when these fish are available and it is their responsibility to see that these fish are distributed to their respective tribal members. In 1972, 256,194 lbs. of salmon which had returned to the department's hatcheries were provided to Indian people.

10. **Cooperative State-Indian rearing programs which provide maximum benefit to all resource user groups**

Example — The Lummi Indians are operating a salmon and steelhead hatchery on Skookum Creek, a tributary of the Nooksack River. Once this hatchery is able to develop its own salmon runs, its future egg source will be ensured.

(1974 TR 494 line 1 - 498 line 33)

Q. Okay, I am trying to get there. Suppose instead of a fixed percentage from the Court you had the tribe each year tell you how much they were going to take, how many units of gear, how many fishermen, where and on what species and during what period of time. Wouldn't that eliminate the problem of having a fixed percentage and a different actual take by the tribe in that year?

A. The conversations I have had with Indian tribal officials in the past have shown that at least at times their plans and claims for what they will do and what they will take have not always been carried out, nor do they meet the test of conservation.

(R811 lines 6-19)

Q. Now, turning, if you will to 1973, the sockeye fishing season on Lake Washington, did you have a season for fishery there?

A. Yes.

Q. How many clients did you have fishing there?

A. The commercial fishery was closed this year because we didn't expect a run of commercial size. The sports fishermen fished and the Indians fished.

Q. By the way, are the Indians allowed commercially to market their sockeye take from Lake Washington?

A. Yes.

(R832 line 18 - 833 line 4)

Q. Page 17, if you would, at the bottom at line 26, the question is asked, "As a general matter do you have any opinion as to whether the Department of Fisheries could regulate the commercial and sport fisheries for salmon to provide a greater volume of fish from which the Indian tribes in this case could take?"

If you were asked that question, Mr. Lasater, what would your answer be?

A. I would say yes, provided that we had some legal parameters within which to work. In other words, if we were to take fish from the all-citizen fishery unlawfully, in other words, not in provision with a special right or go beyond the special right, then I would say we would be limited and could not do it. The fishery could be regulated to put more fish in, yes.

Q. Let's assume that the legal instruction to you was for all of those rivers from the edge of the northern Sound southward, you should increase the salmon runs to those rivers and the Indians would crop them on all of the rivers where the fisheries occurred, could you accomplish that?

A. To a limited degree. There are many salmon that are taken outside of our jurisdiction that would limit our capabilities in this. But to a limited degree based upon some of those limitations, yes, we could.

(R894 line 24 - 895 line 25)

A. I think that a percentage would far better serve conservation and management of the resources. Sometimes it's easier to work with very arbitrary figures, but you may not like how it comes out, but it's easier to work with. The results may be terrible, but it's easier to work with.

I believe that the percentage method is going to give us the best end result.

Q. From a conservation standpoint?

A. Yes.

Q. What difference does it make whether you're given a percentage figure or a number to work with from a conservation standpoint? Why would it make any difference?

A. If you have a percentage and it's a percentage of available harvest or production above and beyond the spawning escapement, one of the things that immediately happens is that you never impact spawning escapement.

The other things is that when the run goes up at a high level under a percentage share, the fisherman get more fish. That to us is a just and fair way of operating. When there are more fish the fisherman should get more fish. We don't think he should be fixed to a quota that doesn't reflect the run size. In hard times when we are unable to give the large run, then we think that the person has to share in the low runs as it has always been.

(R912 line 4 - 913 line 6)

THE WITNESS: May I respond to you? I am not sure of my ground here. The salmon run as it approaches — we have to spend months preparing our management scheme or plan. It starts as soon as one run is over, and it takes a great deal of work and a great deal of time to do it properly for the entire area we are working with, and if at the last minute that whole plan is challenged and the fish are coming, there is no time to devise a new plan, you see, and salmon cannot be saved. They are going up to die when they are through spawning, and the resource has to move quickly and decisions have to be made quickly, and times — just for instance, in the management of the run going to the Frazier, it means a quarter of a million fish a day. That is not uncommon.

If you wait for three days you are tied up for three days and can't decide because of the litigation or injunction or some such, there goes three quarters of a million fish, and it is wasteful, and it is going to hurt conservation of the resource.

(R989 lines 7-25)

Q. Now, you explained that there is some difficulty for the Department when the method of determining the Indian harvest is subject to repeated court challenges. Could you explain to us and refer to Exhibit F-5, the process that you go through in regulating, in adopting your regulations?

A. Yes, I can. This chart isn't outlined —

THE COURT: Can you gentlemen all see this? We will turn it around a little more for you. Thank you, that is just fine. I can see it from there, too.

A. (Continuing) This chart is an outline of the steps that are followed to establish commercial salmon regulations by Washington State Department of Fisheries. The last of the commercial season ends at the end of November, so starting immediately in December and January we begin to review the previous season's fishery and analyze it. You learn from each season, and this also gives you an idea starting right then, of how we might have to adjust our fisheries for the following season to improve ourselves, do a better job. By January we are getting our predictions or forecasts of the run size for the coming season. We then, the staff prepares regulation proposals and reviews them based upon analyses of the fishery and predictions.

These proposals after they go over and are worked on at some length by the staff, are brought by the staff members, brought to the attention of the management division and the patrol division, because the people that want to are responsible for achieving the catch and escapement. You can't put burdens on your enforcement people that they cannot meet. They

often will want to say, well, maybe you would like that line there, but fishermen aren't going to find it. If you move it a little bit there is a light they can see. That type of thing goes on.

The revised proposals after they are all reviewed by our divisions, are presented to the administration for review, and subsequent approval, modification or rejection. The Director has the authority to accept or ask for modifications, or can actually reject staff recommendations, as you may well know.

By early March we have decided on those regulations for the coming season. The management pattern which we propose and these are mailed out to all segments of the commercial fishery, sports interests, Indian tribes, license holders, the news media, and individuals who have requested such information during the last week of March or the first week of April. It has to be 20 days after we make our recommendations public, we hold a public hearing where the proposals are orally presented. Written material is handed out. There is justification made for those regulations, and we have public comments on those regulations in person or they have come in in letter form or telegrams that are read into the record.

Then for several days we allow a period to consider all of the proposals that have been made to us for changes in those regulations, and decide whether the Director will accept the recommendations or whether he will reject them or accept part of them. Then we have an adoption hearing, public hearing, where we adopt the regulation pattern decided upon. It will affect the coming fishing season.

By late in the spring or mid-spring, late May, we have made regulations summaries and mailed these out to the people or organizations that got our proposals, so they will know in summary form what regulations they are expected to comply to when they fish. Then the season starts and as the season develops and we get more accurate information on the

actual run size and we see how the fish are behaving, which affects the fishery, and we see how the fishermen are behaving, because they may change their pattern of fishing, we make emergency regulations to get our spawning escapement and allow the proper harvest.

So we make these emergency regulations commonly on a 24 hour basis notice to the fishery to change things, to properly reflect run size and actual conditions as they develop.

(R1079 line 7 - 1082 line 18)

FURTHER REDIRECT EXAMINATION

Q. (By Mr. McGimpsey)Mr. Lasater, Mr. Getches was just taking quotes out of the Joint Biological Statement back and forth which indicate that the Department does have, for each of its respective clients different goals, and some of those goals relate to other things than strictly achieving spawning escapement.

Is that a fair statement?

A. Yes, I believe so.

Q. Now, can conservation, can that term and that concept exist in a vacuum?

A. No, it does not. Once you have met the basic element of conservation for salmon, which we have said is spawning escapement, and you have hopefully additional fish that may be harvested, then you are going to have to regulate so that these fish can be taken. In regulating so that they can be taken, you at the same time must regulate so that they don't take too many and you achieve your spawning escapement.

The two go together. You cannot have one without the other.

Q. Now, when you have different goals for the sport fisheries, like maximum sustained recreational yield,

and different goals for non-Indian commercial fisheries like maximizing their profits, are those goals considered independently of the goal to achieve for the Indians what you have called a fair share?

A. Yes, I believe they are to be considered independently. You have to consider the treaty right first, as I understand it. It has a prior or higher priority. You can only consider these others after you have met the treaty rights, as I understand it.

Q. In the pure biological sense of the term "conservation," in other words, preserving the species from extinction, in that sense of the term, could you regulate any fisheries if you had more than one user without having to take into consideration the allocation of the harvest among those user groups or the fact the harvest would be allocated among them?

A. You have to consider that the harvest will be shared among your separate user groups in some way, and you consider the legal framework that is allowed to you within which you can operate.

Even history comes into play as regulations have been developed over the many years. So, you do have to consider in our society, where we adopt public hearings, where the public has input, the wishes of the various clients that you are working to get fish for.

Q. Mr. Hovis spoke of some of the goals at least of his tribal members that they wished to fish for ceremonial purposes and personal use purposes and commercial purposes in that order of priority.

Would these be goals that are other than conservation goals which might affect the decision of the Department?

A. Yes, they are, and they have affected our decisions.

Q. And these goals would be what? What would be the purpose of using these goals in your regulations?

A. The purpose is, I believe, because the Indians want them that way. I have no personal interest as a person

in preserving an Indian ceremonial. I recognize their value in preserving a ceremonial and am perfectly willing that regulations be set so that they can have ceremonial fisheries.

Q. Now, when you set a regulation for a ceremonial fishery, does the problem of conservation always become a matter that fits into that decision?

A. Yes. We were particularly concerned this year when we had on the Columbia River requests for ceremonial fish coming in when we had a summer Chinook run that was about half of the low run we predicted. We were concerned that ceremonial fishery might affect the conservation of the resource.

Q. Now, generally the extent of that ceremonial fishery would weigh with the conservation necessity, would it not? I mean, the greater the ceremonial fishery, the greater the conservation problem?

A. Yes. There is a difference between wanting a couple hundred pounds and wanting two thousand pounds.

Q. And isn't that true of any other objective that you would have for any fishery; that if you weighed that particular objective that there would be some conservation aspect of your decision making?

A. Yes. They relate. They always do.

Q. Is there any way to have objectives in vacuums that never relate to conservation and conservation never relates to other objectives?

MR. PIERSON: Your Honor, I don't know how the witness can understand that question. I sure can't.

Q. (By Mr. McGimpsey) Do you understand it, Mr. Lasater?

A. Yes, I do.

Q. Would you answer, please.

A. I believe that as soon as you have met the ultimate goal of conservation and have fished for harvest and try to meet objectives of the people who are going to harvest, if they just want to fish to eat, then you must

consider how he's going to take that fish out without detracting from the conservation of the species.

(R1160 line 15 - 1165 line 3)

Q. Can this percentage share model work if the Court would not allow the Department to consider catches on Indian reservations as part of the Indians' share in the total plan?

A. I don't believe so. First of all, we don't see that the reservation, per se, has anything to do with the treaty right to fish. Many of the tribes, in fact, do not have reservations.

But when Indians fish off-reservation, they often land their catches on-reservation or take them to the reservation for sale. If the reservations were exempted, there would be great pressure to make a great increase in the reservation catch because it would not count.

I would expect that this might put strong pressure to over fish, and then there would be great incentive to take all fish to the reservation for sale so that they would not count on the percentage.

I can't believe that we can control or fairly regulate a percentage under those conditions.

(R3605 line 22 - 3606 line 18)

Q. Could you explain what the sockeye fishery was this year?

A. Well, first of all, in that year we had a commercial season in Puget Sound for sockeye. This gave us a commercial catch. In 1973 there was no commercial fishery allowed. So the catch is divided entirely between sport fishery and the Indian fishery on Lake Washington, with the exception of a few that might have been taken in the Strait of Juan de Fuca, but most of those would have been taken by Canadians.

(R3626 lines 14-23)

Q. Now, directing you attention to the fall Chinook run in 1971, did you set a special Washington Department of Fisheries season or permit operation for Muckleshoot Indians?

A. I believe.

Q. What rivers?

A. It would be the Green River or lower Green River, it is called the Duwamish in the lower reaches.

Q. How is that regulated? Was that a seasonal regulation or a quota regulation, how did you do it?

A. There was a permit that set them so many days a week to fish.

Q. And were there commercial fisheries out in the marine area to that run?

A. Yes.

(R3787 lines 4-20)

Q. Do you know whether the Department of Fisheries could manage to provide such a 50 percent share to the Makahs and Lummis?

A. I doubt it. I just think that there is a large enough number of fish moving past, knowing the number of fishermen they stated and their gear, I don't think they could intercept 50 percent.

Q. If they had help from other Indians, do you think they could?

A. If they got enough gear out there, they could. It would have to include purse seines as well as gillnets I would think.

Q. Do you have any other reason to say that the Department of Fisheries could not manage such a 50 percent share?

A. I don't think I know what the legal implications are to know if we could manage it or not from a legal standpoint at all.

Q. I'm asking you as a biological expert whether you know of any other reasons why the Department of

Fisheries could not manage such a 50 percent share. I think you could regulate the fishery that way. There would be a lot of difficulties involved by making additional splits.

(R3838 lines 3-25)

Q. Directing your attention, if you will, to the Indian fishery on Lake Washington, are there any Indians there besides Muckleshoot Indians?

A. What year?

Q. 1972.

A. I believe there were some Snoqualmies.

Q. And was that according to the arrangement with the Department of Fisheries?

A. We had told some Snoqualmie fishermen they could fish under the same arrangements as the Muckleshoots.

Q. And this year you have had an Indian fishery on Lake Washington, have you not?

A. Yes.

Q. And were the Snoqualmie Indians there also?

A. I believe so, yes.

(R3844 lines 10-24)

If I assumed that, then the next problem is that there is great incentive to increase the reservation fishery and decrease the off-reservation fishery in order to get your share higher and higher, but it doesn't count.

Q. Why wouldn't they have that incentive now since they already can fish on a reservation?

A. They are not afforded a particular share. If they are guaranteed a particular share that wouldn't count against another share, then the incentive would be to take the share under the law and then get as many fish as you could otherwise to boot. It would be open ended.

Q. Why wouldn't they now get as many fish as they possibly can on-reservation?

A. You see, if we had a — they will do this up to a degree, but I don't say that everybody fishes that could, and I heard testimony that there is some empty sites. But if you had a guaranteed share and then the opportunity to catch even more that weren't counted on the guaranteed share, then there is great incentive to get as many on the share that doesn't count as possible.

(R3962 line 3-32)

Testimony of CARL M. CROUSE,
Director, Washington State
Department of Game
August 27+28, 1978

Q. Maybe more directly I can say when you are confronted with a claim in a treaty that Indians have a right to take from the Steelhead resource, and you compare that against the statements I have read about the ultimate recreational use for sportsmen, isn't it true that you concentrate and consider only the interests of the sportsmen?

A. When we are confronted with what we claim are treaty rights for fishing — and I think you understand that we do not claim any jurisdiction on reservations for any type of wildlife, including the fish we are responsible for — we have, and we will continue to follow any legislative act, any congressional act, or any ruling of any court that we have these cases before that came up. We are extremely pleased when we can get a clarification of what our position is.

To this date, we do not feel there has been a ruling within the parameters that we are responsible to allow commercial fishing by a special group on the rivers.

(R113 line 3-22)

Q. Mr. Crouse, do you have any limit on the number of sport fishing licenses and punchcards you issue every year?

A. No, we do not.

Q. Are you allowed to limit that number?

A. No.

Q. Do you have bag limits on the number of fish that sport fishermen can take?

A. Yes.

Q. What is the limit?

A. Two per day, 30 per season.

(R172 lines 14-24)

Q. Isn't it accurate to say that even including the Indian net fisheries for steelhead on reservations in the State of Washington, you have no information available to you indicating that any such net fishery has destroyed the steelhead run?

A. They have not totally destroyed them, but certainly this reduces the other catch, and certainly we recognize that there is a commercial fisheries for steelhead on Indian reservations.

Q. You say "reduce the catch." You mean reduce the sport catch?

A. It certainly does.

Q. Has the resource been preserved?

A. We have preserved it, yes.

(R256 line 19 - 257 line 8)

Q. Finally, Mr. Crouse, is it not a fact that the basic position of the Game Department has been that it is unwilling, unless absolutely forced to, to participate in the diminution of the share of steelhead available for sports fishermen?

A. Yes, our position has been that we feel steelhead by the very nature are a fish that lend themselves to our

recreational use, and this is a higher and better use for them than commercialization.

(R314 line 5-13)

Testimony of WALTER A. NEUBRECH,
Retired Chief of Enforcement
Washington State Department
of Game

August 29, 1973

CROSS EXAMINATION

Q. (By Mor. Ziontz.) Mr. Neubrech, you have retired now from your position with the Game Department, effective July 31, is that right?

A. Yes.

Q. And that completed a career that spanned thirty-three years?

A. Thirty-six, I believe.

Q. As I understand it, you commenced in 1937?

A. I actually commenced in 1935.

Q. What was your job title when you began?

A. I was Deputy Game Protector.

Q. And would that be a title that would be more commonly referred to as a Game Warden?

A. In the early days, it was considered Game Warden. At the time I went to work it was considered Game Protector.

Q. When you retired, what was your title?

A. Chief of the Wildlife Management Division.

Q. In that capacity, were you the chief enforcement officer for the Department of Game?

A. Yes.

(R572 lines 1-22)

Q. Now, what is the procedure that is followed when you decide that the operator of the net is not going to return and you take the net?

A. The net is brought to one of the state installations to be cleaned and prepared for storage, marked and stored.

Q. Where are your installations?

A. Throughout the State of Washington.

Q. Every office of the State Game Department may have some nets there?

A. Yes. Let me correct myself on that, there is only about four or five of the offices in the state that are dealing with this particular subject, so I confine it down to about five of them.

Q. All right. And in those cases the nets are brought into that office, they are cleaned and the debris and fish are taken out of it?

A. Yes.

Q. What is done with the fish that are taken out of them?

A. Commonly the fish are deteriorated to the point that they are of no value and they are destroyed. Sometimes they are given to the County installations or state installations.

Sometimes they are given to the schools.

Q. Have your officers ever appropriated any of those fish to their own use?

A. I can't answer that, I don't know.

Q. Is there any rule or policy of the Department regarding what disposition must be made of those fish?

A. Yes.

Q. What is the rule?

A. That they not be used for their personal use, but given to some institution or — some charitable institution or some institution of the state government.

Q. Well, is that a written rule or sort of an understanding?

A. I think it is a written — I believe — I think I'm correct that this is a statement of policy in a policy manual.

Q. Did you not testify that there may be cases where that policy was not followed?

A. I am assuming there must be.

Q. Now, with respect to the nets, what is done with those nets?

A. I stated before, they were cleaned and stored in our warehouses or in our buildings.

Q. And then what happens to them?

A. Well, they are still stored there.

Q. Do you mean you take no action to have any court declare a forfeiture or a confiscation?

A. No, we have not. We have debated that for some time, but we have not done it.

Q. Does that mean within the possession of the Game Department there is still hanging nets that were confiscated as long as twenty-five or thirty years ago?

A. I think I'm right, I think we did, if I am not mistaken, give to the tribal — the Nisqually Tribal Council on two different occasions — we did give them a battery of nets, and I would hazard a guess, I am going to say 30.

We returned them to the Tribal Council on the condition that they would not be permitted to be used off of the reservation.

Q. But aside from those 30 nets, would you say still that you have a substantial number of other nets that were confiscated?

A. Yes.

Q. About how many would you estimate there are still on hand all around the state?

A. 70. I would like to qualify my remarks again by saying that there are nets and then there are nets. There are

some that are of practically no value, and perhaps should be destroyed, they have not been.

(R603 line 1 - 605 line 18)

Testimony of DR. BARBARA LANE,
Plaintiffs' Expert Anthropological Witness
September 5-7, 1973

If I may refer you to the Skokomish report, which I see is marked USA-23, on pages 12 and 13. If I may read from that section.

A. If you choose to do so, please do.

A. (Reading:)

"With respect to those property rights, it should be observed that although the weirs as such were community property, the individual dip net platforms on the weir from which all net fishing was done were privately owned.

"The content of these group and individual ownership rights is more precisely described in the folowing passages from Elmendorf, 1960, page 72.

'A number of men in one village community would build and own a weir together. Each man owned one dip net platform on the weir; all net fishing was done from these platforms. What an individual caught and dried was his own. If he made a good catch, it was customary to give a feast and feed his fellow villagers; what was left over was usually smoke dried and belonged to the person who had caught it.

"A person might sell or trade fish, but only outside his own village. Offering food in sale or trade to a fellow villager has never been done; the impression was gained that as a hypothetical case, such conduct would have been regarded as

scandalously stingy. Sold or traded fish was almost always smoke preserved.' "

Then he goes on:

"Dip net platforms were not sold or rented, but an owner often lent 'use of his platform to a relative or friend. According to an informant, he would say 'do dipnetting with my dipnet.' The borrower got all his catch and was not required to pay for the use of the platform. Public opinion required him to distribute part of his catch to the villagers if the catch was a good one, but he was not expected to give more to the owner of the platform than to anyone else. Platform borrowers apparently included, in practice, any fellow villager of the owner.' "

That is the end of the descriptive material from the ethnographer of the Skokomish, and I went on to say then:

"The fact that use rights to individually owned dipnet platforms were freely extended to fellow villagers in no way diminishes the ownership rights in either the platform or the dipnet itself.

"Concepts of ownership were highly developed and rather precisely formulated, not only in Twana culture, but in most, if not all, cultures of the Northwest Coast. While use rights were freely extended, it was necessary for the borrower to request permission to use the privately owned site, gear or privilege and for the owner to accede to the request. Alternatively the owner could initiate the extension of use rights by offering them.

"The absence of formal payment or rent for use rights was common throughout the Northwest Coast culture area, especially when the user was either kin or fellow villager of the owner. The lack of payment or requirement for same was an expression of solidarity between the owner and the user.

"Formal rent or payment for use of resource areas or gear expressed a more distant status relationship between the contracting parties. The presence or absence of consideration paid for use rights spoke to the relationship of the parties to the transaction but said nothing in regard to concepts of ownership."

(R1767 line 9 - 1770 line 2)

Q. Return now to page 26 of your report. You state your opinion that no such restrictions, referring to fishing, methods of fishing, were indicated by the commissioners or contemplated by the indians.

My question is: Do you believe —

A. Excuse me, Mr. Coniff. It would be helpful to me if you would let me know when you turn to the page, where on the page.

Q. I am sorry, I will slow down. I am on page 26.

A. Yes.

Q. I am at the top of the page, and I will read the first two sentences that I am concerned with.

A. Yes.

Q. "There is no mention of restrictions as to purpose, times or method of taking either in the treaties themselves or in the official records relating to treaty proceedings. It is my opinion that no such restrictions were indicated by the Commissioners or contemplated by the Indians."

My question is this: In view of the abundance of the resource, do you believe that any such restrictions were necessary at that time?

A. No, I do not believe they were necessary at that time.

Q. Do you believe, is it your testimony then that neither party would have contemplated need for any such restriction, if I understand your testimony correctly?

A. Just let me make one thing clear. When we speak of restrictions, we are speaking of restrictions on the Indian.

Q. Restrictions upon the fishing activities engaged in by the Indians?

A. Yes. And I am sorry, what was the second question? I just wanted to make sure that we were speaking here, and we understood each other, that this was relative to the Indians.

Q. Is it your testimony?

A. Yes.

Q. That neither party to the treaty contemplated the need for any restriction on Indian fishing activities?

A. I don't think I have so testified anywhere.

Q. You state that no such restrictions were indicated by the Commissioners or contemplated by the Indians, and I'm asking you, if I am interpreting your testimony correctly, if that is what you meant?

A. You are interpreting my testimony incorrectly. I said, indicated by the commissioners and contemplated by the Indians. I said nothing about what might have been contemplated by the commissioners.

Q. Do you belive that the commissioners contemplated the needs for such regulation of Indian fishing?

A. Well, Mr. Coniff, my answer to that, of course, would have to be in the realm of speculation, since I have already indicated in the passage that you read that they give, no evidence on this matter.

The only evidence that I can draw upon to form an opinion is the evidence of salmon, and the knowledge of this resource and the need for regulation of it or restriction of harvesting, which those government people who were with the Commission party would have been aware of or privy to in their time, and at that time they would have been aware, they could hardly have avoided, I think, being aware that this was a resource which could be dessimated, could be destroyed and required regulation.

I think at the time of the treaty there is no question that the restrictions were not necessary. If I

were asked to give an opinion, which I have here, which you are asking me to do now, I think it is very highly probable, very, very likely that they must have realized that restrictions would be necessary in the future, but they said nothing about it here.

Q. Further along on page 26, on paragraph C, you express your opinion regarding the meaning of "in common with all citizens of the territory," the language of the treaty?

A. Yes.

Q. My first question is this: Do you believe that at the time the Indians entered into these negotiations and signed the treaties that they recognized they were being asked to move to a reservation?

A. Yes.

Q. Do you think that the Indians understood at the time that they entered into these treaties that when they moved onto these reservations that these reservations were to be their exclusive homes, they would have exclusive rights to fish or to live, to deal with the land on these reservations?

MR. PIERSON: Just for clarification, I am not sure I understand what he is talking about when he says, "these reservations."

Q. The Indian Reservations that were clearly contemplated by the treaties and by the treaty minutes, I believe it was clearly indicated that it was explained to the Indians they were to wander around no longer. They were to move onto the reservations, that would be their home.

A. Partly correct and partly incorrect, I believe, Mr. Coniff. The official proceedings, the papers that accompany the treaty documents themselves, and all of the ancillary literature make it quite clear that what was contemplated to at least what they said they were talking about on the part of, and I believe it what they intended, on the part of the treaty commissioners, was the Indians should remove their

homes to the reserved lands, which would be exclusively theirs, and secured from intrusion by whites.

Q. This is a real problem that the treaty commissioners themselves were aware of, was it not, the fact that white settlers were coming in?

A. The situation was that the government of the United States at that time had created a legal dilemma, in that when they — I'm sorry, I forget dates here — when the Territory was set out, the legal provisions were that Indian title to the land would be extinguished.

But before they had taken any steps to do that, they had passed the Oregon Donation Act, which gave inducements to non-Indians to enter the Territory — this was even before Washington and Oregon Territories of course, were separated — to come in and take up lands, lands to which the United States Government had not yet extinguished Indian title.

The government was very concerned, and the treaty commissioners were concerned, Stevens was concerned, and this is contained in letters that he sent to people in Washington, D.C., before he was appointed commissioner to draft these treaties urging the importance and urgency of extinguishing Indian title in order to prevent collisions between the settlers, who thought they had the right to go and take up donation claims, and the Indians, whose title had not yet been extinguished.

They were concerned not only with collisions between the settlers and the Indians, but also with trouble with the settlers who felt they had been given inducements, and made a very arduous journey by oxcart across country, through very difficult terrain, to hostile Indian territory in some cases, to go up and locate there, and they felt the government should take care of the title business because they were angry with the government as well as fearful of trouble with the Indians.

I might say that the history, the context of this was that the boundary between the territories of Great Britain and the United States had not yet been settled at that time.

At that stage it was thought that all of the country from the Columbia north might become British and that south of the Columbia, American.

There was a rush on the part of both sides to get settlers into that country, to make a claim of the fact of having population of their own nationals already there on the ground.

So, the question of treaties was not because the government was trying only to protect the Indians from collision with the whites over land, but rather to clean up its own legal mess vis a vis its own citizens.

Q. In the course of your answer you used the term "Indian title."

A. Yes.

Q. How would you define that term?

A. I don't define it. I'm merely quoting the terms that were used in the letter of instructions to Stevens, the term that Stevens used in his first territorial address to the legislature here, when he explained to the citizens that the first pressing order of business was the extinguishing of Indian title to the land in the territory.

Q. Do you feel that the treaties accomplished that goal?

THE COURT: I hesitate to intrude, but I think we have been diverted on a limited area from the original question and answer that was given. I think you went off on a bypass, and I am anxious to hear the remainder of the witness' views on this matter of the residence of the Indians, what was contemplated that the Indians should do with respect to remaining on the reservation.

That I was listening for, and you got off on this very illuminating and interesting subject. I am not

criticizing it, but I want to hear what the rest of that answer is.

THE WITNESS: Thank you.

THE COURT: I consider it very important to this case.

THE WITNESS: If I may continue.

There is no question I am not giving opinion here. I am relating to you what is available in the contemporary documents by Stevens, by Simmons, by Gibbs, and it is clearly set out in a number of instances, both to the Indians and to the whites, but the purpose of the reservations is to have the Indians remove their permanent homes there, and there they will be safe from intrusion by any whites within the boundaries of the reservations, but that they will be free to go as formerly to their fisheries, to collect berries.

This is simply that they had agreed to keep their permanent homes there, but they are in no way restricted to the reservations.

To the contrary, there are explicit assurances that they should only keep their homes there so that there isn't the problem and so that the whites could move onto the ceded territory without any conflict with the Indians.

Q. (By Mr. Coniff) Do you believe, then, that the Indians understood that the reservations were to be their exclusive areas ceded?

A. Yes. Well, excuse me. I think we need a clarification there. This is the way it is stated at some places. At other places, for example, in the proceedings of the Quinault treaty, Governor Stevens is on official record there, in the official treaty proceedings as saying to the Indians, "You don't have to remove to the reservation if you don't want to. If you want to stay where you are and the local whites want you to stay there," — as the local whites were insisting, because they liked having the Indians as neighbors. They were

living in harmony and cooperative economic enterprises, and so on — "you're free to do that."

What they were doing is reserving certain lands to which the Indians could remove without fear of that ground bringing them into conflict with white settlers.

Q. Being invaded by the white settlers? Their reservations could not be invaded by the white settlers; is that it?

A. Yes.

(R1848 line 22 - 1858 line 14)

Q. This is a real problem that the treaty commissioners themselves were aware of, was it not, the fact that white settlers were coming in?

A. The situation was that the government of the United States at that time had created a legal dilemma, in that when they — I'm sorry, I forget dates here — when the Territory was set out, the legal provisions were that Indian title to the land would be extinguished.

But before they had taken any steps to do that, they had passed the Oregon Donation Act, which gave inducements to non-Indians to enter the Territory — this was even before Washington aand Oregon Territories of course, were separated — to come in and take up lands, lands to which the United States Government had not yet extinguished Indian title.

The government was very concerned, and the treaty commissioners were concerned, Stevens was concerned, and this is contained in letters that he sent to people in Washington, D.C., before he was appointed commissioner to draft these treaties urging the importance and urgency of extinguishing Indian title in order to prevent collisions between the settlers, who thought they had the right to go and take up donation claims, and the Indians, whose title had not yet been extinguished.

They were concerned not only with collisions between the settlers and the Indians, but also with trouble with the settlers who felt they had been given inducements, and made a very arduous journey by oxcart across the country, through very difficult terrain, to hostile Indian territory in some cases, to go up and locate there, and they felt the government should take care of the title business because they were angry with the government as well as fearful of trouble with the Indians.

(R1854 line 1 - 1855 line 9)

Q. You have no opinion.

Now, we move along in the treaty language itself on the Medicine Creek Treaty, which is typical of the Stevens' treaties, we then find the following language after the erecting of temporary houses for the purpose of curing,

> "—together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands;

My question is: Do you have an opinion regarding the language which states, "together with the privilege of hunting, dot, dot, dot, on open and unclaimed lands"?

A. You are asking me for my opinion?

Q. Do you have an opinion?

A. Yes, I do.

Q. Would you state your opinion?

A. My opinion is simply that I notice a distinction in terms with regard to fishing, a right is mentioned and with regard to hunting, a privilege is mentioned, and I would presume that there might have been this kind of difference contemplated that the whites understood that the land was going to become heavily populated with whites, it was going to become settled and,

therefore, game would be reduced and possibilities of game would be reduced.

The same with regard to berries, I think they contemplated the land would be taken up in large part and this would reduce that resource, and this may have had something to do with the language that is mentioned here.

With regard to the pasturing of horses, on unclaimed lands, there is specific documentation on that, I think it is quite clear to understand what was meant by that. Both the Indians and the non-Indians it was contemplated would pasture their horses on common ground, and is referred to in the British countries today as — I don't know about here, as, "On the commons." In Norfolk you still have commons where sheep graze and in Canada we have commons. This was common ground which was public grounds, which was used by people in common in that they are not — and it was thought there would be places like this remaining because the open grounds of this sort were described as being areas that the settlers did not wish to take as places for their homes. They preferred to settle at the edge of the open ground in the treaties, and so I think it was contemplaced there would always be these open spaces where everybody would have their horses gazing in common. There was this problem, and there are other provisions about taking care of the horses, and there is a distinction clearly made here between this kind of ground and then the privilege of using these — the right of taking their fish at all their usual accustomed places. To me the two are being separated quite clearly in this clause, that's my opinion.

Q. Now, earlier you stated that the Indians understood that they were to remove themselves to the reservation, this would be their home area that they would live there or they could live there if they so desired?

A. I think it was hoped most of them would live there.
Q. And I think you said the Indians understood this at the time they signed the treaties?
A. I didn't say that, I said that's what they were told.
Q. That's what they were told?
A. Anything that they understood there, I'm giving my opinion, I have no documentation as to what they understood.
Q. When you are giving your opinion without documentation would it be fair to say your are speculating?
A. I presume so.
Q. Do you have an opinion as to how the Indians could have understood the concept of on-reservation status under the treaty and also understood the in common with language of the treaty to mean exclusive right?
A. I'm sorry, may I hear that again?

THE COURT: Read it back.

(Last question read by the Reporter)

A. I have no way of knowing how the indians could have understood the "in common" with language based upon —

THE COURT: I think it would be desirable to break that question in two. Really, you are asking about two different things, and may I suggest we take one at a time.

THE WITNESS: Let me perhaps clarify —

THE COURT: Do you remember the question?

THE WITNESS: I think so.

THE COURT: Take the first question.

THE WITNESS: You are really asking me about two different things here, yes. All right, the Indians understood that the reserved lands were reserved exclusively to them, they understood that no whites could invade the reservations, and where tnose reservations were located so as to include usual and accustomed Indian fisheries, which some of them did, I think the understanding of all parties concerned was

that no whites could go onto thc reservation and use those fisheries.

I think what was understood and what was contemplated, certainly by the Indians, regarding the usual and accustomed fisheries off the reservation was that they would be using those as they had before but that whites would also be fishing in areas off-reservation, and I think that the problem which we are dealing with here is exactly what the content was of the Indian off-reservation fishing and the non-Indian off-reservation fishing with regard to this provision.

I tried to explain it before in the summary, I think in the passage which you read, and that is that the language says nothing about whether it was meant that Indians and non-Indians would fish at the same place at the same time or on the same run or whatever. This is not spelled out. I can only conclude that when the Indians received — demanded and received assurances they could continue to use their usual and accustomed places which were not included in the reserved ground. They understood they would use them as they had before without non-Indians being on the same spot.

For example, if they were constructing a weir with privately owned dip net locations built on to it, that they would not have those weirs and those dip nets invaded by whites, or if they were going to a pool or a place in the stream where they normally speared fish, that they would not be confronted or have to fight with whites wanting to fish at the same place at the same time and at the same spot.

I think what was happening, and I think I said this quite clearly in my report, is that the Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but that as owners of these rights, in the native way of looking at things, they were extending use rights to

the non-Indians to share in the resources, but I don't think they were giving up anything, or that they thought they were giving up anything.

(R1870 line 15 - 1876 line 14)

Q. Do you believe that Captain Jack was capable of explaining the terms of the treaty in Chinook jargon to the Indians?

A. Oh, in a general way. I believe the terms of the treaty could be explained in Chinook jargon. As to the legal entailments of the language in the treaties, I do not believe this could be conveyed in the jargon. I believe I am in complete concurrence with Dr. Riley in that portion of his direct testimony in which he said, I believe it was his direct testimony, in which he said that if all parties had spoken fluent Makah or fluent English, there still would have been problems in communicating the meaning of the language of the treaty, because people were operating from two different approaches with different kinds of understandings about property rights, et cetera, and this woud make for difficulties at least in that area, and certainly in others, and I find myself in complete agreement with Dr. Riley on it at that point.

I might say that apparently this room is filled mostly with people who all are fluent English speakers, and many of whom have legal training, and I gather they are still trying to arrive at a common understanding of what the language in the treaty contains.

(R1886 line 11 - 1887 line 11)

Q. Is there any evidence that would give you a clue as to understanding why the term "usual and accustomed stations" was used?

A. The only evidence that I can cite on is the fact that Indians were concerned to retain their fishing sites,

the fishing rights, their ownership over the fishery resource that they were concerned with, and so in response to their expressed concerns by people at almost every treaty for which we have records, and unfortunately we are not told anything about what the Indians might have said at the Medicine Creek Treaty in the official proceedings of that first treaty, but in all of the subsequent treaties from Point Elliott onward, and especially as we go onward at the treaty of Point No Point, the Treaty with the Makahs, the treaty on the Chehalis River, Indian after Indian is cited as speaking to the — securing of and the retaining of their rights to fisheries and all of them speak of it in terms of this being the thing they are most concerned with.

Not one of the Indians is quoted in the official proceedings as asking for anything in the way of agricultural implements, teachers, or anything else. All they keep talking about is their fisheries.

Q. Okay. I believe we are wander a little bit away from my question. As far as you are concerned who drafted the treaty language of this article 3 that appears in these treaties?

A. The fishing clause language?

Q. Yes.

A. I can't be positive, but I believe that it was George Gibbs. My reasons for saying so are that in a document which he prepared in March of 1854 which is earlier in the year before the Medicine Creek Treaty first was negotiated, he set out similar language in a report to Governor Stevens in which he was proposing the kind of things which should be taken care of in the treaty.

Q. Now, is it your understanding that as far as in the negotiations, that the representatives of the government approached the Indians with drafted treaties; in other words, was the language in this clause negotiated language, to your knowledge, or had it been drafted?

A. It had already — Gibbs had already seen the necessity for putting such a clause — I believe it was Gibbs. I think it is highly probable he was not the only one, as I have indicated in my boundary report, who made that concern known as a necessary component of the treaty, but the heads the various clauses in their rough form were drafted before any meeting, any formal meeting upon a treaty ground with Indians.

The Medicine Creek Treaty was drafted just a little bit ahead of the meeting with the tribes that were party to that treaty, and I think the language of the clauses may have been adjusted on the treaty ground after discussion of the Indians, but we are not given clear evidence one way or another on that.

Q. In any event, the usual and accustomed fishing ground language was the language that appeared early in the 1850s and appeard in the subsequent treaty, and was not likely the result —

A. No, the actual words, "usual and accustomed" I am not certain was in the March report. I think it was something like, oh, "their fishing grounds must be secured to them," or something like this. "Their fisheries must be secured," I am not positive that the usual and accustomed phrase appears that early.

I assume that that is — I may be incorrect here. I just assume it is a legal sort of a phrase or phrase that a lawyer might use, and I assume that Gibbs, being a lawyer, perhaps contributed to the phrase, and that is just conjecture.

Q. Could we assume that Mr. Gibbs or whoever drafted his treaty would have used those terms in their common pilance as they-were used in 1855 by English speaking people?

A. That is certainly a possibility.

Q. Is it a high probability that they used it in those terms?

A. I don't really know, Mr. McGimpsey.

THE COURT: Well, on that point, I meant to ask, do you agree that insofar as the representatives of the United States were concerned, it would be perfectly reasonable and permissible in interpreting the English language, according to its dictionary meaning in English, unless there was some different meaning 100 years ago, which of course, is possible. Do you agree with that proposition?

THE WITNESS: Yes, of course.

THE COURT: For example, I am sure you must have noted that that clause is in the disjunctive. It says, "Usual and accustomed places,"' and I would assume that we should get down the dictionary, or if necessary get one that was extant in 1855 and get the definition of "accustomed" but certainly I would think at a minimum it would exclude the casual and unusual or exceptional place where some Indian en route some place or other happened to fish, but I may be wrong about that; but I'm using this for the purpose of illustrating the point that the interpretation of ordinary English words in these treaties, as concerns the intent and purpose of the English speaking white man who drafted these treaties, it is perfectly legitimate right now.

The converse here: I ask you as a professional in your field, anthropology, would an anthropologist consider that it was admissible to take the dictionary meaning of English words as they may have been in 1855 and apply it to the understanding of Indians of what the words of the —

THE WITNESS: Yes, the difficulty, of course, is that we don't know how this was interpreted to the Indians.

THE COURT: Well, it seems to me, since there is more evidence that any of the Indians spoke or understood English, that we would be straining things to take a modern English understanding of these words in English and assume that that was under-

stood by thee non-English people, speaking, but I am exploring what mental processes I have to go through —

THE WITNESS: Yes.

(R1946 line 4 - 1948 line 5)

Q. Why is it that you are better able from the evidence to interpret from an anthropological interpretation of what the term "in common with" meant than you were with the term "usual and accustomed"?

A. Simply because I am able to bring to bear on that particular question a more adequate knowledge of what Indian practice was with regard to their fisheries and other property rights at that time. So, I have something to work with and, I think, make a fair judgment or form an opinion on some kind of adequate basis as to what the frames of reference were from which they could approach that language; where I don't have the same kinds of situations with the other phrase.

Q. Now, do I understand you correctly that your greater familiarity with the methods used by Indian fishermen to fish allows you to interpret the term "in common with"?

A. No, that is not what I said. If I didn't speak clearly enough, let me explain it right now.

I said I was speaking with reference to a better understanding of the Indian property rights. Not methods, not technology, but notions of use rights, property rights, however you like to phrase that with regard to their fisheries, because I understood their notions of free extension of use rights to friends, neighbors, visitors and so on in no way impeding ownership or title to these rights.

I can with that base see how they could have understood an explanation that the whites would also be fishing with them, not to be a termination in any way of the rights that they conceived that they held to the fisheries.

So, I have something to work with, and I am trying to explain to you very carefully what it is that I am basing my opinion on.

Q. Now, as I understand your opinion, it is that there were distinct property right concepts among the tribes?

A. Yes.

Q. But that user rights were fairly freely offered to other users by particular owners of property?

A. Yes.

Q. And it is in that context that you are better able to interpret the term "in common with"?

A. Yes.

Q. Now, does the term "in common with" then connote to you that the Indians would understand this to be an extension of user rights to places or facilities in which they had property rights?

A. With the understanding that the person who has the property rights has the decision as to who uses what, where and when.

Q. And that is the basis of your determination of "in common with"?

A. Yes. I'm giving you my opinion, yes.

(R1952 line 16 - 1954 line 18)

Q. I take it that the extent of the commercial fisheries in the case area at treaty times was not so extensive so as to threaten the abundance of the resource?

A. It would appear that was the case.

(R2006 lines 12-16)

Q. Dr. Lane, as I understand your testimony, the Indians at treaty times did have property concepts in that particular Indian might have an ownership interest in a fishing site and they would grant user interests to other Indians, is that correct?

A. That's correct.

Q. When you spoke of a primary and secondary right,

would the ownership interest be the primary right you referred to and the user interest the secondary right?

A. No, no, that's not what I referred to.

Q. Would you clarify then the difference between a primary and a secondary right for me?

A. Yes. It is simply that certain people would have stronger rights, if you would like to put it that way, in a resource producing area or any fishing location than other people who had weaker rights but still had rights, and these would, in my view, would be termed as ownership rights in the location. However, they were not of the same degree.

Q. There were varying degrees of ownerships rights, is that your testimony?

A. Yes, as I am using the term.

Q. The distinction between ownership rights and user rights holds up, does it not?

A. Yes, there would be other people who had no claims of ownership, no claims of heirship to a particular location but who might be accorded use rights by the owners.

Q. You drew an analogy yesterday or the day before to yourself and your fence post digger, I believe, a post hole digger, as to that being analogous to the type of ownership user relationship on fishing rights, is that right?

A. Yes.

Q. Now, did it ever occur that two or more Indians might have this type of an ownership interest in a particular fishing site?

A. Which type of interest?

Q. Well, in your analogy, the type of interest that would be analogous to your owning the fence hole digger?

A. Yes, if I understand what you are asking me.

Q. In other words, you and another person could have bought a fence hole digger and owned it in common, right?

A. I perhaps didn't speak properly the other day. My husband and I own the post hole digger.

Q. You and your husband own the post hole digger, but you could have had common ownership interest in it?

A. Yes.

Q. And there you would still extend use rights to other Indians?

A. Yes, correct.

Q. As far as fishing sites, were there other —

A. I think there were analogous situations.

Q. That occurred?

A. Yes.

Q. Is that situation analogous then to what we call in common law a tenancy in common?

A. I don't know.

Q. If your ownership interest in that fence hole digger with your husband were, under the law of Canada, a tenancy in common in that you each had undivided equal interest in it, would that be analogous to what two Indians might have in a particular fishing site if they had an ownership?

A. I'm sorry, I can't answer that because I don't know what an undivided interest or these other terms may entail.

Q. Well, without worrying about what the actual legal connotation is of an undivided interest, if you and your husband have each an equal interest to the post hole digger, is that the type of interest that each of those two Indians would have in my hypothetical question?

A. Yes, you could have a situation like that, yes. I see now.

Q. Now, in the treaty, the use of the term "in common with" could that have been a legal term?

A. Yes, I suppose it could have been.

Q. And as I understand your testimony, Mr. Gibbs was — there is a 90 percent chance that he wrote the treaty or drafted the treaties?

A. Oh, he definitely was one of those who sat at the office in Olympia drafting it, and he was not yet serving as Secretary of the Commission, but I think he was very influential in the drafting, yes.

Q. And he was an attorney, was he not?
A. Yes, he was.
Q. And would it be likely, in your opinion, that some of the language that would be used in the treaty would be legal language?
A. I would assume so.
Q. Now, you also indicated — one other question, could this idea of an undivided ownership interest that you have indicated two Indian fishermen could have, could that idea have been discussed in Chinook jargon?
A. I think so.
Q. Now, you also indicated that with regard to references in the treaty about pasturing horses, cattle, I believe it was, in open and unused areas —
A. Just horses.
Q. Horses in open and unsused areas, that you felt that they were referring there to a situation analogous to the English commons?
A. I'm saying that the only suggestion I'm able to think of in this discussion that occurred at several of the treaties, for example, during the first attempt at making a treaty with the Quinault, Chehalis and Cowlitz and other tribes, some of these people who owned horses at the time discussed this, and I'm speaking now with reference to the individual treaty proceedings, the record of the daily log of the negotiations, and during that week they were talking — one of the concerns was "If we have to move away from our own country to go somewhere on the coast, how will we feed our horses?"

And so the question came up, it came up as, you know, earlier along in some of the treaties on the Sound, and as a matter of fact, I probably should mention this that afterwards in part of the correspondence from Gibbs to Stevens, they realized the original Puyallup and Nisqually Reservations were simply inadequate to provide for the stock, the horses of the Puyallups and the Nisqually, who lived upriver

who had horses at that time. Gibbs said to Stevens, "When we set up a reservation for the Upper Chehalis, we will have to set it up in such a way that there is a place for the horses of Upper Chehalis and the Upper Nisqually and Upper Puyallup Indians."

Q. Now, as far as those Indians where the treaty says they will have equal access, I guess, with whites, in effect, to open and unclaimed lands for their horses —
A. Yes.
Q. This would be the in common with type of arrangement, would it not, that we have referred to?
A. The reason that I made the suggestion that this may be a plausible explanation was because — and I can't think exactly where just now, I believe it was Gibbs, or perhaps it was Stevens, who writes this won't create a problem because they don't imagine these areas will become places taken up by settlers, so there will always be a common ground for the horses to graze.
Q. And that was because the settlers wanted basically to live in the woods?
A. Yes, the edge.
Q. At the edge of the clearing?
A. Yes, at the edge of the clearing, that's correct.
Q. So it would have been contemplated by the parties that these open and unclaimed lands that they were speaking of that were to be used in common by both the Indians and whites?
A. This explanation appears in the correspondence somewhere, and that's why I mentioned, that's the only clue I could find to explain what they might have had in mind.
Q. Was there not a similar type of concept with regard to fishing locations in that it was understood that the settlers were not likely to use fishing locations that were being traditionally used by the tribe?
A. No, I think not, in point of fact, there were already settlers trying to use locations which had been

important fishing sites, so I think definitely no.

(R2024 lines 2 - 2030 line 25)

A. When I spoke of cooperative enterprise I referred to the fact that the reef net owner had to rely on the help of many other people to construct the weir and handle the gear. Boulders had to be brought in chukanut to serve as anchors. Men had to work on building the different parts of the net which were then put together, so it would be in proper condition before it was placed in the location. Many men had to be hired on as crew, and these might be relatives, and might also include people who were not relatives and might include people who were co-owners, and even those who were not in any way owners of the site, and the work of many women was required to dry the catch, because many fish were caught at one time, and numbers of them would come together at the reef net locations and work cooperatively in order to take advantage of the opportunity to take huge amounts of fish at one time.

This in no way conflicts with the fact that specific locations were inherited and privately owned in family lines.

Q. Of course, there was a sharing then of the catch among all these who participated in this cooperative enterprise?

A. Yes.

Q. Then, of course, they must have had well-developed concepts of joint effort producing joint benefits, mustn't they?

A. Yes.

Q. Isn't that quite consistent then with the terminology in the treaty that the right to take fish at the usual and accustomed stations would be in common with other citizens of the territory?

A. I don't think there is any relationship between the two sets of statements.

Q. You don't think that merely to say "in common with a certain other type of citizen," isn't also another form of joint effort, Dr. Lane?

A. No, I think you are placing two things in one context that are unrelated.

Q. Certainly, Dr. Lane, if they would have a catch in common after these efforts that would entail sharing, would it not?

A. I am sorry.

Q. Well, maybe I can rephrase the question. Certainly in the method of cooperative enterprise, as you refer to it on page 15 in reef netting, implied a concept of sharing, didn't it?

If Indian four, five, six and seven went on to locations owned by Indian Number One, or maybe one and two, they still understood they were going to share, didn't they?

A. Let me explain.

Q. May I have a direct answer? Doesn't that imply that they could share?

A. The only people who could share, Mr. Rhea, are the people who were hired on as crew and working on the gear, or people who had ownership rights in it and could come and collect a share by virtue of inherited ownership.

Q. I'll accept that point, but still, nonetheless, as between those people or as among those people, and I believe one place in your report on in your authority you say that the crews were ten at least in number, isn't that correct?

A. The size of the crews would vary.

Q. All right. Now, nonetheless, they would be ten or fourteen in size, that would not be uncommon would it?

A. I think not.

Q. Very well. Now, you have just said in this sentence that you gave instead of ayes or no answer, you stated that they would go on there and then share, isn't that correct?

A. Yes.
Q. All right. Doesn't that imply then an ethnic consciousness, if you will, of a theory of sharing? If you don't want ethnic consciousness, let's say then doesn't that imply the existence in the minds of those individuals of a concept of sharing?
A. Of sharing results of their labor, yes.
Q. All right. A sharing of results obtained by labor, would you agree with that?
A. Yes, or by virtue of inheritance.
Q. No, I'm not speaking of inheritance at this point, I'm confining my line of inquiry to ownership by effort.
A. I merely wanted it clear to you that not all the people who shared worked on the gear.
Q. I'll accept that, but I still say the fact remains say fourteen that worked on it or sixteen or eighteen if they worked on that, they shared, did they not?
A. Yes.
Q. And I would ask you again, that does indicate then a consciousness in their minds of the idea of a division of the result of certain efforts, does it not?
A. Yes.
Q. All right. So then doesn't that also reveal a state of mind that would be compatible with the notion that the whites — I mean the Indians and the non-Indians would share the waters of Puget Sound together, which is really the substance of the wording of the treaty?
A. I don't think there is any question but that the Indian people who were parties to the treaties were agreeing to share the waters of the Sound with non-Indian fishermen. I don't think there is any question about that.
Q. Then you think that is what the meaning of the words "in common with" really were put in the treaty for, is that correct?
A. Yes, I do.

(R2044 line 2 - 2049 line 3)

Testimony of CARROLL L. RILEY,
Defendants' Expert Anthropological Witness

June 29, 1973
September, 1973

Q. Would you tell us your educational background?
A. Yes. I attended Southwest Missouri State in 1940-41, 1945-46 concentrating in chemistry and classics. In 1946-48 I attended the University of New Mexico, majoring in anthropology and minoring in history. I graduated from that university in 1948 with an Honors A.B. I attended the University of California from 1948-49, graduating from there in 1950 with an M.A. in anthropology. Then from 1949-52 I attended the University of New Mexico graduating from that university in 1952 with a Ph.D. in anthropology.
Q. You have a doctorate in anthropology?
A. That is correct.

(1974 TR 388 line 32 - 389 line 11 (Ex D1))

Q. Have you done any teaching in anthropology?
A. Yes.
Q. What has been your academic experience?
A. I was an instructor at the University of Colorado in 1953-54. From 1954-55 I served as an Assistant Professor at the University of North Carolina; from 1955-60 as an Assistant Professor at Southern Illinois University, Carbondale; from 1960-67 Associate Professor at Southern Illinois University, Carbondale; 1967 to present Professor at Southern Illinois. In 1970 I also became Museum Curator of Anthropology at Southern Illinois University, and in 1972, Director of the University Museum at Southern Illinois University, Carbondale.

(1974 TR 389 line 33 - 390 line 12 (Ex D1))

Q. You mentioned, Doctor, doing some field work in

Western Washington in 1952, 1954, 1956, and 1966 for the Federal Government. Could you tell us what agency of the Federal Government that was?

A. Yes. It was the United States Department of Justice.

Q. What was the purpose of your field work?

A. I was requested to serve as a researcher on a series of Indian claims for compensation before the Indian Claims Commission, testifying particularly on group identity, economic and political organization on a series of present day Western Washington tribes.

Q. What groups did you study at that time?

A. I originally was asked to study the groups around the Puget Sound (Squaxin, Nisqually, Puyallup, Duwamish, Suquamish, Snohomish, Snoqualmie, and Skykomish, Skagit, Samish, Duwahah, Lummi, and Nooksack).

Q. Did you study other groups of Indians also?

A. Subsequently, I was asked by the Federal Government to research and report on the Skokomish and Clallam, Makah, Quinault, and Quileute and (I believe at still a later date) the Cowlitz.

(1974 TR 393 lines 12-32 (Ex D1))

Q. Dr. Riley, do you have any opinion as to what may have been the Indians' concern that the treaties assured them the right to take fish at their usual and accustomed stations?

A. This, I think, was covered in my direct report. Certainly one concern was simply the concern that they have enough to eat, and that they be protected in this right, this basic human right, to have enough to eat in a period when they saw impingement of settlers increasingly on their land.

Q. Were there any other —

A. — by "their lands" I mean Western Washington Territory generally.

Q. Were there any other reasons that they might have thought to have been secured of their right to take fish at their usual and accustomed stations other than their own sustenance of food?

A. Dr. Lane discussed at some length the commercial uses in this area as far as Indian fisheries are concerned. The data on that, I think, are somewhat mixed. There unquestionably, however, was Indian trade all through the area, and certainly trade was one of the factors.

(R2172 lines 3-24)

Q. Do you have an opinion from your studies on what the parties understood by the term "in common with" in the treaty clauses as that concerned fishing?

A. Well, again I have always assumed that to be a legal term for the reasons I gave before in the "usual and accustomed" in my layman's knowledge of the legal term "in common with" based on my own holding of property and holding of property in common with people, it means pretty much what it means in common English parlance. It is a sharing, it is to be shared and to be shared without the idea of division.

(R2180 lines 5-17)

Q. Yes, you understood it correctly. Now, if I were to say to you that you could continue to go to the places where you had commonly gone, my question is in two parts.

Would that connote to you that you could go there with other people, or that you could go there as you usually had?

A. I don't believe that the first connotation would necessarily follow at all. I believe that the second one would be the one I would —

THE COURT: I don't think you are answering the question. Repeat it now again, please.

Q. If I said that you were permitted to continue to go to places or a place where you had commonly gone, as between the two alternatives I give you, which is the more probable connotation, that you could go there in common with others, or as you usually have gone there?

A. Phrased as you have phrased it, sir, it would surely be the second.

(R2185 lines 3-21)

Q. Next statement:

"During the negotiations which led to the signing of the treaties, the tribal leaders expressed great concern over their right to continue to resort to their fishing places and hunting grounds."

Based upon the evidence which you have examined, in your opinion as an anthropologist, do you agree or disagree?

A. Among the Makah and the Meninick meetings — let me answer no, and then let me expand.

Among the Makah and the Meninick meetings, there is some worry about fishing grounds among the Clallam and Skokomish that the treaty of Point No Point — there is some concern about whites moving into the areas, and also about rivalry between the Skokomish and the Clallams and the fact that they did not get along very well.

Generally speaking, there was not expressed, at any rate, in the minutes of the meetings, which are all in evidence, a great concern over fisheries, except in terms of general statements, like he wanted to hunt and fish and to take fish at accustomed places, et cetera. This is — do you understand my phraseology, not the phraseology of the documents?

Q. Yes. And the two examples you gave were in the Clallam Treaty and the Makah Treaty. Do you know of any other examples that you can recall where there

was anything approaching or appearing to be an assurance of the kind that we are speaking of here — I'm sorry — and expressed concern about the Indians?

A. There may well have been expressed concern in the Medicine Creek and in the Point Elliott treaties. You were asking me of the intensity of this concern?

Q. No, I'm just asking you whether it was ever expressed, to your knowledge.

A. It was expressed, yes.

Q. Is there any treaty involved in this case, and I can name them for you, if you like, where that concern was not expressed, to your knowledge?

A. I would have to re-read the treaties. Perhaps if you would name them —

Q. The Treaty of Medicine Creek.

A. In the Treaty of Medicine Creek there was no concern.

Q. There was no concern expressed?

A. Right.

Q. And the Treaty of Point No Point?

A. In the Treaty of Point No Point, there were concerns expressed, but as I have said, that the context of the expression is the Clallam coming into Makah — I'm sorry, coming into — let me rephrase that.

It was Clallam coming into Skokomish, into Hood Canal, Skokomish, and some worry there would be warfare, or at least there would be trouble of some sort, and there was also some worry about the whites coming into the area.

At one point the Skokomish Indians suggested that they share the whole thing with the whites, and one of the Treaty Commissioners said no, that wouldn't work, the whites would soon take over everything, and it would be better for them to have a reservation where they could be protected.

Q. The Treaty of Point Elliott.
A. I was talking of Point No Point.
Q. I'm asking you now about the Treaty of Point Elliott.
A. I don't remember any specifically.
Q. The treaty with the Quinaults.
A. Again, I don't remember any specifically.
Q. The treaty of Neah Bay.
A. We discussed that, haven't we? That is the treaty of the Makah. In that a number of people expressed the desire to fish and expressed the desire to take whale on the shores, and Stevens says, as I recall, fishing with the whites, and they finally said yes. That was certainly one of the kinds of — there were certainly expressions on the part of the Indians of some concern.
Q. The treaty with the Yakima?
A. I have never read the treaty with the Yakima.
Q. Have you read any of the documents describing the negotiations leading up to the treaty with the Yakima?
A. No. I really do not know anything about the Yakima, anything that is not correct. Of course, I know a little about the Yakimas, but nothing to answer your question.
Q. Do you know whether the Indian speeches or speech communication at the negotiations at the Treaty of Medicine Creek is recorded anywhere?
A. The Treaty itself or the negotiations or both?
Q. The communication of speech by the Indians negotiating for the Treaty of Medicine Creek.
A. To the best of my knowledge, it is not. I know of no place.
Q. The next statement, speaking of the tribes or their predecessors involved in this case, and the time of the treaties and the signing and negotiation of them, "they were reluctant to sign the treaties until given assurances that they could continue to go to such

places," that meaning their fishing places and hunting grounds, and take fish and game there.

Do you agree or disagree?

A. Yes, that seems to be the thrust of that article in the treaties, which assures Indians their accustomed and — usual and accustomed rights to fishing grounds and hunting and berrying places.
Q. So you agree with that?
A. That the Indians were worried about it, oh, yes.
Q. I'm talking about the statement, do you agree or disagree?
A. I'm sorry, would you rephrase the statement? I think I agree with you.

THE COURT: Read the statement again.

Q. (By Mr. Pierson) "They were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there."
A. I'm not sure we can draw that conclusion there from the various treaty documents. These treaties had people who were reluctant to go places because they alleged — they proposed — they were really developed later on, they weren't alleged, that closed reservations were on salt water, and some of them were upriver. There was a reluctance, as I pointed out to you a few moments ago, of groups that were not friendly to each other settling in the same area, and the like.

It is very difficult to say to what degree of reluctance the Indians had, they seemed to be very cheerful in signing these treaties at the end.

There was discussed for a day or two, certainly this was a factor.

Q. Is there any other material besides the minutes of the treaty negotiations upon which you would rely in stating whether you agree or disagree with that statement?

A. The minutes of the treaty certainly are the primary materials. There is, of course, the discussion in Swan of the abortive treaty that Governor Stevens tried to sign, and that was part of my answer.

There are discussions by Hazard Stevens, who was a boy at the time, who was the son of Governor Stevens. There were discussions by people like Ezra Meeker, an old time settler, who was rather critical of the — of some of the treaty provisions, particularly the inability of the treaty people to understand the upriver and downriver so-called stick Indians and the Indians on the bays and inlets.

There was an account of Gibbs, the '77 account of Gibbs.

Q. And you draw upon these sources in determining whether to agree or disagree with the statement I read to you?

A. I draw on those sources, yes.

THE COURT: I think all you have said, however, is that you are not sure that you can agree. Maybe that is just a figure of speech, but did that adequately express your thought?

THE WITNESS: Yes, I believe Mr. Pierson said was that a major issue, and I said well, it was an issue but I'm not sure it was a major issue. There were a number of issues.

Q. (By Mr. Pierson) My question was. Dr. Riley, whether it is possible for you to draw on all the background and resources which you have had available through your long experience in this area to agree or disagree with that statement.

THE COURT: And to that, as I recall you said that you are not sure that you can agree, and does that express your thought and understanding of the matter as best you can put it?

THE WITNESS: I suppose the record will express it, but you might read the statement again, if you wish.

Q. (By Mr. Pierson) Certainly. "They," being the Indians, "were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there."

A. Yes, they were reluctant to sign the treaties in some cases. The Treaty of Chehalis was not signed at all. The reason they were reluctant to sign, that had nothing to do with fisheries as near as I can figure out from the extant evidence, it was that the Indians downriver did not want to live with the Indians upriver.

The other treaties, they were not in fact reluctant to sign, in fact they were very eager to sign, and the treaty documents bear this out, this is with great authority, if the speeches of various of the leaders who did sign, telling how good their hearts were to the whites, and I think this was one of the factors that they took into account in signing those treaties.

I think they were very canny people, given their cultural lives, but I think there were other factors, and I really don't know, and I don't think that there is anything in the treaty documents and in the literature of that period that gives any indication of those factors except the Chehalis Treaty, which was in fact, not signed at all.

Q. Dr. Riley, I want you to listen to another series of statements, and let's assume that this is an accurate recitation of the written description of what happened in the negotiations with the treaty at Point No Point.

The Indians were concerned —

THE COURT: Excuse me, do you understand that you are required now to assume that this is an accurate thing?

THE WITNESS: I do, sir.

THE COURT: Then you express an opinion based on that assumption.

THE WITNESS: Yes, sir.

Q. (By Mr. Pierson) "The Indian parties to the treaty of Point No Point were concerned with possible loss of their sources of food — 'berries, deer and salmon.' The first to speak said in part: 'I wish to speak my mind as to selling the land. Great Chief, what shall we eat if we do so? Our only food is berries, deer and salmon — where then shall we find these? I don't want to sign away all my land, take half of it, and let us keep the rest. I am afraid that I shall become destitute and parish for want of food.'

"After the Indians had been assured that the reservation would be only a place at which they must make their homes, the Indians discussed the proposal among themselves, and on the following day assented to the Treaty. At that time one of the tribes said: "My heart is good. I am happy since I have heard the paper rea , and since I have understood Governor Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only.' "

The description continues later on:

" 'We are willing to go up the canal since we know we can fish elsewhere — We shall only leave there to get salmon, and when done fishing will return to our houses."

Are you familiar with that description?

A. Yes.

Q. And does hearing that refresh your recollection as to whether you can agree to the statement about the assurances given in any of the treaties involved in this case?

A. Well —

THE COURT: The question is, is your memory refreshed by this?

THE WITNESS: Yes, my memory is refreshed. That is my answer to your question, my memory is

refreshed. Now may I expand on that? That of course, is a part of the treaty, and I was trying to talk to the treaty as a whole, and I don't question that the Indians were interested in having salmon — having rights to take salmon on Hood Canal and in the river. If that is a question, I say yes, of course.

Q. The question was —

THE COURT: And I take it then in connection with the statement you made a few moments ago that their joy, their readiness to sign the treaties was predicated on the proposition that they had been guaranteed these very rights that we are speaking of, right?

THE WITNESS: I think this was a factor. I think there was several other factors, and one that has not even been touched on here is the fact that Americans were moving into this area and the Indians were in fact worried about being pushed off the lands, so to speak.

Q. Were they worried about being pushed out of their usual and accustomed fishing sites?

A. That may also be.

Q. In your opinion as an anthropologist, was it so?

A. In my opinion as an anthropologist, that was so.

Q. All right, now, you said that the quote I gave you was part of the treaty. You don't mean part of the terms?

A. Part of the treaty documents. I think that is what you referred to earlier.

Q. All right, now the last statement I would like to read to you is — and this is in the context of assurances given and concern expressed regarding continuation of fishing at usual and accustomed places:

"The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties."

Now would you agree or disagree with that

statement as descriptive of negotiations and signing of the treaties involved in this case?

A. Yes, would you read that once more? I may be getting a little tired, but I kind of missed that first sentence.

Q. (Reading)

> "The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties."

A. I think that is one of the inducements.

Q. Well, do you agree or disagree with the statement?

A. Do I agree or disagree witht he statement? I agree with the statement and I qualify it by saying that that was an inducement.

(R2352 line 14 - 2365 line 2)

A. Oh, I see. I am sorry. All right. On the lower portion of page 25, after the quote from Starling, Indian Agent,

> "There is no record of the Chinook jargon phrase actually used in the treaty negotiation."
>
> I think that has been taken up since. There certainly is one, and I believe that that was corrected in the treaty of Point Elliott. There is a page or two of Chinook jargon with the English translations. That is not the treaty, but the treaty negotiations.

Q. Yes, and that Chinook jargon phrase which is translated into English does not describe any of the terms of the treaty fishing rights provisions we are about in this case, does it?

A. That is correct.

Q. So to the extent that sentence says there is no record of the Chinook jargon phrase, the right of taking fish at all usual and accustomed grounds and stations is further secured, there is no record of the Chinook

jargon phrase used for that language. Is that a correct statement?

A. Excuse me, sir. What — the statement you have made is correct, and let me read you the statement that I objected to.

Q. All right.

A. (Reading)

> "There is no record of the Chinook jargon phrase actually used in the treaty negotiation."
>
> Now —

Q. And that statement, Dr. Riley, under the heading of "B" "Meaning of 'the right of taking fish, at all usual and accustomed grounds and stations, is further secured' "

A. That is correct, sir.

Q. And do you know of any place in the negotiation literature or informant testimony or historical reconstruction where you have seen the Chinook jargon used to translate that phrase?

A. I have not. If by that phrase you mean the phrase on taking a fish —

(R2372 line 15 - 2374 line 7)

Q. Then all you have to say is, "Yes, I am correct."

A. Yes.

Q. Now, where else do you disagree?

A. It's really the same kind of disagreement. At the bottom of page 27, there is, in the last paragraph the statement:

> "In my view, the most likely Indian interpretation of the 'in common' language would be that non-Indians were to be allowed to fish without interfering with continued pursuit of traditional Indian fishing. I think it most likely that the government intended for non-Indian participation in fishing."

Q. I'm sorry, Dr. Riley. You missed two words, "* * * intended to provide for * * *"

A. I'm sorry.

> "* * * provide for non-Indian participation in fishing with no thought that this would require any restriction of Indian fishing."

I do, in fact, agree with that, and I agree with it perhaps for different reasons than Dr. Lane, and I will — at least, one different reason from Dr. Lane.

It is my feeling, my belief, that as of 1855 the number of Indians was so small — in fact, even the number of settlers was so small — that there was no vision on the part of the treaty commissioners about the possible necessity of restricting the fisheries.

This is brought out in one of the plaintiffs' exhibits, the exchange of letters between Stevens and Fowler in 1856, when Stevens was interested in getting rights or developing commercial fisheries.

Stevens, as comes through rather clearly in most of these documents was, in fact, very interested in the Indians. He asked Fowler if the Indians would suffer if this kind of white commercial fishery — large-scale fishery, were to be started in this area.

Fowler's answer, as I recall — and I don't have the document with me at this moment — was "No, in our time," a very interesting phrase, "In our time, no."

Q. Dr. Riley, are you aware of any conflict between Indians and non-Indians concerning fishing at any of the Indians' principal or usual places of fishing prior to the treaty?

A. Prior to the treaty? Prior to 1855?

Q. Yes.

A. There is the account of Hitchcock and the Makah on a date of about 1850. To what extent that was a dispute over fisheries, a dispute over the land that Mr. Hitchcock was using, or both, I don't know. But there certainly was that.

I imagine there were others. At the moment, I cannot think of them.

Q. And is it your understanding as an anthropologist that one of the purposes of the treaty fishing rights clause was resolved to protect against such conflicts?

A. It is my belief that the government was attempting to protect the Indians in fishing in their usual and accustomed places and protect them against whites, but allow them to fish in common with whites.

Q. And in protecting and allowing that in common fishing, it was intended to resolve the conflicts that existed between Indians and non-Indians?

A. This is not stated in any of the treaty documents, per se. There are accounts, scattered accounts of it, a number of accounts of it in the R.C.I.A. documents, and there obviously were problems.

Dr. Lane has documented some of them or has discussed some of them.

It is my belief that Governor Stevens hoped to resolve these. I would say that they were not resolved because of splits — "split" really is not a good word — because of the different emphases and different areas of control of the Indian agents and the state and the Federal Governments, the territorial or Federal Governments.

Q. What I'm trying to get at, Dr. Riley, is whether it was the intention of the government treaty commissioners by thus protecting the Indians to resolve the conflicts which had previously existed, to their knowledge between non-Indians and Indians regarding fishing?

A. My answer is yes, with the understanding that they were trying to protect both Indians and citizens.

Q. And what were they trying to protect the citizens from?

A. They were trying to make sure that the citizens received their fair share of the fisheries, if you wish. In common with, if it means nothing else, must be taken to mean that.

Q. Why do you say that?

A. Well, would you expound on that just a little?

Q. It's a very simple question. You made a statement that in common with means, or must be interpreted to mean —

A. I'll give you a simple answer, then. It's my opinion.

Q. What is it based upon?

A. It's based on a whole series of things, actually. It's based on the number of complaints of the citizens, of which you have people like Swan in his early book articulating. You have people like Swan and Riley, which Dr. Lane pointed out yesterday, in the Puyallup case. You have people like Hitchcock who was quite perturbed and angry as to his inability to establish a Makah fishery.

I am sure there are others. These occur to me at the moment.

You also have the report of the treaty documents themselves. You also have the 1855 report of Stevens, which is largely Gibbs' railroad report.

The 1854 report of Stevens contains a section on which he gives his philosophy of Indian life. He wants to turn them into good citizens, educate them, make them into agriculturalists, blend them with the people.

He is concerned, very concerned, about the Donation Act, very worried about it. He points out that the Donation Act has opened up land that has not as yet been treatied for, and this is bound to create problems.

Manypenny to Stevens, in the documents I just mentioned, treaty documents, brings up the same point.

Q. What else do you base your opinion on?

A. Do you want more?

Q. I want all you have, Dr. Riley.

A. I'm giving you a series. I'm sure there are more, but I would say that if you asked me to completely document every statement I would have to go over the records. If you wish, I will.

Q. To your recollection, Dr. Riley, in light of these things that you have just cited to us, or any of your other experiences, have you come across a statement by anybody contemporaneous with the negotiation and signing of these treaties which says in common with was intended to grant to the non-Indians a fair share?

A. I know of no such statement.

(R2381 line 2 - 2386 line 11)

A. Let me say one more thing about that. Musn't we make a distinction about a precise legal definition and a definition that people will understand? What I think I was saying to you is that it is my belief that the language in Chinook jargon could have been understood in layman's terms.

I do not think, as Dr. Lane does not think, it could have been understood in legal terms.

But the Indian has been subjected — and I'm talking only about Western Washington Indians — the Indian has been subjected throughout the United States to an Indian policy that began before the signing of the Washington treaties which had has its intent making him into a citizen.

Governor Stevens indicates that for Western Washington, and it is certainly no secret. It is talked of again and again in various parts of the country, making him into a citizen, educating him, and if he wasn't a farmer, making him a farmer, making him, as Col. Simmons suggested in 1858, and as other people have suggested at other times for other areas, take the little children and take them away to school and do not let them see their parents, and do not let them speak their language. Make them speak English.

This was the policy of the United States.

(R2453 line 22 - 2454 line 14)

Q. For example, if I wanted to help this Court understand the words that were used and I wanted to look at a dictionary, look at a dictionary, a list of words that were commonly used in Chinook jargon around this area, around 1855, 1856, 1857, around those times, to find out whether "usual" was in the dictionary, whether "accustomed" was in the dictionary, whether "citizens" was in that dictionary, whether "territory" was in the dictionary, what would be my best source? What would be the thing I should go and look to which would be of assistance to this court and bring forth and put it in evidence here?

A. We are talking about 1973?

Q. No, I'm talking about a contemporary document around this time, a contemporary dictionary.

A. I would think Gibbs.

(R2460 line 10 - 2461 line 13)

Testimony of THOR C. TOLLEFSON
Director, Washington State Department
of Fisheries

July 9, 1973—August 29, 1973

Q. Mr. Tollefson, are you presently the director of the Washington State Department of Fisheries?

A. Yes.

Q. How long have you held such position?

A. Since May 1, 1965.

(1974 TR, 424 lines 17-21)

Q. Are you familiar with the operation of the International Pacific Salmon Fisheries Commission?

A. The Commission was created pursuant to a treaty between the United States and Canada. It manages the Fraser River stocks of sockeye and pink salmon. It is composed of three Canadian and three United States citizens. I am one of the latter, having served for eight years, and am currently the Chairman of the Commission.

Q. Would you describe briefly the management functions of the International Pacific Salmon Fisheries Commission?

A. The treaty and protocol provide that the Commission must manage the stocks of salmon I referred to above in such a manner as to (1) provide adequate escapement for spawning purposes, and (2) divide the catch as equally as possible between the two countries. Over the years the catches of each country have come close to matching the catches of the other. A more complete statement can be found in the Joint Biological Statement at pp. 101-103.

Q. In your opinion, has the Commission been able to successfully manage the Fraser River pink and sockeye runs on the basis of a percentage share of the harvest divided between the United States and Canada?

A. Yes. The annual reports of the Commission over the years have indicated that this has been the case.

(TR 1974 430 lines 4-26)

Q. Could your department perform its statutory duties if the management of the salmon resources in Puget Sound and on the coastal rivers involved in this lawsuit were fragmented between the department and the Indian tribes?

A. Jurisdiction to manage fisheries, or any resource, must reside in one agency to be successful. Divided jurisdiction means no jurisdiction, really. I don't remember what court in effect made that statement, but experience suggests that this is clearly true. If Indian tribes attempt to regulate the same off-reservation areas that the court has said we have jurisdiction to regulate there will be continued conflict between the tribes and the department and the resource will suffer.

(1974 TR 431 lines 9-20)

Q. Did you have any role in the establishment of International Pacific Salmon Fisheries Commission?

A. No. It went back way beyond my time.

Q. Do you have any knowledge of whatever as to how they decided to have the equal shares?

A. Well, just from reading the literature, originally the sockeye and pinks coming through U.S. waters, like coming on the south side of the Straits or passing through the San Juan Islands up by Point Roberts, were cropped more heavily by the U.S. than by the Canadians. This disturbed the Canadians because they considered these fish their fish, wholly spawned within their waters.

So, they began negotiating with the United States to get an equitable division of the fish. They thought at that time that they, at least, ought to have half, and they would have been happy to get them.

Then there was a tremendous slide in what we call the Hellsgate area that blocked the fish from going up and almost decimated the fish destined for the upper reaches of the Frazer River. So, it became very necessary for something to be done there to restore the stocks.

The U.S. had more money than Canada. So, they solicited us to enter a treaty with them under which we would make fish passages available while we would go 50/50 on the cost and then divide the fish 50/50 as nearly as possible in the course of the agreement itself.

Q. So, the United States put in some money and guaranteed a 50 percent share.

A. Correct.

(R692 line 14 - R693 line 21)

A. Well, we think we have done a fair job, but one has to recognize that we human beings, Indian, non-Indians and fishermen are the same the world over, they all want more fish and more fishing time. But we haven't had any great problems, except perhaps on the Puyallup River in the last couple of years.

Since we launched on our program of providing Indians with special fishing rights the last couple of years, they have not abided by our regulations, and we haven't bothered them simply because this case has been pending.

(R708 lines 5-15)

Q. Director Tollefson, can Indians fish anywhere in the State of Washington without a license in the normal fishing season set by the Department for all citizens?

A. Yes, they can, in the areas that are open to other fishermen.

(R721 lines 4-9)

Testimony of CALVIN PETERS
September 10, 1973

CALVIN PETERS, called as a witness by and on behalf of the plaintiff Squaxin Island Tribes, being first duly sworn, was examined and testified as follows:

(R2482 lines 8-11)

Q. Do your tribal regulations, to the extent that they regulate your off-reservation areas, cover these areas where your tribe, you believe, has usual and accustomed fishing grounds?
A. I believe that it covers a portion of it.
Q. And what portion doesn't it cover?
A. This is my own conclusion, but I believe, you know,

that we have these fishing rights to fish in Western Washington, in the Puget Sound —
Q. In your own mind it would be anyplace in Western Washington?
A. Yes, because I personally have commercially fished from the Coast up in the Straits and out on the ocean myself.
Q. And when you commercially fished in that manner, was it your own boat?
A. Yes, it was.
Q. And how large a crew did you have?
A. There was just myself, or sometimes I took my sons with me.

(R2489 lines 6-24)

Q. Do any of your other tribal members fish commercially with either gill nets or seine nets in the regular commercial season fisheries?
A. Yes, we do.
Q. And how many of your members do that, do you know?
A. Offhand, I couldn't say, but I know of two families, two members of a family that does this.
Q. And would they follow the fish up to Alaska?
A. Yes, they do.

(R2498 lines 12-21)

Testimony of HILIARY IRVING
September 10, 1973

Q. Mr. Irving, are you a Makah Indian?
A. Yes. I'm a full blooded Makah Indian.
Q. Where do you live?
A. Neah Bay, Washington.
Q. And is that the reservation of the Makah people?

A. That's the main village of the Makah Nation, yes.

(R2519 lines 3-8)

Q. And when you say the halibut fishery has been regulated virtually — when you say the halibut fishery has been curtailed considerably, who was it curtailed by?
A. By the International Halibut Commission.
Q. So it wasn't State curtailment, was it?
A. No, sir.

(R2564 lines 1-7)

Testimony of JOSEPH ANDREWS

September 10, 1973

JOSEPH ANDREWS, called as a witness by and on behalf of the United States and Skokomish Tribe, being first duly sworn, was examined and testified as follows:

(R2589 lines 20-23)

Q. Do these fishermen that fish commercially in your tribe have other occupations?
A. Yes, most of my people are loggers.
Q. And so then their commercial fishing is mainly to supplement their income?
A. Well, income plus the food.

(R2600 lines 2-7)

Q. And you indicated before that many of your members are employed in logging, is that the same major occupation of these members that live on the reservation?
A. That's right.
Q. What other occupations could they be in?
A. Oh, they farm.

Q. Other than farming and logging?
A. Well, I myself am a surveyor. I survey.
Q. And for all of them fishing is a part time occupation?
A. Yes.
Q. And you fish for food and to supplement your income, is that correct?
A. Food and kind of a privilege that we have. Like I got relief out of fishing, it seems to ease my tensions or keeps me away from the world. I enjoy it.
Q. And this is when you are sport fishing?
A. Yes.

(R2602 lines 5-24)

Q. Are you aware of any current Skokomish religious practices that surround the steelhead? Does it have any significance in a religious context to you?
A. I know at one time that we had the festivals there, but we don't practice them anymore.

THE COURT: When you were a boy?

THE WITNESS: Yes, when I was a boy it was practiced.

THE COURT: And it had to do with steelhead?

THE WITNESS: Steelhead, yes.

Q. These ceremonies no longer occur today; is that correct?
A. Not that I know of.

(R2608 line 16 - 2609 line 4)

Testimony of BILL FRANK, JR.,
Tribal Witness

September 10, 1973

BILL FRANK, JR., called as a witness on behalf of the United States and the Nisqually Tribe, plaintiffs herein, being duly sworn, was examined and testified as follows:

(R2620 lines 13-17)

Q. Mr. Frank, have you ever had any of your gear confiscated by enforcement officers of the state?
A. Yes, both by the State Game and Fisheries Department.
Q. And what type of property was taken?
A. I have had boats, motors, nets, taken.
Q. Was there anything else taken in connection with this?
A. No. Oh, I have had fish taken along with the nets.
Q. Have you ever been notified of any judicial proceeding at which any of that property was to be declared confiscated or forfeited?

(R2623 lines 6-15)

Q. (By Mr. Dysart) Mr. Frank, have you ever been notified of any judicial proceedings in which any of the property that has been seized from you was to be declared confiscated or forfeited?
A. No.
Q. Has any of the property ever been returned to you?
A. No.
Q. And how long has this problem existed?

(R2628 lines 5-12)

A. The ones that I identified, some of them were torn, and I can't completely tell you how — until if I had spread them out on the ground and looked them all over. But they were torn and the ropes were cut, and they were put in a gunnysack.
Q. From your experience, at times when you have been present when nets have been seized by the Department of Game, can you tell us the manner of seizure?
A. They have at one time on the back of their pickup trucks or whatever, they have thrown grappling hooks into the gillnets and torn them out of the river.

And they have went up there with their jet boats, they have taken them and cut them off. I don't think at one time I have ever seen them where the knot was easy to pull to untie it, they had taken their knives and cut them, they cut all my anchors off.

If they happened to be snagged, they could cut the snag part out of the nets so that they could confiscate what part they would get out of the river.

Q. Now you say that you had property seized in December of '71 and January and February of '72; were you arrested or charged with any offense in connection with that?

MR. CONIFF: Objection, your honor.

THE WITNESS: No.

THE WITNESS: It would be in the month of December of 1971, and into January and February of 1972, sir.

Q. (By Mr. Dysart) Now, Mr. Frank, have you ever seen any of your gear in a warehouse or other property of the Washington Department of Game?
A. Yes. It wasn't in the warehouse, it was in Olympia at the Department of Game outside of the warehouse, outside of the Department of Game in Olympia. It was kind of on a parking lot or something.
Q. What was the occasion for you seeing that?
A. We were there to identify my gear — all my gear that they had confiscated.
Q. Did you recognize some of the gear that was there as being yours?
A. All I could recognize was my boat and my motor, and all I could recognize at that time was the four gillnets.
Q. Now, were there additional gillnets in the items that were shown to you?
A. I believe there was about twenty or so.
Q. Were those nets identified as to where they had been seized by the Department of Game?
A. Some of them were and some of them wasn't.

Q. What condition were they in?

MR. CONIFF: We are moving into the area of the witness' next testimony, the bottom of page 9 over to page 10.

Here again he is discussing other pending lawsuits involving other individuals making statements.

THE COURT: He is just speaking of himself, had he ever been charged with any offense, is what the question was. And your answer was what?

THE WITNESS: My answer is no sir.

(R2629 line 2 - R2631 line 9)

Q. (By Mr. Dysart) Have officers of the Fisheries Department ever taken any of your gear, to your knowledge?

A. Yes.

Q. And has any of that gear ever been returned to you?

A. No.

Q. Has there ever been a judicial declaration of confiscation or forfeiture with respect to that?

MR. MCGIMPSEY: Objection, not within his competency to know whether there has ever been.

THE COURT: Well, not to his knowledge, that's the extent to which he can speak.

MR. MCGIMPSEY: I agree that he can testify that he received no notice of a forfeiture, but whether there has been one --

THE COURT: I see what you mean. The only part of his answer that is in the record here is that he has no knowledge of any judicial proceedings with respect of his gear.

Q. (By Mr. Dysart) Is that a correct characterization of your testimony, Mr. Frank?

A. Yes.

(R2633 lines 2-22)

Q. If we could stay with Mr. Mills for a moment.

Isn't it true that Mr. Mills does claim and exercise, claim treaty fishing rights on the Nisqually River in the Franks Landing area?

A. Mr. Mills is exercising his rights.

Q. If I understand you correctly, then a person can acquire treaty fishing rights by marriage into the Nisqually Tribe.

A. An Indian person.

Q. For example, Mr. Mills, whom I believe has claimed at least, that he is part Yakima, part Warm Springs, and he being married to your niece, would then be in a position to claim these rights; is that correct?

A. Yes.

Q. Are you and Mr. Mills close personal friends?

A. Yes.

(R2662 lines 1-15)

Q. Does Mr. Ted Kover that you mentioned before in the fish committee, is he on the Nisqually roll, the 1965 roll?

A. No, his wife is.

Q. Is Mr. Kover a Nisqually Indian?

A. No.

Q. And yet he is operating on the Nisqually Fish Committee and is a Nisqually fisherman or claims Nisqually fishing rights?

A. Yes, he is exercising his wife's rights as a Nisqually Indian.

Q. Is Mr. Kover an Indian?

A. Yes.

Q. What tribe?

A. I believe he's from Colville.

(R2666 lines 3-17)

Testimony of BENJAMIN RUBEN WRIGHT
September 11, 1973

BENJAMIN RUBEN WRIGHT, called as a witness on behalf of the United States and the Puyallup Tribe, plaintiffs herein, being first duly sworn, was examined and testified as follows:

(R2869 lines 3-7)

Q. Are you a member of the Puyallup Indian Tribe?
A. Yes, I am; enrollment number 288 of the 1929 enrollment.

(R2869 lines 19-21)

Q. Are you a commercial fisherman?
A. I am right now, temporarily.
Q. And what is your other employment, besides fishing?
A. I have worked six years with the Employment Security Department, State of Washington, as an interviewer, and my job description was Community Worker.
Q. And what is your status with that agency at the present time?
A. Starting July 1 of this year I am on one-year annual leave, and I am expecting to hopefully go to work for the Puyallup Tribe as a probation and parole officer.
Q. What program is that particular position organized under?
A. It's the — money comes from the Law and Justice from the U.S. Government. The Puyallup Tribe is going to be the contractor for the two positions.
Q. And what will be your principal responsibilities in that position?
A. Helping the offender to rehabilitate.

(R2870 lines 5-23)

Q. Members of your tribe in your experience and in your knowledge about the white fishermen at work on purse seine boats, do you share with them a common goal to make a livelihood or earn money from your commercial fishing?
A. Yes.
Q. And would you say your interest is just the same as their interest then, as far as the commercial aspects of your fishing goes?
A. I guess so, yes.

(R2895 lines 16-25)

Testimony of CHRIS PENN
September 12, 1973

CHRIS PENN, called as a witness on behalf of the United States and the Quileute Tribe, having been first duly sworn, was examined and testified as follows:

(R3190 lines 10-13)

Q. Where do you live, Mr. Penn?
A. I live on the Quileute Reservation, and the name of the town is Lapush, Washington.
Q. Are you a member of the tribe?
A. Yes, I am.

(R3190 line 25 - 3190 line 4)

Q. Tell us what kind of fishing the Quileute people do today.
A. Well, we have a gillnet in our rivers, and we also have six boats that are owned by our tribal members offshore fishing. It is mostly gillnet in the river.

(R3191 line 22 - 3192 line 2)

Q. Now, is it possible for your fishermen to fish for a living all within the boundary of the reservation, or is it necessary to go outside the reservation for fishing?
A. We have to go outside the reservation to fish.
Q. Why is that?
A. Well, on account of the rivers on the bottom where we fish on the reservation, is not suitable for drift net, for instance, drift net there is only one or two places on the reservation that you can — we have to go outside to accommodate all our fishermen.
Q. About how many members are there in the Quileute Tribe?
A. 460 on the rolls.
Q. About how many of these 460 people depend on fish in some way or another; either for livelihood or food?
A. It goes by the head of the family. There is 34 fishermen.
Q. You mean the 34 fishermen feed their own family, or they feed all 460 people?
A. No, they feed their own family.
Q. How about the other people who are not related to fishermen, are they in any way involved with fish?
A. No.
Q. Do they eat fish?
A. Yes.
Q. Is the fish distributed free as gifts?
A. In certain times — certain times of the year, of our ceremonies, yes.
Q. In what kind of ceremonies are fish used?
A. We have Quileute Days, and in parties, birthday parties mostly, and they have a ceremony that we use a lot of fish, is given Indian names to each family.
Q. Is fishing important to the Quileute people?
A. Yes, it is.
Q. In what way?

A. Well, that is the only way, that is the only resource that we have, of making any money on the reservation.
Q. Do your people make a distinction between salmon and steelhead?
A. No.
Q. What is the steelhead as far as you are concerned?
A. Fishes, they are all the same, in our fishes. It is still fish, steelhead and the silver and king are all the same. We use it the same way as anything else.

(R3192 line 10 - R3194 line 10)

Q. They have been just taking everybody's nets?
A. Yes.
Q. Have you ever had any of your taken?
A. Yes, I have had some.
Q. How many nets have you lost?
A. I have lost three so far.
Q. Now, do you know every time you set a net outside the boundaries of the reservation after, say, November 20th of the year, that the Game Department is going to take that net?
A. Not November 20, no.
Q. When is that?
A. December 1.
Q. Now, do you know that the Game Department is going to take that net if they find it?
A. Yes. We know they are going to take it.
Q. Why, then, do you continue to re-set the net?
A. To protect our treaty rights.
Q. Has the Game Department ever contacted you to find out if you own those nets?
A. Yes, they have. They came down to LaPush. I can't name the exact date. They came down and offered to give us our nets back, but we was working on the dock at the time. This was during the summertime. They

took the nets back. They parked in front of the store and waited there, and that's as far as they came. We couldn't get off work to go up and get our nets.

Q. Where were you working?
A. I was working at LaPush Fish Company at the time.
Q. They offered to give the nets back to you?
A. Yes. But we didn't get to go up there.
Q. Have you ever taken them up on their offer after that?
A. No. I have never heard from them any more.
Q. Have they ever offered to return any other nets that they have taken besides that one?
A. No.
Q. Do they still have your nets?
A. Yes, they have.
Q. Nets of other Quileute fishermen also?
A. Yes.

(R3197 line 1 - R3198 line 16)

Q. How far out?
A. Anywhere between 20 fathoms all the way out to the forties. About five miles.
Q. Five miles out?
A. Yes.
Q. Are most of the trollers out in that area?
A. Yes, there is.
Q. I take it there aren't very many trollers, then, inside?
A. Well, they're inside, yes.
Q. Why is it that your are trolling out at five miles?
A. That's where the fish are.
Q. Is that pretty true up and down the coast?
A. Yes, it is.

(R3208 lines 1-15)

Testimony of JOE DE LA CRUZ
September 13, 1973

Q. Mr. De La Cruz, are you an enrolled Quinault Indian?
A. Yes, sir.
Q. How long have you lived on the Quinault reservation?
A. I have been on the Quinault reservation approximately twenty-six years. I left the reservation during the time I was in the service and the time when I was in school for ten years.
Q. Are you the chairman of the Quinault business committee?
A. Yes.

(R3474 lines 12-20)

Q. Let's just explore that for a little bit.

In your experience fishing on the ocean is most of the fishing being done outside the three-mile limit?

A. I'll say a great majority of it, at least off the Quinault Reservation and Grays Harbor, a great majority of the fish are picked up beyond that three-mile limit. I know certain times of the year when water temperatures are right and they run in closer into shore within that three-mile limit, which is normal in late July or August when the fish do move in. But this year I have been out there only a few times, the fish have been out there 15, 20 miles and even beyond that almost the total summer.

(R3505 lines 11-25)

Testimony of LENA COLTEE HILLAIRE
September 10, 1973

Q. Did the Puyallup Indians have any programs for distributing fish to members of the tribe who couldn't

fish themselves, like older people or people who couldn't fish?

A. Yes, they always did.

Q. How was that done?

A. Well, we would appoint somebody to do that, and then they would get the fish for the elders, and the olden days, and they would even clean them for the old people.

They used to get them all clean, ready to take around to the elders, yes.

Q. They would distribute them around to —

A. Yes.

Q. — all members of the tribe?

A. Yes, on fish and clams and ducks and things like that, any of our Indian food was gotten for our old people. I helped when I was a little girl. I helped at Nisqually and Puyallup.

Well, I helped other reservations, too, when I would go, mamma would go to visit, you know.

Q. Coming back to the seine for a moment, do you have any estimate that you could give us and tell us how long this seine was? Was it longer than this room?

A. Oh, yes, the rope would come about where you are. It is how much slack we had in the rope. Then they would go around. That is quite a ways, because — and then they would come to shore with the ends of the seine, that is the net.

Then they would start pulling and they would have a little canoe that they called det-wick on that side, and just bat the water with their paddles to keep the fish from getting out until the slack of the rope come in, and when the rope was in they didn't worry no more.

Then they start hauling the fish. Oh, those days, they were the fishing days, not now, but those days were.

And then they would scoop all the little fishes out, the women, throw them so they, you know, keep on going, I guess, wherever they were going. Oh, it was a lot of fun for me.

THE COURT: Kind of fun for you to think about it, isn't it?

THE WITNESS: Yes, oh, I know the history of way back, because I never knew English, you know. I had to go to school to learn English. I used to ride with a dairy woman, and finally mama moved right across to Puyallup school, and then I would go to holler to her to bring me a canoe. I didn't like it in school. They punished me.

I didn't read the pictures, you know, all right. Seven of us, we used to get put in the clothes room, and then we would dance the Indian dance and we would talk Indian and we would just have a high old time.

MR. DYSART: That is all I have.

THE COURT: Anything further for plaintiffs?

THE WITNESS: And then, you know, before when the Indians, before their seasons they get fish and the Indian doctors name the fish and everything. Then we would burn it so that we could have a good run for the next year. We had a lot of Indian traditions, and they worked, too, on the Indian. I do that yet. I burn stuff, you know, when I want anything done. I still follow my Indian life.

I eat a lot of Indian food, but I got no more. All the white people took all our food. We have got nothing in the woods now, not even Indian medicine. Yes, that is true. I never take white man's medicine. Always Indian. And I have been physical — I have my physical examination and everything. I don't get sick, but I get hurt now.

See, I got hurt, yes.

MR. DYSART: Thank you.

(R2681 line 5 - R2684 line 5)

Testimony of FORREST L. KINLEY,
Tribal Witness
September 12, 1973

Q. Mr. Kinley, are you a member of the Lummi Tribe?
A. Yes.
Q. And where do you reside?
A. Lummi Reservation.
Q. Do you have any official position within the Lummi Tribe at this time?
A. Assistant to the chairman.
Q. And in years past have you occupied a position within the tribal government?
A. Yes, I was chairman and member of the council for approximately 20 years.
Q. Have you ever worked in fishing for a livelihood?
A. Since I was around 12 years old.
Q. And will you tell us briefly what kind of fisheries you have worked in?
A. I have fished — I have fished every type of fisheries there is. I started out gillnetting in the Nooksack River. I have reef netted. I have beach seined. I have my own purse seine boat. I have gillnetted commercially on the outside and gillnetted within the reservation it elf, so that I have had experience in all types of fisheries.

(R3004 line 25 - 3005 line 22)

Q. (By Mr. Ziontz) Now, with respect to the Game Department , has the Lummi Tribe ever tried to reach an accommodation with the Game Department?
A. I think that any tribe in the State of Washington would say that there is no Indian tribe in the State of Washington that has gotten any cooperation out of the Game Department.

During Eisenhower's administration, I happened to be one Indian that was appointed with Newton Edwards who was assistant Secretary of the Interior, to come out here and talk to Game, Mr. Biggs and one other head they had at that time. I just don't recall, Biggs and —

Q. Mr. Biggs was the Director of the Game Department?
A. Yes. The other man was in enforcement. I think he's still on.
Q. Is that Mr. Neubrech?
A. Neubrech.

We met with them and their staff, and they didn't want to cooperate with the United States Government. They didn't want to cooperate with the Lummi Indians.

Also, during the time that I was in tribal government, we requested a meeting with the Game Department to come up and make some concessions on the Nooksack River that we have always considererd steelhead as a salmon, and we still do.

We recommended to the Game Commission that we would make a 72 hour closure during their season if they would take a one day closure, and that we could not even let them take a one day closure.

We told them to name their own day. If one fish got away, we felt that this would help the steelhead run in the Nooksack River.

I think that the statistics of the State of Washington would prove that we have maintained a steelhead run in the Nooksack River without any help from the state, and that the Nooksack River has showed a good, even run of coho salmon, and, you know, without too much support from the state.

I think that the Lummi Tribe can stand on their own track record of conservation in the Nooksack River by the state's own records.

Q. In what way is the tribe, the tribal fisheries hurt by state action at this time?

A. Well, I was for maybe twenty years on the tribal council as a council member and head of various committees and things like this.

For years I have attempted to get the state to put in their regulations, just a very small thing, to define the boundary of their fishing area, so that it don't include Lummi reservation.

This would make the enforcement for both the state and the Lummi Tribe a lot easier, and there wouldn't be no conflict and things like this.

Up to this day, we have never been able to get the state to include this in their regulations.

The other thing is that at the present time they have opened Bellingham Bay to a heavy fall Chinook fisheries, which practically eliminates our cuts our Indian fisheries in the Nooksack River down to where the majority of our people will not reap the harvest that we should with the size of runs that have been available to our people.

A few years ago, the pink salmon was on its way down in the Nooksack River. We met with the state and agreed if they would agree to close Bellingham we would agree to take the responsibility for the disappearance of pinks in the Nooksack River.

Well, they did agree to close it down for two years, and we did bring up their pink run back to where it is today.

I think that we have a track record that we can live on that we have regulated our fisheries as Lummi Indians.

(R3017 line 9 - 3020 line 8)

A. I fished throughout Puget Sound purse seining.

(R3074 line 21)

EXHIBITS IN U.S. v. WASHINGTON
(Submitted in 1973)
384 F. Supp 312
(W.D. Wash. 1974)

EXTRACTS
WEBSTER'S ENGLISH DICTIONARY

1828 and 1862 Editions

(Exhibit PL-86)

"Common. 1. Belonging equally to more than one, or to many indefinitely; as, life and sense are common to man and beast; the common privileges of citizens; the common wants of men.

"2. Belonging to the public; having no separate owner. The right to a highway is common.

"3. General; serving for the use of all; as, the common prayer.

"4. Universal; belonging to all as, the earth is said to be the common mother of mankind.

"5. Public; general; frequent; as, common rapport."

REPORT OF GEORGE GIBBS TO CAPTAIN M'CLELLAN ON INDIAN TRIBES IN THE TERRITORY OF WASHINGTON

March 4, 1854

(Exhibit PL-9)

* * *

"It is not believed that extensive reserves would be desirable for these tribes. The nature of their country and

their own habits make the case entirely different from those of the prairie Indians. Although some of them cross the mountains in search of buffalo, they are not generally hunters; nor is their country any longer a game country. They require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large; but they do not need the exclusive use of any considerable districts. A large portion of their territory will, in all human probability, never be occupied by white men; and so far nature has provided reserves. What is necessary for them, and just in itself, is, that small tracts of good land should be set apart as permanent abodes, where they may raise their vegetables and bury their dead, secure that they will not be driven off at the pleasure of the first corner.

"This is especially so, because their main resource during a portion of the year is speedily destroyed in the neighborhood of settlements. A drove of hogs belonging to one white man will consume the winter provision of a tribe of Indians. In like manner, the use of their customary fisheries, and free pasturage for their stock on unenclosed lands, should be secured.

"The subject of the right of fishery, in its present position, is believed to be one concerning which difficulties may arise. It is certain that the intention of Congress never was that the Indians should be excluded from them; but as no condition to this effect was inserted in the donation act, the question has been started whether persons taking claims, including such fisheries, do not possess the right of monopolizing them. It is, therefore, proper that this also should be set at rest by law."

P.27

DOCUMENTS RELATING TO THE TREATY OF DECEMBER 26, 1854 WITH THE NISQUALLY, PUYALLUP AND OTHER INDIANS

(Exhibit PL-10)

Report of James Doty, Secretary to the Treaty Commission, December 26, 1854:

> "At an evening session of the Commission, all the members being present, the Treaty was very fully discussed, and also the provisions necessary to be incorporated in the further Treaties to be concluded with Indians upon the Sound and Coast.
> * * *
> It was also thought necessary to allow them to fish at all accustomed places since this would not in any manner interfere with the rights of citizens, and was necessary for the Indians to obtain a subsistence."

REPORT BY ISAAC I. STEVENS GOVERNOR AND SUPERINTENDENT OF INDIAN AFFAIRS TO THE COMMISSIONER OF INDIAN AFFAIRS

September 16, 1854

(Vol. 746, Executive Documents of the Senate, 33rd Congress, 2nd Sess., 1854-55)

(Exhibit PL-47)

"The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing. It is therefore desirable that this question should be set at rest by law."

P.456

LETTER FROM GOVERNOR ISAAC STEVENS to GEORGE W. MANYPENNY COMMISSIONER OF INDIAN AFFAIRS

December 30, 1854

(Exhibit PL-11)

Office Supdt. Indian Affairs
Olympia, Washington Territory
December 30, 1854

Hon. Geo. W. Manypenny
Commissioner of Indian Affairs
Washington D.C.

Sir:

I have the honor herewith to transmit articles of agreement and convention, whereby the Indians at the Head of Puget Sound have ceded their lands, with a record of the proceedings duly certified to by the Secretary, all which I submit for the approval of the Department. I trust that the Treaty may be approved of and ratified by the President and Senate.

Referring to the record of the proceedings it will be seen that Mr. James Doty was appointed Secretary, Mr. George Gibbs, Surveyor, Mr. H. A. Goldsborough Commissioner, and Mr. Benj. F. Shaw Interpreter, and that the Indian agent of the Sound District, Col. M. J. Simmons, was on duty in his appropriate capacity with the commission.

After a full conference with these gentlemen, all versed in Indian affairs, I determined to call the Indians, parties to the above treaty, together on the She-nah-nam, or Medicine Creek, and my views both as to the terms of the treaty, the Indians to be treated with necessarily and the probable reserves are embodied in programs which were made the basis of instructions to these gentlemen in intercourse with the Indians; and which with the forward duly recorded in the proceedings.

* * *

"These reserves have been so selected as not to interfere with existing claims or with the progress of settlement, and yet at such points as will enable Indians to catch salmon, gather roots and holmes, pasture their animals on unclaimed land, and participate heretofore in the labor of the Sound. These rights, with restrictions, are secured in Article 3*d* of the treaty.

* * *

But for a more general view of the conditions of the Indians and the obligations of the government.

The Indians on Puget Sound have been for a considerable time in contact with the whites, have acquired many of their habits and all their vices. They form a very considerable proportion of the trade of the Sound. Many are good laborers and are employed in families, vessels, lumber yards, mills and on farms. They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it. Whilst they cultivate small patches of potatoes, their principal food in fish and roots and berries.

* * *

"The provisions as to reserves and as to taking fish, pasturing animals, and gathering roots and berries had strict references to their condition as above, to their actual wants and to the part they play and ought hereafter to play in the labor and prosperity of the territory. It may be here observed that their mode of taking fish differs so essentially from that of the whites that it will not interfere with the latter. They catch the salmon with spears in deep water and not with seines or weirs."

TREATY PAPERS TREATY OF POINT ELLIOTT

(Exhibit PL-14)

Address of Governor Stevens to the Indians, January 22, 1855:

* * *

"We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries."

* * *

DOCUMENTS RELATING TO THE NEGOTIATION OF THE TREATY OF POINT-NO-POINT

January 26, 1855

(Exhibit PL-15)

* * *

"I wish to speak my mind as to selling the land—Great Chief. What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food."

* * *

"Mr. Simmons, the agent, explained that if they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. That where a small tract alone was left, the privilege was given of going wherever else they pleased to fish and work for the whites. If you can cultivate more land than this, you can have it."

* * *

Governor Stevens proceeded to advise them as follows:

"* * * Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a doctor to teach and cure you. Is not

that fatherly? This paper secures your fish? Does not a father give food to his children? Besides fish you can hunt, gather roots and berries."

DOCUMENTS RELATING TO THE NEGOTIATIONS OF THE TREATY WITH THE MAKAH INDIANS

January 31, 1855

(Exhibit PL–16(b))

"Kalchote Neah Bay * * * He thought — he ought to have the right to fish and to take whales and get food where he liked. He was afraid that — if he could not take halibut — where he wanted, he would become poor.

* * *

"Gov. Stevens informed them that so far from wishing to stop their fisheries, he wished to send them oil kettles, and fishing apparatus.

* * *

"Gov. Stevens replied that 'he wanted them to fish but that the whites should fish also.' "

JOURNAL OF OPERATIONS OF GOVERNOR STEVENS, TREATING WITH INDIANS EAST OF THE CASCADE MOUNTAINS in WASHINGTON TERRITORY

May 22, 1855

(PL–22)

"The homestead provisions as in the treaties in the Sound was spoken of. That their horses could be allowed to graze in the neighborhood of their reservation on lands unoccupied by whites, and unclaimed.

"They would have the right of travelling throughout the country for lawful business; fishing at accustomed places in common with the whites. And going to the

mountains for berries, always provided that they were to remain upon their reservation when required, and were in no manner to interfere with the whites when off of it."

LETTER FROM GOVERNOR STEVENS
to
CAPTAIN FOWLER, SPECIAL INDIAN AGENT

December 6, 1856

(Exhibit PL–7)

Office Supt. Ind. Affairs
Olympia W.T. Dec. 6, 1856

Capt. E.S. Fowler,
Special Indian Agent
Port Townsend, W.T.

Sir,

I have to request that you will furnish me at the earliest practicable moment with all the information you can collect in regard to the Fisheries of the Sound, Straits and Coast—to what extent they might enter into our commercial operations and made an article of export—the market—the craft best adapted to the business—the best point for a depot on the Sound. The extent the whole business might be developed. The extent to which the labor of the Indians could be availed of. Is there any likelihood that, for some years, the quantity of fish will be diminished as to ~~straighten the Indians~~ interfere with the subsistence of the Indians.

Truly & respectfully,
Isaac I. Stevens
Gov. & Supt.

*Also send me any information of interest you can collect in reference to the early history of the Indians under your charge, their habits, customs, &ct.

REPORT OF AGENT M. T. SIMMONS
to
SUPERINTENDENT GEARY

July 1, 1860

(Exhibit PL–41)

The salmon that run up the Qui-nai-elt river, in great numbers, are considered the fattest and best flavored of any taken on this coast, and the Indians should be encouraged to open a trade in them. I think they can be more profitably employed at present in this way than in agricultural pursuits, as it will be a more congenial employment for them.

P.420

"ON THE INDIANS OF WESTERN WASHINGTON AND NORTHWESTERN OREGON"

A Paper Prepared by
George Gibbs, M.D.

Transmitted to Professor J. W. Powell by Acting Commissioner of Indian Affairs Galpin, October 13, 1876

(Exhibit G-4)

* * * as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seigniorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the Sound particularly, from one to another locality, according to the season. * * *

REPORT OF SUPERINTENDENT C. H. HALE
to the
COMMISSIONER OF INDIAN AFFAIRS

October 19, 1862

(PL–42)

TREATY OF OLYMPIA—
QUI-NAI-ELTS AND QUIL-LEH-UTES.

This reservation is situated on the Pacific Coast, about eighty miles south of Cape Flattery. It was surveyed, and the lines marked under a contract made by W. W. Miller, esq., during his superintendency. This survey was not executed any too soon for the interests of the government. If some of the other reservations had been early surveyed and properly defined, there would have been a saving to the department of much more than the cost of survey.

* * *

The Indians mostly reside upon the river, and cannot well be removed thence. They are able to procure the principal part of their subsistence from the river with but little exertion, on account of the excellent fishery near its mouth, being one of the best on the coast. The Quinaitl salmon are justly celebrated for their delicacy and superiority. In the spring of the year they are quite abundant, so that with little exertion, especially if provided with suitable fishing nets, and one to direct and instruct them in reference to curing and preparing for market, these Indians might be greatly benefited. I propose to try the experiment next spring, if it be practicable, by giving them all the encouragement in my power to put up all the salmon they can, so that after their wants are provided for, the surplus may be sold for their benefit.

To retain this fishery the claim of a settler was included within the bounds of the reserve. This was done under the direction of the former superintendent, W. W. Miller, esq. I am well satisfied that it was absolutely necessary to do so in order to prevent serious difficulty with these Indians. The claimant, who had taken in good faith, had incurred considerable expense in his preparations for conducting the fishery, but upon the representation of the matter to him by the superintendent he at once relinquished his claim, the assurance being given that the

loss actually sustained by him should be reimbursed. An appropriation for this purpose should at once be made, so that some of the materials which are still on hand may be preserved from waste and be usefully applied.

A BRIEF HISTORY OF THE SALMON FISHING AND CANNING INDUSTRY ON PUGET SOUND

by

Robert Paul Thomas
Department of Economics
University of Washington
Seattle, Washington

May 1, 1973

(Exhibit MLQ-1)

* * *

Hewes estimated that the average Indian salmon capture would have amounted to between 100 and 130 million pounds and that the Northwest Coast Indians would have accounted for about 35 million pounds of this total. It is clear from Chart 7 that the Indian's annual catch did not endanger the salmon population. The Indians harvested fish that were superfluous from the point of view of spawning.

The coming of the White Man did not lead initially to a conflict with the Indian over fishing rights. Nevertheless, the history of White-Indian relations during this period is very important to understanding the current fishing dilemma. The White Man initially was not primarily interested in the salmon fishery, concentrating instead upon agriculture and the exploitation of other natural resources within the Pacific Northwest. The White Man wanted the right to the land, the Indian the guarantee of his right of access to the various fisheries.

A reading of the minutes of the treaty negotiations brings out the point that the Indian valued the land little

but considered fish the basis of his well-being. Indeed the Indian considered fish the basis of his whole culture. Thus the tribes were willing to sell the land for consideration, but insisted that they retain their rights to fish. Given the nature of their economy, this feeling is easy to understand.

* * *

JOINT BIOLOGICAL STATEMENT

May 11, 1973

(Exhibit JX–2a)

This Joint Statement has been prepared by and under the direct supervision of, and has been reviewed by, each of the undersigned. Except as may otherwise be stated in said Statement the facts, opinions and conclusions set forth herein are those to which each of us would testify as an expert witness in the case for which the Joint Statement has been prepared.

J. E. LASATER, Assistant Director
Washington Department of Fisheries

JAMES L. HECKMAN, Manager
Northwest Fisheries Program
Bureau of Sport Fisheries & Wildlife
Fish and Wildlife Service

CLIFFORD J. MILLENBACH
Chief, Fisheries Management
Washington Department of Game

May 14, 1973
Date

PREFACE

This report has been prepared for the purpose of presenting certain basic fisheries information for use in *U.S. v. Washington*, Civil No. 9213, U. S. District Court, Western District of Washington. That action is concerned with the treaty-secured fishing rights of certain Indians. The case is limited to the consideration of those rights as they apply in off-reservation waters of Western Washington exclusive of the Columbia River drainage area and in adjacent offshore waters. The case is concerned primarily with the rights of the Tribes which are parties to that case as they apply to the taking of salmon and steelhead at those Tribes' usual and accustomed fishing places within the aforementioned area (see map p. ii).

Accordingly, this report is limited to a discussion of the salmon and steelhead resources within the U. S. portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed and the offshore water adjacent to those areas (including those fish which are within any of such waters but are native to outside areas). As used in this report (except where the context clearly indicates otherwise) the term "Puget Sound" includes the Strait of Juan de Fuca and all saltwater areas inland therefrom, and all terms and discussions which would otherwise have a broader or more general scope—such as "fishery resource," "anadromous fish," "salmonids," "total catch," "hatcheries," "freshwater areas," etc.—are to be construed as being limited to the aforementioned geographical area and species to which this report is confined. Other terms commonly used in reference to Pacific salmon and steelhead are defined in the glossary.

§2 Management of the Resource

§2.0 Introduction

Fisheries management means maintaining and enhancing the fishery resources and the aquatic environment and establishing controls on the harvest. In this part we will consider fisheries management programs in terms of their objectives, methods of accomplishment, and the activities of various management entities.

§2.1 Management Objectives

2.1.0 Introduction

Fisheries management takes into consideration both the resource itself and the objectives and needs of the societies which control and seek to utilize it. The anadromous fishery resource is both perishable and renewable. Thus, while an over-harvest could imperil its renewability, an under-harvest during the limited time it is available would result in an irreplaceable waste of the resource. Fisheries management seeks to avoid both of these adverse results and to maintain the stocks at a level which will permit the optimum yield from one fish cycle to another. But the "optimum yield" of the different types of fisheries must be considered in broader terms than just the quantity of fish product obtained. Because in today's society fish resources serve broader needs of man than nourishment. The commercial, sport, and Indian fisheries are managed for different use objectives and user interests. Accordingly, the objectives of fisheries management vary in accordance with the purposes and constituency for which the particular fishery is being managed.

Commercial fisheries are managed to achieve a maximum sustained yield in terms of food and economic profit whereas sport fisheries are managed to achieve a maximum sustained recreational experience and a high yield of personal use food and "trophy" product. The Indian tribes have as their primary use objectives the fostering of Indian economic well-being, the preservation of their cultural heritage and way of life, and the provision of a significant element of Indian diet.

2.1.1 Commercial Fisheries Management

Managing the fishery for maximum sustained profit requires, among other things, that the harvest occurs near the time when the available "crop" has attained maximum bulk and quality. These do not necessarily coincide in time and place. Thus the proper time for commercial harvest corresponds most nearly to the relatively brief period of time when the fish are full-grown and returning to or entering their natal stream to spawn. Net fishery seasons permit the efficient taking of mature or nearly mature fish for commercial purposes during this time period only.

2.1.2 Sport Fisheries Management

Managing for maximum sustained recreation requires providing ample opportunities for fishing. Long seasons, economically and geographically accessible waters, and high catches per individual effort all increase recreational yield. Angling is the accepted method of recreational fishing for salmon and steelhead. It involves catching the feeding fish with baited hooks or lures. Generally, salmon are taken in the marine areas and steelhead in freshwater streams.

Feeding and growing salmon in the ocean and Puget Sound are of greatest recreational value because they are vulnerable to sport gear over a long period. On the spawning migration route from their saltwater feeding areas, full-grown salmon are available to anglers for only a short period of time. Feeding activity of these latter fish diminishes or ceases as they complete their saltwater migration. The efficiency of angling gear is then

measurably decreased. In some Puget Sound areas where salmon are in or approaching their natal estuary, the catch rate is commonly one-tenth that of the ocean fishery.

In contrast to salmon, steelhead actively feed throughout their entire spawning migration route and are readily available to sport gear in freshwater areas. They are not generally taken by sport gear in saltwater.

2.1.3 Indian Fisheries Management

Management for Indian objectives is closer to commercial management than to sport inasmuch as pursuit of an economic livelihood and the efficient procurement of a food supply are major purposes. In addition, salmon and steelhead have special significance in the religious, cultural and mores of the Indian people. Because of traditions, treaty provisions, and location of Indian communities, the Indian fisheries are largely place-oriented. Management for Indian fishery objectives must take this factor into consideration.

§2.2 Management Methods

2.2.0 Introduction

Fishery management methods are related to the life history characteristics of the resource discussed in Part I of this report. The life histories of salmon and steelhead are cyclic. The harvest today, particularly with respect to salmon, can occur in a number of locations on their migration and at several phases of their life progression. During a substantial part of this migration and development, fish of different species, races, and river systems are intermingled to both known and unknown extents. These facets of the anadromous salmonid fisheries make the task of management a complex and difficult one—one in which forecasts of constantly changing variables play a key role.

While there are a number of managers and policies governing the management of salmon and steelhead, the methods or techniques employed by each are essentially the same. All managers are faced with a growing demand on the resource coupled with a serious deterioration of the natural

P.47-50

§2.5 Washington Department of Fisheries—Jurisdiction and Management Objectives

The Washington Department of Fisheries is the State agency charged with management of those fish which the State has classified as food fish. It functions in accordance with RCW Chapter 75 and WAC Chapter 220. The objectives of the Department are broadly summarized as follows:

1. To conserve and, where possible, expand the primary fishery resources;
2. To promote optimum use of the fisheries resource by fishermen (commercial, sport, and Indian), the fishing industry, and general public;
3. To encourage harvesting of the sustainable yield of fish in a manner that provides the greatest return to the economy;
4. To develop public understanding of the fishery resource, its environment, and the philosophy governing exploitation of the resource, and to maintain public respect for the law.

The Department of Fisheries manages and regulates the harvest of the salmon resource for each of the three distinctive fisheries discussed earlier—i.e., commercial, sport, and Indian. As previously indicated, the differences in use objectives of these three fisheries dictate that separate management policies be applied to each. These policies have been discussed in *§2.1.*

In addition, it is the position of the Department of Fisheries that because any State regulation of the exercise of the Indian fishing rights secured by Federal treaties must fully respect the rights thus secured, no regulation may be adopted by it regulating the exercise of treaty fishing rights unless such regulation is determined to be necessary for conservation. P.67-68

§3.1 Indian Historical Fisheries

3.1.0 Introduction

The historical Indian fisheries for salmon and steelhead were the crux of the Indian economy in Western

Washington. In their fishery, the Indians used several kinds of devices and gear, including weirs, traps, various configurations of nets, spears, hook and line, and clubs. Variations of each of these devices occurred in different parts of the region. Some of the variation depended on cultural preference and some on adaptations to local conditions such as depth of water, speed of current, rocky or sandy bottom. Weirs, i.e., open-work fences, were built to permit flow of the water, but to divert the fish so that they could be more easily harpooned, netted, or trapped. Some weirs were large enough to permit the construction of catwalks from which to fish. In historical times Indians fished for their own immediate consumption and cured fish by various means of drying and smoking for later use and for trade. The Indians traded or made gifts of fresh or cured fish to the early non-Indian transient visitors and settlers.

The use of the harpoon, hook and line, and most nets was usually an individual effort by a fisherman to supply food for his family during the winter. The use of the weirs and traps and some nets, such as the seine and reef net, was a Tribal or village effort where the catch was divided among those who did the work. In some cases individual families had their own weir. Reef net fishing by the Lummi Indians was conducted differently than most salmon fishing. Fishing locations were owned by members of families who secured their rights through inheritance. Those men, who usually acted as captains of the canoes, chose those who participated in the season's fishing. The men whom they chose each had to furnish the sections of the net, and the share to which each was entitled was in proportion to the net furnished.

Indians today continue to take salmon for commercial, ceremonial, and subsistence purposes within marine waters and certain rivers by a variety of means, including trolling and the use of gill nets and set nets. The Tulalip Indians also operate beach seines on marine waters bordering their reservation and occasionally within the river estuary. The Swinomish Indian Tribe operates two

traps in the marine waters of their reservation. Following are descriptions of the gear used. P.108-109

3.3 The Location of the Salmon Fisheries

3.3.1 Ocean Sport and Commercial Troll Fisheries

The ocean is a vast "mixing" area for salmon from literally hundreds of diverse streams from several geographic locales. Fishermen utilize ocean areas from Central California to Southeastern Alaska in pursuing these salmon. Major commercial and sport fishing areas in the northeast Pacific Ocean are shown in *Figures 49 and 50*, respectively. These figures illustrate that the commercial troller ranges along the entire coast while the sport fishery is limited primarily to the areas where good ports exist. This is, in part, due to the difference in the boats used by these two fisheries. Some commercial fishing vessels have the capability of ranging far from port for several days at a time, while the sport fishermen and some commercial fishermen in small boats must return to port each night. With the introduction of large, high-speed charter boats, however, the range of the sport fishery is being extended.

The range of area and time spent at sea by the commercial troller is somewhat restricted due to resident license requirements, e.g., a Washington resident commercial salmon troller fishing within the 3-mile territorial waters of the State of Oregon or landing his fish in Oregon ports must meet the license requirements of that State. Non-resident licenses are usually more expensive than resident licenses, thereby tending to restrict Washington resident fishermen to Washington ports or Washington coastal waters. Commercial fishing licenses are not required of Indian fishermen in Washington. By mutual agreement with Canada, U.S. fishermen are able to operate in the Canadian territorial waters (3 to 12 miles off coast) as far north as the northern tip of Vancouver Island, while Canadian fishermen may fish in the 3 to 12-mile zone off Washington as far south as the mouth of the

Columbia River. A limited area in the Strait of Juan de Fuca is also open to commercial trolling (*Figure 53*).

P.125-126

3.3.2 The Commercial Gill Net Fishery Within Puget Sound

The economic success of the gill net fleet depends upon its interception of salmon in areas where the fish are reasonably concentrated. The actual area that is fished depends upon the migratory behavior of the species being sought. The general locations which are fished at one time or another during the open fishing periods are shown in *Figure 51*. Depending upon the origin of the species being sought and the expected size of the returning runs, fishing is concentrated in the San Juan Islands area, Point Roberts area, the inner Puget Sound area, etc.

3.3.3 The Commercial Purse Seine Fishery Within Puget Sound

Since 1936, purse seines have been limited mainly to areas of Puget Sound outside the "Initiative 77 line" (*Figure 42*, Sec. 2.3.3), i.e., essentially to the Strait of Juan de Fuca and Strait of Georgia. There are certain exceptions to this. Seines are permitted inside the "77 Line" during August in odd-numbered years. Also, seines are permitted inside the "77 Line" after October 4 of any year to harvest chums. Thus, the purse seining locations shown in *Figure 52* for the inner Puget Sound areas are used mainly for the harvest of chums. In addition, the 1971 legislature further permitted seines to fish inside the "77 Line" from June 10 to July 25—particularly to fish for Lake Washington sockeye. It also gave the Director of Fisheries discretionary authority to permit seines to fish at times and places where existing fisheries cannot feasibly and properly harvest the runs to prevent wastage.

P.126-127

3.3.4 The Commercial Reef Net Fishery Within Puget Sound

Reef nets are a non-mobile type of fishing gear, both physically and legally. The number and location of reef

nets is limited by legislation entirely to northern Puget Sound, particularly in and adjacent to the San Juan Islands and Pt. Roberts. The locations of reef net sites are shown in *Figure 53*. The limited and minor troll fishery within Puget Sound is also shown in this figure.

3.3.5 The Major Puget Sound Marine Sport Fishing Areas

Although sport fishing is permitted the year-round in all areas of Puget Sound, the fishery varies seasonally as to its relative importance and magnitude, depending on the abundance of fish and fishing conditions (*Figure 54*).

3.3.6 The Indian Marine Fisheries

Today only a few Indian Tribes are active in marine fisheries. The Makahs and Quileutes have troll fisheries off the Coast. The Makahs also pursue both troll and gill net fishing in the Strait of Juan de Fuca. The Tulalip and Lummi Indians use gill nets, and in addition the Tulalips use seines, in Puget Sound. The Swinomish Indians operate the only remaining traps in Washington State, westward of their Island reservation. The Squaxin Island Indians conduct gillnet fisheries in the saltwater inlets of the mainland near their reservation.

3.3.7 The Indian River Fisheries

Indian fisheries currently are exercised at the mouths and varying distances upstream from the mouths of coastal and Puget Sound rivers. These include: Nooksack, Skagit, Stillaguamish, Green, Puyallup, White, Nisqually, Skokomish, Sekiu, Hoko, Sooes, Waatch, Ozette, Quillayute, Hoh, Raft, Queets, Quinault, Moclips, and Chehalis Rivers (*Figure 25*).

3.3.8 Freshwater Salmon Sport Fisheries

Sport fishing for salmon occurs in all of the major streams of the coastal and Puget Sound areas. Fishing is generally located in the lower portion of the river mainstems. Most of the systems receive angler use during the fall primarily for chinook and coho, and in some rivers springtime fisheries have developed for spring chinook salmon.

P.128-129

3.4.8 Distribution of Marine Salmon Catch from Coastal and Puget Sound Streams

Salmon which originate in rivers of Washington are caught in marine sport and commercial fisheries from California to Alaska. Depending upon the species and the river of origin, each adult salmon returning to the river may represent as many as 5 salmon from that river which were caught in marine waters by many different fisheries. Using data gathered from a large number of specific studies conducted by U.S. and Canadian fisheries scientists the migration routes and areas of marine residency of salmon have been determined. Extensive studies either have been or are currently being conducted for different species in varying degrees of intensity for all major watersheds in Washington.

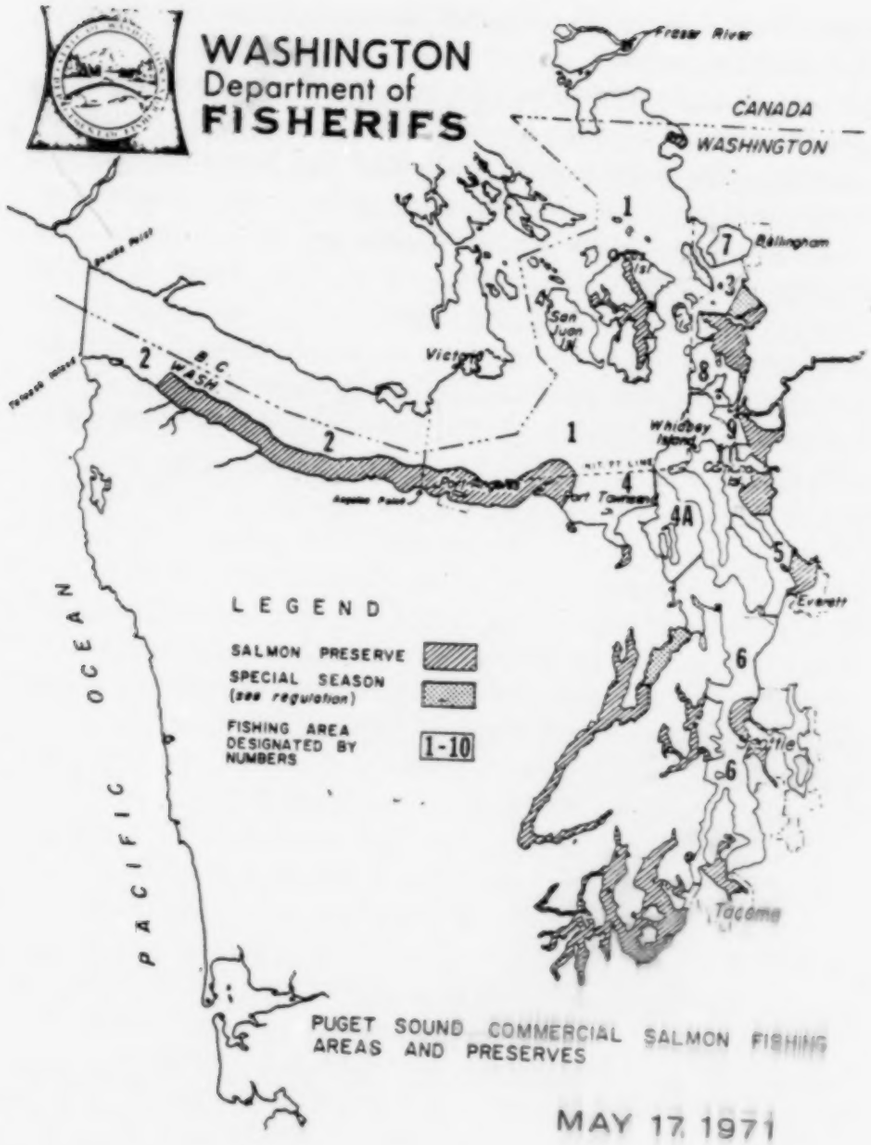
The marine fisheries listed below are those in which significant numbers of coastal and Puget Sound chinook and coho salmon stocks are known to be caught. Other sport and commercial fisheries located along the California, Oregon, British Columbia, and Alaska coasts also take these stocks. Usually the most significant numbers of pink, chum, and sockeye salmon are caught in the net fisheries of Puget Sound.

1. British Columbia commercial ocean troll fishery
2. Washington commercial ocean troll fishery
3. Georgia Strait Canadian marine sport fishery
4. Washington ocean sport fishery (sport areas 1-6)
5. British Columbia Strait of Juan de Fuca net fishery
6. Washington outer Puget Sound (commercial areas 1 and 2 net fishery)
7. Washington inner Puget Sound (commercial areas 3-10) net fishery
8. Washington inner Puget Sound (sport areas 7-12) sport fishery
9. Indian marine fishery

The largest number of coastal and Puget Sound chinook and coho salmon stocks is consistently taken in the Canadian commercial troll fishery off the west coast of

Vancouver Island. The largest catch of Puget Sound pink and sockeye salmon occurs in the "Convention Waters" of the strait of Juan de Fuca by both the Canadian and U.S. net fisheries. Although limited data are available for chum salmon, this information indicates the most significant catch occurs in the Washington inner Puget Sound net fishery. An exception is the Nisqually River chum salmon stocks on which the most significant fishery is the Nisqually River Indian net fishery. The only significant marine harvest which occurs on coastal salmon stocks is by the ocean commercial troll and sport fisheries. Most of the harvest of coastal pink, chum, and sockeye stocks occurs in the rivers.

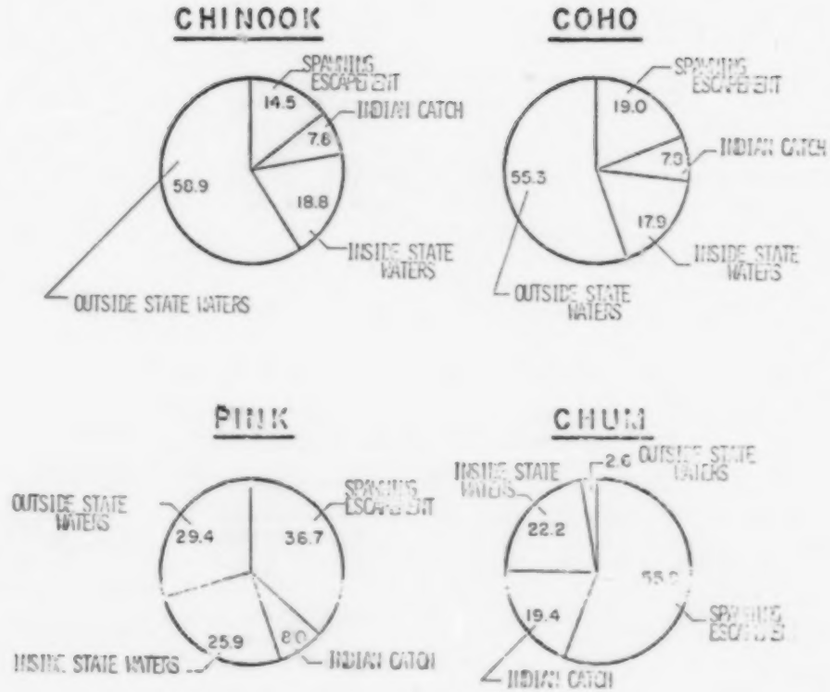
P.134-135



AVERAGE ANNUAL SALMON CATCH AND ESCAPEMENT FOR SEVERAL RIVERS ON WHICH TREATY INDIAN FISHERIES OCCUR IN PUGET SOUND AND COASTAL AREAS

1965-1970

(Exhibit F-7)



NUMBER AND PERCENTAGE OF SALMON ORIGINATING IN PUGET SOUND AND COASTAL RIVERS HARVESTED BY INDIAN FISHERMEN ANNUAL AVERAGE

1965-70

(Exhibit F-70)

River	Percentages				
	Chinook	Coho	Chum	Sockeye	Pink
Nooksack	28.1	64.4	34.5	–	43.1
Skagit	14.8	20.8	10.5	38.0	19.5
Snohomish-Stillaguamish	20.6	14.1	27.4	–	20.6
Lake Washington[1]	0.0	0.0	–	2.5	–
Green	0.0	8.4	0.0	–	–
Puyallup	20.6	11.4	1.5	–	48.5
Nisqually	23.3	21.1	100.0	–	32.4
South Sound	8.3	5.5	3.1	–	–
Skokomish	48.8	52.3	52.8	–	–
Hoko-Sekiu	37.1	34.4	100.0	–	–
Quillayute	83.9	50.8	100.0	–	–
Hoh	75.0	44.0	100.0	–	–

[1]1971 catches only.

River	Numbers				
	Chinook	Coho	Chum	Sockeye	Pink
Nooksack	7,130	21,448	4,465	–	30,823
Skagit	5,751	9,054	1,863	282	66,592
Snohomish-Stillaguamish	4,498	12,706	3,314	–	55,403
Lake Washington[1]	0	0	–	9,000	–
Green	0	4,622	0	–	–
Puyallup	1,625	4,410	247	–	13,107
Nisqually	736	3,574	14,432	–	1,520
South Sound	55	458	577	–	–
Skokomish	5,983	8,656	12,086	–	–
Hoko-Sekiu	138	600	17	–	–
Quillayute	3,417	4,410	234	–	–
Hoh	3,570	2,570	62	–	–

River	Dollar value 1972 All species
Nooksack	$ 213,480.75
Skagit	185,264.00
Snohomish-Stillaguamish	178,313.75
Lake Washington[1]	27,000.00
Green	18,488.00
Puyallup	51,261.75
Nisqually	81,284.00
South Sound	4,690.00
Skokomish	142,798.00
Hoko-Sekiu	3,848.00
Quillayute	52,746.00
Hoh	46,228.00

AFFIDAVIT OF DR. BARBARA LANE, ANTHROPOLOGIST

Relevant Background Description

BARBARA LANE, upon oath, deposes and says:

1. I am an anthropologist. In this capacity I have been retained by the United States and plaintiff-intervenors in the case of *United States v. Washington* (No. 9213, W.D. Wash.) to study, and report on, anthropological subjects relevant to those people in the Territory of Washington who were, or claim now to be, parties or successors to parties to one of the following treaties:

a. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132;

b. Treaty of Point Elliott, January 22, 1855, 12 Stat. 927;

c. Treaty of Point No Point, January 26, 1855, 12 Stat. 933;

d. Treaty with Makahs, January 31, 1855, 12 Stat. 939; and

e. Treaty of Olympia, July 1, 1855 and January 25, 1856, 12 Stat. 971.

My background is summarized as follows:

Personal Data:

Born Scranton, Pennsylvania, January 5, 1927; age 45; married, three children; U.S. citizen.

Academic Degrees:

A.B. (Anthropology) University of Michigan 1946
M.A. (Anthropology) University of Michigan 1948
Ph.D. (Anthropology) University of Washington 1953

University Teaching:

University of Washington 1950-51
University of Hawaii 1956-57
University of Pittsburgh 1963-64
University of British Columbia 1964-66, 1969 (summer)
University of Victoria 1968 (summer), 1969-70
Western Washington State University 1972-73

Consulting and Research:

British Columbia - British Columbia Attorney General's Office
Alberta - Indian Association of Alberta
Alberta Native Counselling Center
Washington - U.S. Justice Department
(*State v. Moses*, et al.)
Small Tribes Organization of Western Washington
U.S. Justice Department
(*U.S. v. Washington*)

Ethnographic Field Work:

Coast Salish Indians: Cowichan, Saanich, Lummi, Muckleshoot — 1949-52

Athapaskan Indians: Chilcotin — 1950
Melanesians: New Hebrides — 1953-54, 1957-58

Professional Organizations:

American Anthropological Association
Canadian Sociological and Anthropological Association
Sigma Xi

ANTHROPOLIGICAL REPORT
on the
IDENTITY, TREATY STATUS, AND FISHERIES
of the
NISQUALLY TRIBE OF INDIANS

by
Dr. Barbara Lane

(Exhibit-USA 25)

THE ROLE OF FISHING IN NISQUALLY CULTURE

The central role of fish and fishing in Nisqually culture in the years just prior to and subsequent to the

Treaty of Medicine Creek is attested to in a variety of ways by contemporary observers.

Like most of their neighbors in western Washington, the Nisqually held the salmon in special esteem and were concerned to insure that the supply should never fail. To this end, a complex of special rites and observances were performed. In the anthropological literature, this complex of traits is known as The First Salmon Ceremony.

Specific details of the ceremonial complex varied from one group to another but the basic reasons and format were consistent for the Nisqually and most of the other Indians of the coast. The first salmon ceremony was the most important form of animal ceremonialism in the area, a clear reflection of the central importance of salmon in the native economy. The purpose of the ceremony was to welcome the first salmon of the season and to show respect to the salmon in order to ensure an abundance of the species in the local streams. It was thought that if the salmon were not treated properly, they would become offended and cease to return to the stream where they had been improperly attended.

The first salmon taken in a given run were usually handled in a ritual manner. They might be painted with red ochre, were usually cut in an unusual manner, and generally had to be consumed by specific persons, after having been cooked in a prescribed way. The bones were then returned to the stream so that other salmon might follow.

Among the Nisqually, salmon were normally prepared in a variety of ways including boiling. In aboriginal times this was accomplished by a method known as stone boiling. A water-tight container such as a rigid, tightly woven basket lined with pitch or a water-tight box made out of cedar was partly fill. d with water and heated stones lifted from the fire with wooden tongs were placed in the container in order to bring the water to a boil. Among the Nisqually, first-run salmon were not boiled. In his journal of Indian notes dated 1854-55, Gibbs includes the following entry

> The Nisqually Indians like the Chinook, would not sell the first salmon to the whites for fear they would boil them and the others would not come. They associate the Rubus Spectabilis with the fish in the same way as the latter tribe. So the Sklallams took out the heart before selling the fish for fear it should be given to a dog or thrown in the water.

In addition to the prohibition on boiling the first salmon of the season, the Nisqually along with their neighbors restricted other sorts of behavior which might offend the salmon. Curtis (1913:95) mentions the suspension of certain types of games and sports during the salmon spawning season.

> The very common hoop-and-pole game was current in this region. The hoop, about six inches in diameter, was rolled swiftly toward the contestants, who with their spears stood waiting thirty or forty feet away and endeavored to hurl their shafts through it in such a manner that the spear would transfix the turf and hold the hoop. Bows and arrows sometimes took the place of spears. Shooting arrows at a mark was much practised. But none of these contests were held during the salmon spawning season, for the invisible spirits of the salmon, passing through the village on their way up stream, might be struck by a missile and become angered, not to return that way again.

Smith (1940:101) mentions for the Puyallup-Nisqually that the first salmon caught after the building of a large tripod fish trap were eaten at a community feast and had to be cut in a particular manner.

> In part, also, the feast may have been ritualistic for the salmon were cut length-wise, never cross-wise, or "they would get insulted and not come any more".
>
> Among other items, Smith notes that the salmon
>
> > were boiled entire, flesh, entrails, gills and bones, and all had to be finished to the last scrap.

The requirement that every bit of the first salmon be consumed is a recurring feature of the first salmon ceremony throughout the Northwest Coast culture area.

The underlying concern appears to be that no part of the salmon should be improperly disposed of, as, for example, eaten by dogs.

Smith's information that the first salmon were boiled appears to conflict with Gibb's comment that they should not be boiled. It is possible that the two comments refer to different local custom, to different species of salmon, or that custom changed in the seventy odd year interval between the two reports. Whatever the explanation of that particular point, certain conclusions can be drawn.

It is clear that the Nisqually were concerned that the salmon runs should continue in their streams. This concern was manifested by the performance of certain ritual acts on the part of the local community to welcome and honor the salmon. It was also evidenced by the nonperformance of certain activities on the part of individuals in order to avoid offense or injury to the salmon. The latter concern extended to protecting the salmon from unwitting injury on the part of others as demonstrated by the refusal to sell first-run salmon to the whites.

The traditional importance of fish and fishing in aboriginal Nisqually culture is also reflected in the little information preserved to us regarding the astronomical observations of these people.

In his unpublished journal of Indian notes dated 1854-55, Gibbs made some notations regarding the astronomical knowledge of the Nisqually Indians. Gibbs noted the names of three constellations recognized by the Indians and, interestingly, all were identified with fish and fishing.

The first constellation, for which Gibbs did not know a European name, was called in the Nisqually language "edad' and was said to represent a fish weir.

Orion's belt was identified by the Nisqually as three Indians catching small fish in schools. The sword was said to represent the fish.

Pleiades was described as a species of fish with large heads and small tails.

Elsewhere in the same journal Gibbs reported that the Nisqually attribute the northern lights to schools of herring turning up the whites of their bellies.

The foregoing appear to contain the sum total of information recorded by Gibbs on Nisqually astronomical lore. The facts speak for themselves. Nisqually preoccupation with fish and fisheries was projected in their perception of stellar configurations and celestial phenomena.

Additional contemporaneous information on the role of fishing in Nisqually culture at treaty times is available in the fisheries reports of Dr. G. Suckley whose zoological investigations are part of the scientific record of the *Pacific Railroad Reports*. Suckley's work is a pioneer effort to identify and classify fishes of the northwest, particularly the Salmonidae.

His reports include observations on Indian techniques of taking, preparing, and curing of fish as well as Indian statements about salmon characteristics and migration patterns. Suckley was based at Fort Steilacoom intermittently between 1854 and 1856 and much of his data relate specifically to the Indians living around Steilacoom and in the Nisqually watershed. Suckley employed the name Nisqually to include both these groups.

Suckley tentatively identified sixteen species of salmon and salmon-trout for the Columbia River and Puget Sound regions. While he expected that further investigation would reduce the number of species, he thought that the native taxonomic systems erred in the other direction, merging under a single category what must be distinct species.

It is instructive to note that the Nisqually salmon nomenclature as recorded by Suckley circa 1854 makes virtually the same species distinctions as our present scientific classification.

POLITICAL AND ECONOMIC ASPECTS OF INDIAN-WHITE CULTURE CONTACT IN WESTERN WASHINGTON IN THE MID-19TH CENTURY

BY
BARBARA LANE, Ph.D

MAY 10, 1973

(Exhibit USA 20)

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SUMMARY OF ANTHROPOLOGICAL REPORT IN U.S. v. WASHINGTON

This summary contains two kinds of statements—matters of record and matters of opinion. Documentation on specific tribes is not provided here, but is available in the full report of which this is a summary. Matters of record are indicated by phrasing such as "available documentation demonstrates" and statements of opinion are duly noted as such.

This report is limited to the Coast Salish and Nootkan speaking peoples residing west of the Cascade Mountains in the geographic area covered by this case.

By: Barbara Lane, Ph.D.

November 30, 1972

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I. Indian Life at the Time of the Treaties

A. General Structure of Indian Life

Aboriginally and during the time when the treaties were negotiated, Indian settlements were widely dispersed throughout western Washington. Population density was higher than almost anywhere else in native North America north of Mexico. These two conditions depended upon (a) the peculiar potentialities of the habitat and (b) the successful and efficient utilization of available resources by the native population. Some fresh food was available on a year-round basis throughout much of the area, but the critical factor was that anadromous fish were available in prodigious quantities at predictable times. Efficient taking-techniques made it possible to harvest large numbers of fish as they ascended the rivers. Well-developed food preservation techniques insured that the huge harvest could be saved for use over an extended period of time. However, this was not a "lotus land" in which the native fisherman in a few hours' time could obtain a year's supply of food for his family.

The indigenous population occupied a series of ecological niches with varied topographic and climatic characteristics. Winter villages were situated on protected bays and inlets and along the rivers and streams. During the winter season, when people remained in their permanent villages, those living near the foothills contended with snow conditions unknown to the saltwater dwellers. These differing conditions materially affected the types of fresh foods accessible to the coastal and inland peoples during the cold weather.

In other seasons, when people ranged over a wider area and set up temporary camps at fishing locations, shell-fish collecting grounds, and the like, they were able to share access to resources not available in the immediate vicinity of their winter villages. Nevertheless, local differences in topography, rainfall, temperature and wind conditions remained important even though the area concerned was larger. The foregoing factors determined in part where particular species would be found, their

accessibility, and, in some cases their utility. Wind-drying of salmon, for example, as contrasted with sun-drying or smoking, was feasible only in a few locations.

There was considerable local diversity in the availability of animal, plant, and mineral resources used for food and artifacts. For example, the Makah had access to whale and halibut; the Stillaguamish and Sauk-Suiattle to mountain goat. The Lummi apparently imported various fibers and grasses from upriver Skagit and flint from Puget Sound. The Makah imported red ochre and diatomaceous earth from the Quileute. Red ochre was made from hematitic soils and was used for paint. Diatomaceous earth was used as a kind of soap for removing excess natural oils from dogs' wool used in the manufacture of native blankets.

Extensive trade was carried on among Indian groups in western Washington in order to acquire food stuffs, raw materials, and manufactured goods not available locally. The trade involved both basic necessities and luxuries of native life. The trade existed because different localities had different resources. The variation in local habitats is an important factor in understanding the native economy.

Despite the important local differences, it is still possible to make valid generalizations regarding Indian life west of the Cascades during treaty times.

The rugged hills and mountains and dense forest cover made communication by land exceedingly difficult over much of the area. The terrain and cover also set limits to the value of the land as a game and plant food collecting area. Apparently the heavily wooded areas supported a relatively sparse animal and bird population. Early travellers consistently reported the wooded areas in western Washington as silent, trackless, and little frequented by the Indians. According to the reports, the sighting of numerous animals invariably indicated the proximity of a natural prairie or clearing.

The forest animals included bear and cougar, the smaller tree-climbing species like fisher, martin, lynx, racoon, and squirrels, as well as smaller quadrupeds such

as mice. None of these was important to the Indians as a source of food. The larger land animals which were important to the Indians, like deer and elk, obtained most of their food in the open areas and may be considered prairie dwellers.

Prairies were also important food areas to the Indians in that root crops such as camas and wappato, wild onions and wild carrots were located in the open grounds. These natural prairies, which provided the only important land food areas for the Indians, were the first areas to be taken over by pioneer settlers who wished to farm without the arduous labor of clearing forested land.

Some of the inland groups hunted land animals more than their downstream neighbors and frequently game would be traded downstream for shellfish or other coastal commodities. There are occasional reports in the literature that a particular inland group depended primarily on hunting. No supporting evidence has been found to support such an assertion. The record indicates that nowhere in the area covered by this report did land game supplant fish as the staple food. For western Washington Indians, land resources were not nearly so important for food as saltwater and freshwater resources.

If the land environment posed difficulties, that of the sea and waterways provided major advantages to Indian existence. The Indians invariably lived next to waterways, traveled upon them, and depended on the resources of the waters for their major livelihood.

Some of the coastal groups engaged in daring feats of marine hunting on the open sea and in the straits. Saltwater and/or freshwater fishing was actively pursued by virtually every adult male throughout the area. Fishing was the universal male occupation. Shellfish collecting was a major occupation of women and girls. Waterfowl were taken on the water, on tidelands and mud flats, in aerial nets at their flyways, and diving species were taken with underwater nets in the same fashion as fish. Aquatic plants were used for food, medicine, and artifacts such as fishing line, etc.

The water resources were rich, but again there was tremendous local diversity. Types of marine life differed in the open sea, in bays, rivers and lakes. Topographic features such as depth of water and nature of bottom or shoreline predicated presence or absence of specific species in a given locale. Halibut are found in banks of about thirty fathoms in the ocean and straits, perch are seen in shallow water off rocky shores, flounder abound in sandy estuaries and bays.

Availability varied not only from area to area, but also seasonally. This depended not only on presence or absence of a given species in local waters at different times of the year, but also on seasonal availability of suitable bait. Furthermore, storms, rough seas, and fog made fishing impossible at certain times.

In addition to areal and seasonal variations, there was considerable fluctuation in abundance and availability from year to year. Some of this was regular and predictable, as in the case of runs of certain species and races of salmon. Other causes were erratic, such as flooding and alterations in watercourses.

Insofar as food was concerned, the native habitat provided limited land resources and rich marine resources. The latter were unevenly distributed over space and time. Their successful and efficient utilization required an intimate knowledge of local environments and the locally available species and a repertoire of specialized taking-techniques. In the case of fishing, gear and techniques were specific not only as to species but also to water conditions.

Throughout most of the area salmon (including steelhead where available) was the staple food and the most important single food resource available to the native population. This is a matter of record, attested to by historic and ethnographic evidence as well as by observations recorded in the years immediately preceding and following the 1854-1855 treaties.

An article in the July 15, 1853 issue of *The Columbian*, a newspaper published in Olympia, noted that

* * * "salmon is the principle article of Indian subsistence * * *"

George Gibbs, the lawyer-ethnologist who helped to draft and negotiate the treaties in western Washington, wrote an ethnological treatise entitled The Tribes of Western Washington and Northwestern Oregon which was published by the Smithsonian Institution. The monograph was based on observations made in 1850-56 although it was not published until 1877. In it Gibbs reported that "* * * salmon form the most important staple of subsistence* * *"

James Swan, who served as Governor Stevens' private secretary and who published extensively both on coast Indians and on fisheries, wrote in the August 9, 1862 issue of the *Washington Standard* "The most important fish taken in this Territory, both as regards the quantity and extensive use made of it by the natives for food, is the Salmon, of which there are sixteen distinct varieties, including the trout, which belong to the family of *Salmonidae*."

A great challenge was posed by the fact that this species could be taken in vast quantities, but only at particular periods of limited duration. To harvest this resource efficiently, the following were needed: (a) equipment of extensive size requiring cooperative effort (e.g., weirs, seines, reef-netting gear); (b) food-preservation techniques (e.g., sun-drying, wind-drying, smoking) and storage facilities (e.g., cedar boxes, baskets, bladders and kelp containers for fish oil, and smoke houses) so that the huge surpluses could be used later; and (c) an exchange system whereby local surpluses could be redistributed to people in other areas (e.g., ceremonial exchanges, trade).

The major food acquisition techniques in the area were fishing, hunting of land animals and sea-mammals, the collection of wild foods such as mollusks and other intertidal marine life, berries, and the digging of edible roots, shoots, and bulbs.

In order to take these foods as they became available

at certain places and seasons, it was necessary for people to range over the country to be on hand when the camas bloomed or the berries ripened or the salmon began to run. These seasonal movements were reflected in native social organization. In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and lived more or less on stored foods — dried meat and berries and dried and smoked fish. Fresh fish and other foods were harvested during the winter. That season, however, was devoted primarily to intra- and inter-village ceremonies and manufacturing tasks. This was the time when people were congregated into the largest assemblages, occupying long multifamily houses made of split cedar planks. Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, harvesting camas, berry picking, and other economic pursuits. People moved about to resource areas where they had use rights based on kinship or marriage. Such rights were clear cut and important in native society, but were not readily discernible to outside observers of Indian life. Ambiguity was compounded even for observant resident settlers because families did not necessarily follow the same particular pattern of seasonal movements every year. This gave non-Indians the impression that there was no stable political organization. The winter village had no "head chief" or "village council." Leadership and authority tended to be task oriented with the appropriate specialist taking over leadership according to the occasion, e.g., hunting party, communal fish drive, raiding party, life crisis ceremony.

Native society was hierarchical, in which upper-class people, commoners, and slaves were recognized. In parts of the region, stewardship rights and duties over resource-producing areas such as clam beds, reef-net locations, cranberry bogs, or camas beds were inherited.

The dense populations, stratified social organization, and complex ceremonial life which characterized native

culture in western Washington was made possible because of the effective utilization of available resources and the highly efficient means of redistributing periodically available surpluses.

B. Function of Fishing in Indian Life

The first-salmon ceremony, which was general through most of the area, differed in detail and was celebrated over different species from community to community. This was essentially a religious rite to ensure the continued return of salmon to the area. The symbolic acts, attitudes of respect, and concern for the well-being of the salmon reflected a wider conception of the interdependence and relatedness of all living things which was a dominant feature of native world view. Such attitudes and rites insured that salmon were never wantonly wasted and that water contamination was not permitted.

Elmendorf (1960:62) gives the following comments for the Twana (Skokomish) based on field work which began some twenty years prior to publication.

> Most ritually determined acts with reference to river fishing had to do with the salmon run and were directed toward insuring its continuance. The river had to be kept clean before salmon started running. HA [informant] defined the period as starting in early August (for the Skokomish), before the first king salmon came. From this time no rubbish, food scraps or the like, might be thrown in the river; canoes were not bailed out in the river; and no women swam in the river during menstrual seclusion. The object of these precautions was to insure that the salmon would want to come.

In native society, surplus food could be converted into wealth (canoes, blankets, slaves, shell ornaments). Dried or smoked salmon was easily stored and transported. At the same time, keeping qualities were of limited duration. Surplus preserved salmon was usually consumed or distributed within the year.

Distribution was effected through complex exchange systems involving voluntary gift giving to kin and friends, reciprocal gifting to specified affinal kin which sometimes

became competitive, intercommunity feasting, potlatching, and outright sale and trade beyond the local community and sometimes over great distances.

As the staple food, salmon was eaten either in fresh or cured form throughout the year. The large number of salmon recipes and variety of cooking methods, as well as the extensive trade in salmon, attest to the effort made to avoid monotony in the diet.

Trade was carried on to secure salmon species which did not run in local streams. In Makah territory, for example, sockeye did not visit any of the streams emptying into the Strait of Juan de Fuca, but they did ascend Ozette River to spawn in Lake Ozette. Sockeye were highly prized for flavor and fat content and were purchased by Indians who did not have access to a sockeye fishery.

Sometimes trade was for salmon of the same variety as that available locally. According to ethnographic accounts, people claimed to be able to taste differences between salmon of the same kind taken in different bays or streams.

Fish from the same run undergo change in flavor as they proceed from the saltwater to the spawning ground. It was not unusual for people to exchange fish taken at the mouth and the headwaters of a given water system.

Differences in keeping qualities were an overriding reason for much of the trade in salmon. Fat fish were favored for their taste, but did not keep well in the humid climate. They tended to become rancid. The dog salmon, or chum, less tasty but lean, formed the bulk of the dried and smoked winter stores.

Salmon were traded to the Puget Sound area from across the Cascade Mountains. Gibbs (1877:170) described the commerce as follows

> The trade between the two districts was once considerable. The western Indians sold slaves, haikwa, kamas, dried clams, &c., and received in return mountain-sheep's wool, porcupine's quills, and embroidery, the grass from which they manufacture

> thread, and even dried salmon, the product of the Yakima fisheries being preferred to that of the Sound.

The comment regarding preference should be understood in the context of the foregoing discussion and in the light of Gibbs (1877:194) later comments in the same volume. Writing of the salmon in the Columbia, he noted

> The salmon, which enter that river in the spring and are the only ones prized as food by the whites, do not seek either the small rivers of the coast or the lower tributaries near its mouth for the purpose of spawning, but push directly up the principal branches, such as the Willamette, the Snake, &c., to the colder waters of the mountains. * * * Later in season inferior kinds are abundant, and these also succeed in forcing their way up the larger branches, but in addition, leave detachments in every creek that enters the coast, every brook which unites with the rivers, and even in the sloughs formed by rain in the prairies. It is at this season that the coast Indians lay up their winter supplies; for those later species possessing lttle fat are the easiest dried for keeping. The Indians of the interior preserve the former kinds also, which after a stay in the fresh water have lost their superfluous oil, and these are often actually traded to those Indians at the mouth of the river or on the Sound.

As the food staple, fish provided essential proteins, fats, vitamins, and minerals in the native diet.

Fishing methods varied according to the locale but generally included trapping, dip-netting, gill-netting, reef-netting, trolling, long-lining, jigging, set-lining, impounding, gaffing, spearing, harpooning, raking, and so on.

Species of fish taken, again varying according to locale, included salmon and steelhead, halibut, cod, flounder, ling cod, rockfish, herring, smelt, eulachon, dogfish, trout, and many others.

The initial effect of the influx of non-Indians into western Washington was to increase the demand for fish both for local consumption and for export. Almost all of this demand, including that for export, relied on Indians to supply the fish.

The January 15, 1853 issue of *The Columbian*, published in Olympia, contained an article describing the resources and potential of the country to prospective immigrants. In a plea for the development of the fisheries, the writer complained

> * * * that what little has been done in the business of securing the salmon, has been done solely by the Indians, through their crude method, and slender appliances, and that their lazy and worthless habits prevent a sufficient bestowal of time and attention, in furnishing any considerable quantity for export, beyond their own necessities, and what is required for present home consumption.

The article goes on to mention, among other things, that smoked salmon has been but recently shipped to China at a first cost of 25¢ per pound. Perusal of the shipping notices published in Territorial newspapers of the time document export of salmon from Puget Sound to San Francisco and to the Sandwich Islands (Hawaii) as well.

Non-Indians did not engage as fishing competitors on any scale until the late 1870's.

Available evidence suggests that Indian fishing increased in the pretreaty decade for three major reasons: (1) to accommodate increased demands for local non-Indian consumption and for export; (2) to provide money for the purchase of introduced commodities like calico, flour, and molasses; and (3) to obtain substitute non-Indian goods for native products no longer available because of non-Indian movement into the area.

C. Non-Indians' Understanding of Indian Fishing

Available evidence suggests that despite superficial awareness on the part of some of the treaty commissioners that there were special rites, ceremonies, and observances concerning fish and fishing, there was little real understanding of native belief systems. They were regarded at best as interesting, at worst as examples of heathen superstition. As noted earlier, the major concern of the first salmon ceremonies was to insure the periodic return of salmon to their accustomed spawning grounds. A

theme in local Indian mythology deals with a period in the past in which malevolent individuals blocked streams to prevent the salmon coming up.

George Gibbs, in a letter to Colonel Ripley under date of July 21, 1857 described a tactic used in the recent hostilities in the Duwamish-Puyallup-Nisqually drainage areas. The following excerpt is from a draft of the letter. I have not seen the one actually sent. The deletions below are in the draft.

> The Salmon is everywhere the great staple of winter provision. It ascends in vast schools all the streams far up into the mountains. During the war, Col. Casey very sagaciously ~~took~~ ~~advantage~~ cut off the hostile tribes from this resource by constructing weirs at the mouths of the rivers in the hostile district, and thus alarmed the most obstinate bands into submission ~~by fear of~~ to avoid starvation.

It seems more likely to me that the Indians feared a permanent destruction of the runs in those rivers, rather than any immediate problem with supplies. My reasons for this opinion lie in the ritual and mythic preoccupation with insuring that the runs continue, but other evidence would seem to support this view.

A pioneer Puyallup valley resident discussing the hostilities of October 1855 many years later, had this to say (Meeker 1905:309)

> * * * Fish abounded in all the streams at that season of the year, and if interrupted at one place the women could find the salmon abundant elsewhere. Here was the spectacle of an army with strongholds as large as the field to be occupied, with food in all parts, even up to the most impenetrable forests of the foothills.
>
> It is astonishing how abundant these salmon are found in the small streams and even rivulets of the headwaters of the greater rivers below. * * * * * * The food could be obtained for many months, and even a supply accumulated for the later season when the salmon would disappear from the streams. When the final end came considerable supplies were captured and destroyed, silent wit-

> nesses of the industry and determined cooperation of the women in, to them, this great struggle.

From Meeker's account it appears that there was no immediate threat of starvation. This seems to me to support the view that the Indians were concerned about longer-range effects.

The role of fishing in the native economy was more readily appreciated although the intricacies of the native exchange systems and the social role of cooperative enterprises such as reefnetting and weir construction were probably not realized. What was clear was that the Indians depended upon fishing for their livelihood and that they could not be removed from their fisheries without destroying them.

In a report dated March 4, 1854, George Gibbs made a number of suggestions and recommendations relative to the treaties to be negotiated in Washington Territory. He commented in part (Gibbs 1967:28)

> To remove the Indians altogether into any one district is impracticable, for the western verge has been reached. To throw the fishing tribes of the coast back upon the interior, even were the measure possible, would destroy them; * * * *

The contribution made by Indian fishermen to the Territorial economy was also recognized.

There was clearly misunderstanding of Indian concepts of fishing "rights" and there was evidently no perception of Indian self-regulation. It was incorrectly assumed that the Indians recognized no private rights in taking fish.

Discussion of Indian concepts of fishing "rights" requires some examination of specific localities used and gear and techniques employed as these affected the manner in which "rights" were conceived.

The fishing areas used were basically of five kinds: (1) freshwater lakes; (2) freshwater streams and creeks draining into the various inlets; (3) shallow bays and estuaries; (4) the inlets and the Sound; and (5) the straits and ocean.

Customary use rights varied according to the type of locale and the gear being used. Winter villages were located along the salmon streams, at the heads of inlets near the mouths of such streams, and on protected coves and bays. The major requirements in the location of winter villages were shelter from the elements and from surprise attack, suitable beach or bank for launching canoes and for storing them above high water mark, and access to firewood, fresh water, and fishing stations.

The larger and more important villages were usually located at particularly lucrative fishing places: at the forks of a river where weirs could be set up; at the outlet of a river into a lake; and at the heads of inlets near the mouths of the salmon streams. Other large villages were located on the saltwater in protected coves and bays.

During the winter season, if people went out for fresh food stores, they used the fishing areas in closest proximity to their villages. During the spring, summer, and fall, people mo ed about to fish at more distant fishing grounds.

In general, I think it is correct to say that the freshwater fisheries were controlled by the locally resident population. During the winter season, the local residents were the exclusive users. At other seasons use rights at these locations and others within the territory of a particular group would be extended to visitors from other localities.

Visitors from beyond the immediate locality would arrive to take advantage of particular runs not available in their streams or not running at that particular time in their locality. Certain of these visitors would have use rights because they were related to local residents. Others might request permission to fish and such permission was normally extended provided that amicable relations existed between the local people and the visitors.

The situation with regard to saltwater fisheries appears to have been slightly more complicated. Shallow bays where salmon, flounder, and other fish were speared were often gathering places for people from a wider area.

This was especially true if shellfish beds were present. In the deeper waters of the bays, huge flotillas of canoes would gather to troll for the salmon as they gathered in the bays just prior to their entry into the rivers.

Meeker (1905:64) offers a first-hand account of fishing activities at the end of May or early June in 1853

> As we drew off on the tide from the mouth of the Puyallup River, numerous parties of Indians were in sight, some trolling for salmon, with a lone Indian in the bow of his canoe, others with a pole with barbs on two sides fishing for smelt, and used in place of a paddle, while again, others with nets, all leisurely pursuing their calling, * * *

People living upriver on a given drainage system would normally come to the saltwater areas at the mouth of the river to obtain fish and shellfish. At some of the major fishing locations, like Commencement Bay, people from other drainage systems would also congregate to join in the fishing.

The deeper saltwater areas, the Sound, the straits, and the open sea, served as public thoroughfares, and as such, were used as fishing areas by anyone travelling through such waters. However, both within the straits and off the west coast in the open sea there were halibut banks known to the Indians, used by them, and claimed as private property. Other private property rights to saltwater fisheries were recognized reefnet locations in the straits. Among the Makah, ownership of halibut banks was held in the name of the chief as stewart for his local kin group and retainers. With the Lummi reefnet locations, the situation was different. Individuals owned specific locations on the reef which they received by heirship. Owners of locations then hired relatives and friends to work with them in preparing the gear and fishing the site.

Based on his observations made in the mid-1850's and apparently without knowledge of either Makah or Lummi fisheries, Gibbs (1877:186) stated

> As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the Sound particularly, from one to another locality, according to the season.

As intimated by the foregoing discussion, Gibb's generalization requires modification to cover adequately a range of local situations. His characterization is acceptable if it is understood to refer to saltwater fisheries and if it is understood that certain exceptions existed, notably in the halibut, cod, and sockeye fisheries.

As regards freshwater fisheries, all subsequent information about fishing and everything else known about western Washington Indian cultures indicate clearly defined property concepts. Ownership rights to specific fishing areas were well developed; at the same time, use rights were freely granted. Gibbs' statement appears to be concerned with use rights. If so, his characterization is useful, provided that the contexts and limitations noted above are understood.

D. Indians' Fishing "Rights" among Themselves

The nature of "rights" varied from individual inheritance of privately owned sites to shared access to specific trolling areas. Such rights were respected by Indians who did not share them. The latter might ask permission to use specific locations and/or gear and this would be granted usually. Trespass was rare and usually led to friction.

E. Controls over Indian Fishing

Indian control was by accepted, customary modes of conduct rather than by formal regulations involving enforcement and sanctions. With regard to salmon, it was necessary that the first fish from the run be treated ritually. In connection with this and the restrictions on defiling the river prior to the run, Elmendorf (1960:63) commented

> No special authority enforced the taboos on polluting the river prior to the beginning of the run. There was also no special "fish watcher" or

ceremonial lookout for the beginning of the run, although everyone in every Twana community was on the alert for this event.

Controls over fishing were necessary in cooperative efforts which required coordination by someone who organized and directed the group effort. The construction of a weir was usually a cooperative effort, a number of men working under the direction of a leader. The entire community usually had access to the weir, the leader regulating the order of use and the times at which the weir was opened to allow upstream escapement for spawning and/or supply of upriver fishermen.

Techniques such as spearing or trolling in saltwater which involved individual effort were not regulated or controlled by anyone else.

Generally, individual Indians had primary use rights to locations in the territory where they resided and secondary use rights in the natal territory (if this was different) or in territory where they had consanguineal kin. Subject to such individual claims most groups claimed exclusive fall fishing rights in the waters near to their winter villages. Spring and summer fishing areas were often more distantly located and often were shared with other groups.

There is no evidence of any attempt by the settlers to impose regulatory controls over Indian fishing prior to, at the time of the treaty negotiations, or for some time afterwards.

There is, however, evidence of Indian refusal to permit white fishermen access to privately owned fishing areas. Michael Simmons, who helped Governor Stevens negotiate all the treaties in western Washington, and who subsequently had an important career in the Indian Service, wrote of the Makah in his 1858 annual report as Indian Agent for Puget Sound district (Simmons 1858:583)

> Four gentlemen from California, have taken claims and established a trading post and fishery at Waada. They have been there for about nine months and have uniformly treated the Indians well; bought all the fish and oil they could bring for sale, (these Indians catch many whales) at liberal prices, yet they refuse to let them fish on the banks.

F. Location of Indian Fisheries

Indian fishing was not confined to certain types of locations. The Indians developed and utilized a wide variety of fishing methods which enabled them to take fish from nearly every type of location at which fish were present. The Indians with whom we are concerned harvested fish from the high seas, inland salt waters, rivers and lakes. They took fish at river mouths as well as at accessible points or stretches along the rivers all the way to the headwaters. Some locations were more heavily utilized than others.

Although there are extensive records and oral history from which many specific fishing locations can be pinpointed, it would be impossible to compile a complete inventory of any tribe usual and accustomed grounds and stations. Such an inventory is possible only by designating entire water systems.

There are a variety of reasons why any listing of usual and accustomed fishing sites must be incomplete and thus give a spurious kind of accuracy. First, as already noted Indian fisheries existed at all feasible places along a given drainage system from the upper reaches of the various tributary creeks and streams, down the main river system to the saltwater. Fishing stations which were also the site of weirs and permanent villages are more easily documented through archeological evidence, historical records, and ethnographic studies than are riffles where fish were speared. The nature of the gear used has tended to influence the recording of sites.

Second, Indian fishermen, like all fishermen, shifted to those locales which seemed most productive at any given time. The productivity of local sites varied with (1) volume of water in a stream at a particular season or year, (2) amount of mud or silt present at a given time, and (3) alteration in the watercourse due to flooding, log jams, and

other natural causes. The use of particular sites varied over time. There were traditional fishing locations which were used for as long as people could remember, but these were not fixed and unchanging because the watercourses themselves were not immutable and unalterable.

Third, a number of important fishing sites recorded in treaty times are no longer extant because of post-treaty man-made alterations in watersheds and water systems. Diversion of water for power purposes has lowered the carrying power of some streams and dried up others; engineering for flood control has altered the course of rivers; canal-cutting has lowered lake levels; and land fill operations have obliterated still other fishing stations. When sites are demolished, their existence is eventually forgotten.

Fourth, other sites are still extant but are no longer used by Indian fishermen because the appropriate Indian gear for those particular sites has been outlawed by the State or because competing users, not necessarily fishermen, have made utilization of these sites by Indian fishermen unfeasible. In still other instances, extant usual and accustomed sites are no longer fished because the species taken in treaty times have been destroyed by post-treaty events. Alteration of water temperature and water level, industrial pollution, and the fencing of spawning creeks by private land owners are some of the causes.

II. Negotiation and Execution of the Treaties

A. Purpose of Treaty as a Whole

The Indians had received constant assurances from white settlers and from government representatives that they would be compensated for lands which were being settled on and for loss or destruction of native property incident to white settlement. The Indians were concerned that these things be done by mutual agreement.

George Gibbs became a key member of Governor Stevens treaty commission and helped to draft the treaties as well as to negotiate them. In a report dated March 4,

1854, Gibbs made a number of suggestions relative to the treaty negotiations which began later that year. Apparently referring to the fact that there were no outstanding unratified treaties in Washington Territory, Gibbs observed

> No conventional arrangements, strictly so speaking, are known which need action on the part of the government; but the assurance has everywhere been given by the whites, settling among the Indian tribes, that Congress would compensate them for the lands taken.

The United States was concerned to extinguish Indian title to the land in Washington Territory legally, in order to forestall friction between Indians and settlers and between settlers and the government. The Act creating Oregon Territory provided that Indian land title should be extinguished by treaties. Before Indian title had been extinguished, the Donation Act had thrown open land to settlement and induced non-Indians to migrate and take up land claims. This state of affairs concerned the new Governor of Washington Territory and his attitude was shared by the Commissioner of Indian Affairs, George W. Manypenny, who wrote to Stevens under date of April 4, 1854

> With you, I feel anxious that Congress should immediately make provision for extinguishing the Indian title to lands in Washington Territory.

Further, until treaties were concluded and reservations were established, it was impossible to enforce the trade and intercourse laws regulating traffic in liquor and commercial relations in Indian country.

B. Meaning of "The right of taking fish, at all usual and accustomed grounds and stations, is further secured"

Apparently this language originated with George Gibbs, who drafted the treaties in western Washington, although the suggestion itself was made earlier by at least one other party.

In a report submitted in 1853, E. A. Starling, Indian

agent for Puget Sound offered the following suggestions (underlining mine)

I would recommend that, when treaties are made with these tribes, their future homes be all included in one reservation—each tribe having the extent of its reservation marked off—and *their fishing grounds be granted them*; and over the reservation, that the law regulating trade and intercourse with the Indians, and any other law relating thereto, be extended with full force.

There is no record of the Chinook jargon phrase actually used in the treaty negotiation. In my opinion, it would have been possible to convey the meaning of the above language adequately through the medium of Chinook jargon. The English word fish is "pish" in Chinook jargon. Presumably this generic term was used in the treaty talks and it is likely that it would have been understood by the Indians in the same sense as the whites.

There is no mention of restrictions as to purpose, time, or method of taking either in the treaties themselves or in the official records relating to treaty proceedings. It is my opinion that no such restrictions were indicated by the commissioners or contemplated by the Indians. The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue — the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the Territory. I believe that both parties intended the Indians to continue full use of their fishing places, even though most lands adjacent to fishing waters were ceded.

C. Meaning of "in common with all citizens of the Territory"

This language appears to have been introduced by Gibbs. There is no record of the Chinook jargon translation which was used in the treaty negotiations. There is nothing in the official record to suggest that the U.S. intended "in common" to connote future control by "citizens" over Indians. It is my opinion, based partly on

evidence in the official record and partly on inference from ethnographic data, that at least some of the Indian parties expected to exercise control over "citizens" fishing at usual and accustomed Indian fishing sites.

There is no clear evidence as to whether "in common" was intended to connote fishing at the same place, or on the same run, or at the same place on the same run, or something else. Stevens asserted that Indian and non-Indian fishing techniques were so different as to preclude competition, but this information was incorrect.

In a letter to George W. Manypenny, Commissioner of Indian Affairs dated December 30, 1854, transmitting the Treaty of Medicine Creek, Governor Stevens commented on the treaty provision regarding the taking of fish as follows

> It may be here observed that their mode of taking fish differs so essentially from that of the whites that it will not interfere with the latter. They catch salmon with spears in deep water and not with seines or weirs.

The Puyallup Indians who were party to the Treaty of Medicine Creek were using both seines and weirs extensively at the time that Stevens wrote and had been doing so for some years previous. I am unable to account for his assertion that the Indians did not use seines or weirs. I suppose it is possible that Governor Stevens was ignorant of the facts, although it is hard to credit this. The other members of the treaty commission were certainly aware of Indian methods of taking fish and according to the official treaty notes the subject of Indian fisheries was thoroughly discussed by Stevens, Doty, Simmons, Shaw, and Gibbs prior to the Treaty of Medicine Creek.

In my view, the most likely Indian interpretation of the "in common" language would be that non-Indians were to be allowed to fish with-out interfering with continued pursuit of traditional Indian fishing. I think it most likely that the government intended to provide for non-Indian participation in fishing with no thought that this would require any restriction of Indian fishing.

D. Signing the Treaties

Generally, Indian signatories were individuals who had some sort of friendly contact with non-Indians. A few spoke Chinook jargon and probably most were men of importance in their communities, although they were not necessarily the most important men. The "head chiefs" were chosen by Simmons and Stevens. The "sub-chiefs" and "leading men" were selected by Simmons and Stevens, sometimes with the aid of the "head chiefs". The basis for choice were friendliness to Americans, real or apparent status in their communities, and ability to communicate in Chinook jargon. The "sub-chiefs" and "leading men" were intended by the U.S. to represent the bands to which they were thought to belong. Various "bands" and "fragments of tribes" were arbitrarily assigned a subordinate status to other "tribes", each of which had been assigned a "head chief". The latter were taken to represent not only the group to which they belonged, but all other groups which had been declared subordinate to it. The signatories, in the U.S. view, had the capacity to alienate land belonging to such groups. On the Indian side, there was no precedent for signing legal documents, nor was there any culturally sanctioned method of formally alienating land.

E. Communication

It is hazardous to judge the extent of communication of either specific terms or of underlying purposes and effect without a transcript of the actual Chinook jargon used to interpret the treaties. We have no knowledge that any Indian present at any of the treaties understood English. It is a matter of record that many, if not most of those present, did not even understand Chinook jargon. It is also a matter of record that the official interpreter, Shaw, spoke no Indian language and had to use Chinook jargon to interpret the treaties, which were then re-interpreted into the various Indian languages by Indians who understood the jargon. The double translation resulted in the Indians receiving the information at third hand and increased t'[illegible] potential for confusion.

Chinook jargon, a trade medium of limited vocabulary and simple grammar, is inadequate to express precisely the legal language embodied in the treaties. Its inadequacy was commented upon by both Indians and non-Indian witnesses to the treaty negotiation.

The views of Leschi, one of the Nisqually chiefs who repudiated the treaty, are set out in a letter from Dr. William F. Tolmie of the Puget Sound Agricultural Company at Fort Nisqually to Fayette McMullen, Governor of Washington Territory dated January 12, 1858. Dr. Tolmie referred to a trip Leschi had made in spring 1855 to search out a young relative of his who had been taken to Oregon in 1849 by the Indian agent of that time, Mr. Thornton. In the following excerpt from Tolmie's letter, I have supplied the italics

> Leschi has lately informed me and his statement is corroborated by others that he wanted his cousin from Albany to be interpreter for the Nisqually tribe, as in dealing with the whites on such momentous affairs as the sale of their lands *he felt the great disadvanage the Indians labor under, in having no better medium of communication than the Chinook Jargon*. Finding however, that his cousin had forgotten the Nisqually language, he did not urge his return.

III. Current Successors to Treaty Tribes

The following are my conclusions regarding those tribes to which I have been asked to direct my attention. The fisheries listed in this summary are not to be taken as the only important fisheries of each group.

Conclusions Based on Available Documents and Ethnographic Data

A. Makah

1. The Makah Indian Tribe is composed primarily of descendants of the 1855 villages of Neah, Waatch, Tsoo-yess, and Osett.
2. The above-named villages are named in the preamble to the Treaty with the Makah, January

31, 1855 and at least four signatories are identified with each village separately.

3. The principal salmon fisheries of the Makah included Ozette Lake, all the salmon streams from Ozette River north along the Pacific coast and east along the Strait to the Lyre River in Clallam territory and adjacent saltwater areas.
4. At treaty times and in the decades immediately preceding and subsequent to the treaty, the Makah engaged in extensive trade based on a commercial maritime economy.
5. Governor Stevens appreciated the commercial nature and value of the Makah marine hunting and fishing economy and at the treaty assured the Makah of government aid in developing these pursuits.
6. Cultural differences prevented the Stevens party from fully comprehending the property rights which the Makah asserted when they signed the Treaty. The Makah understood the Treaty in one way; the whites understood it in another.
7. Although salmon were less important to the Makah as a food staple in treaty times than halibut, salmon was a vital component in the native diet. In addition to providing variety in the food fare, preserved fall salmon was vital in securing provender in the winter when it was too rough for outside fishing.
8. Post-treaty events and developments beyond Makah control have altered the relative importance of the various Makah fisheries. One consequence has been to increase the importance of the Makah of their salmon fisheries.

B. Quileute

1. The Quileute Tribe of Indians is composed primarily of descendants of the Quil-leh-ute and other bands of Indians residing on the watershed of the Quileute and Hoh River systems.

2. The Quil-leh-ute (including the Hoh) were included in the Treaty of Olympia, July 1, 1855 and are mentioned by name in the preamble. At least one signatory is identified on the treaty as Quilley-hute.
3. The principal fisheries of the Quil-leh-ute were Ozette Lake, Lake Dickey, the Dickey River, Quileute River, Hoh River, and their tributaries, as well as the saltwater adjacent to their territory.
4. The Quileute were primarily dependent on salmon for their staple food. When the salmon supply failed, either through occasional small runs or through swollen rivers making it difficult for the Indians to take them, people starved.

C. Hoh

1. The Hoh Tribe or Band of Indians is composed primarily of descendants of the Hoh, an 1855 geographical division of the Quileutes.
2. The Hoh were included as a band of the Quil-leh-ute in the Treaty of Olympia, July 1, 1855.
3. The principal fisheries of the Hoh branch of the Quileute were on the Hoh River from its upper reaches to its mouth and on the tributaries thereto. The saltwater fisheries were in the area adjacent to Hoh territory.
4. The Hoh were primarily dependent on salmon for their staple food. Although they had a summer troll fishery in the coastal water, they relied on the fall runs in the river for their winter stores. The upriver fisheries were of strategic importance. The bulk of the fall salmon were taken by means of weirs set in the river.
5. The Hoh Indian Reservation was established in order to enable this branch of the Quileute Tribe to remain at their valuable fisheries.

D. Skokomish

1. The Skokomish Tribe of Indians is composed

primarily of descendants of the Skokomish and To-an-ooch who lived in the drainage area of Hood Canal.

2. The above two groups were named in the preamble of the Treaty of Point-No-Point, January 26, 1855. Five signatories are identified as Skokomish on that document.
3. The principal fisheries of the Skokomish before, during, and after treaty times included all the waterways draining into Hood's Canal and the Canal itself.
4. Salmon was the most important source of food for the Skokomish. Four species of salmon as well as steelhead were taken in the rivers, eaten fresh and dried for winter use. Saltwater trolling and spearing was less important than river fisheries.
5. The bulk of the stream fish were taken by means of weirs. At least one of the Skokomish signers to the Treaty of Point-No-Point was the supervisor of an important weir on the Skokomish River.
6. One of the Skokomish signatories to the Treaty of Point-No-Point was the supervisor of an important Skokomish weir in the Skokomish River.

E. Squaxin

1. The present day "Squaxin Tribe of Indians" is composed primarily of descendants of the original inhabitants of all the inlets of upper Puget Sound from South Bay on Henderson Inlet around the head of the Sound to North Bay on Case Inlet. Included are: Henderson, Budd, Eld, Totten (including Big and Little Skookum), Hammersley, and Case Inlets.
2. The Indian inhabitants of the above inlets were listed separately by local group name in the preamble to the Treaty of Medicine Creek and were included along with the Puyallup, Nisqually, and other groups in that treaty. The following names are extracted from the longer series in the

preamble to the Treaty of Medicine Creek. I have added the appropriate inlet location for each named group.

Group name as it appears in treaty	Inlet location
Squawksin	Case
Steh-chass	Budd
T'Peeksin	Totten
Squi-aitl	Eld
Se-heh-wamish	Hammersley

3. The Indians residing on the various inlets of upper Puget Sound were placed on the Squaxin Island Reservation in 1855 and *thereafter were known collectively as "Squaxin" Indians* and were dealt with by the United States as a separate and collective entity.
4. The ancestors of the present "Squaxin Tribe of Indians" were included in the Treaty of Medicine Creek and the United States has always recognized and treated the amalgamated "Squaxin" as a Medicine Creek Treaty tribe.
5. "Squaxin" tribal members today do not reside on the Squaxin Island Reservation, but rather in the localities where their ancestors lived in aboriginal times on the various inlets of upper Puget Sound, often in close proximity to the old village sites.
6. Ancestors of the present "Squaxin" Indians fished the entire area of upper Puget Sound including all the creeks and streams draining into the head of the Sound as well as the saltwater estuaries and bays and the open saltwater.
7. Prior to the 1854 Treaty of Medicine Creek, salmon played a vital role in the economic, social, and religious life of the Indians of upper Puget Sound.
8. Salmon continue to be important to the "Squaxin" as evidenced by continued fishing activity, building of smokehouses, and preservation of salmon by traditional curing techniques.

F. Nisqually

1. The Nisqually Indian Community of the Nisqually Reservation is composed primarily of descendants of the Nisqually and neighboring other Indians, including the Steilacoom, living near the Nisqually River in 1854.
2. The Nisqually and Steilacoom are mentioned by name in the preamble to the Treaty of Medicine Creek, December 26, 1854. None of the signatories to that treaty is identified as to tribe or band, but several of the men whose names appear as signatories can be identified as Nisqually through other historical documents.
3. The Indians who were assigned to the Nisqually Reservation, including the Steilacoom, were thereafter known as Nisqually Indians and were dealt with by the United States as a separate and collective entity.
4. The principal fisheries of the Nisqually Indians included the Nisqually River and its tributaries, as well as the numerous lakes in the area occupied by the Nisqually and Steilacoom. Although some of the principal villages at the time of the treaty were located upriver at the junction of various creeks with the Nisqually River, saltwater fisheries were also utilized.
5. Salmon was the most important single food of the Nisqually. In addition, salmon played a central role in the ceremonial and religious life of these Indians.
6. Salmon continued to be important to the Nisqually as evidenced by continued fishing activity.

G. Puyallup

1. The Puyallup Tribe is composed of descendants of the 1854 Puyallup of the Puyallup River, the Homamish of Vashon Island, and other neighboring Indians, as well as non-Indians who became Puyallup through intermarriage.

2. The population of the Puyallup River villages and the Vashon Island Puyallup at the time of the Treaty of Medicine Creek was estimated to be about 150 people, but very likely the actual number was greater.
3. The Puyallup and the Homamish are named in the preamble to the Treaty of Medicine Creek, December 26, 1854. None of the signatories to that treaty is identified as to tribe, band, or village affiliation.
4. The principal fisheries of the Puyallup were in Commencement Bay and the adjacent saltwater areas of Puget Sound and along the Puyallup River and its tributaries.
5. Salmon was the most important single food for the Puyallup. Four species of salmon as well as steelhead were eaten fresh, smoked, dried, and smoked-and-dried.
6. Salmon were taken in the saltwater by trolling, spearing, and with a seine. In the rivers the principal methods were weirs, traps, spearing, gaffing, and netting either with lift nets or river seines.
7. The reason for the location and size of the original Puyallup Reservation was to locate the Indians where they would have immediate access to both their saltwater fisheries and a stream which was a traditional fall salmon fishery. The small size of the original reservation as well as its difficult terrain were considered unimportant by the United States' representatives because the Indian were primarily fishermen.

H. Muckleshoot

1. The Muckleshoot Indian Tribe is composed primarily of descendants of the Skopamish, Stkamish, and Smulkamish bands who lived in the Green River-White River area in 1855.
2. The three above named bands are listed in the

preamble to the Treaty of Point Elliott, January 22, 1855. Chief Seattle signed for these bands on that treaty.

3. The principal fisheries of the ancestors of the Muckleshoot both prior to and during treaty times included Green River, White River, Stuck River, Cedar River, and tributary creeks.

I. The Stillaguamish Tribe of Indians

1. The Stillaguamish Tribe of Indians is composed primarily of descendants of the Stoluckwamish and other Indians living on or near the Stillaguamish River in 1855.
2. The Stoluckwamish are named in the preamble to the Treaty of Point Elliott, January 22, 1855. They were signed for by Patkanam who was designated head-chief to represent them as well as other Indians at the treaty.
3. The principal fisheries of the Stoluckwamish were located on the Stillaguamish River system from its upper reaches to the mouth.

J. The Sauk-Suiattle Indian Tribe

1. The Sauk-Suiattle Indian Tribe is composed primarily of descendants of the Sakhumehu and other Indians who lived on the upper tributaries of the Skagit River in 1855.
2. The Sakhumehu are named in the preamble to the Treaty of Point Elliott, January 22, 1855. One of the signatories is identified as "Sakhumehu" on that document.
3. The principal fisheries of the Sakhumehu were the headwaters of Skagit River including Baker River, Sauk River and the smaller creeks which belonged to that water system.

K. Lummi

1. The Lummi Indian Tribe is composed primarily of descendants of Indians who in 1855 were known as Lummi or Nook-Lummi and who lived in the area

of Bellingham Bay and near the mouths of the rivers emptying into it.

2. The Lummi were party to the Treaty of Point Elliott, January 22, 1855. Fourteen signatories to that document are identified as Lummi.
3. The principal fisheries of the Lummi included reef-net locations for sockeye at Point Roberts, Village Point, off the east coast of San Juan Island as well as other locations in the San Juan Islands. Other fisheries included Bellingham Bay and the surrounding saltwater areas. The Lummi had important freshwater fisheries on the river system draining into Bellingham Bay.
4. Several Lummi signatories to the Treaty of Point Elliott were owners of valuable reefnet locations near Point Roberts.

IV. **Post-treaty Actions**

A. Comparison of Current Function of Fishing in Indian Life with Same at Treaty Time

Western Washington Indians appear to have discontinued most outward religious forms such as the first-salmon ceremony and some associated beliefs, while retaining other beliefs and certain traditional attitudes and feelings regarding salmon and their environment. An analogy might be drawn with those Christians who do not attend church or pray, but who nonetheless feel bound to the Christian faith and whose lives are much influenced by it. It is clear that many Indians continue to regard salmon in a light which is quite different from that of non-Indians.

Trade in fish was a vital component of aboriginal life in western Washington. During the 1850's, 1860's, and 1870's, Indian fishing and Indian trade in fish formed an integral part of the pioneer economy. As non-Indians began to compete in the fisheries, laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen. As they have been forced out of the fisheries, fewer Indians and smaller quantities of fish are involved.

For many Indians, fish continue to provide a vital component in their diet. For others, fish is not a necessary dietary item although it remains an important food in a symbolic sense. (Thanksgiving turkey is not essential for physical survival, but contributes to our spiritual well-being because it provides an emotional link with our past.) Few habits of human beings are stronger than dietary habits and their persistence is usually a matter of emotional preference rather than nutritional need. For many Indians, salmon remains important in an economic, nutritional, and symbolic sense.

Historically and to the present day, taking, preparing, eating and trading fish have been important functions in Indian communities. As such, fishing provides a basis for cultural identity and a cohesive force in Indian society.

Traditional Indian fishing methods were highly efficient. These methods survived where Indians were allowed to maintain them; that is, where they were not outlawed or where Indians were not prevented access to areas where the methods were feasible. When necessary or appropriate, Indians have adopted new techniques and gear. Indians no longer fish from dugouts, just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and whites no longer use cotton or linen nets.

Indians of western Washington continue to fish for most of the species for which they have always fished. A few are no longer utilized because they are now rare (e.g., eulachon) or because they are no longer in demand (e.g., dogfish for oil). Salmon and halibut remain today, as in pre-European times, the fish of major interest both for consumption and for exchange.

B. Tribal Identity

Continued existence of viable Indian communities, "tribes", "bands", and so on, is not dependent upon nor coterminous with federal recognition. There may be biological, cultural, and geographic continuity since

pre-treaty times, as in the case of the Sauk-Suiattle for example, without federal recognition.

Continuing Indian identity is evidenced by (a) overt traits of aboriginal Indian culture which continue into the present (e.g., language, food preservation methods, games such as lahal, the "bone game", winter dances with the associated spiritual beliefs, art forms, kinship and social links); (b) aboriginal forms which have been melded with introduced ideas to create new, but uniquely Indian features (e.g., the Shaker Church, Indian sweaters, and the modern invention, the Coast Salish spinning device); and (c) persistence of traditional knowledge and belief in the importance of that knowledge (e.g., community histories, location of fishing sites, myths, tales, and songs). This knowledge is as relevant to Indian identity as the knowledge of American history is to the "Americanism" of all of us.

C. Attitudes Toward Rights and Powers Secured and Established by the Treaties within the 25 Years Post-Treaty

Throughout the area Indians consistently attempted to assert their treaty protected fishing rights as evidenced by efforts to maintain control of their fishing sites and by litigation concerning these issues. Non-Indian activity over the years has served to erode the value of Indian fisheries. River fisheries have been destroyed because of power development and use of rivers for navigation and transport. In-shore fisheries have been destroyed through building of breakwaters and harbor development. In addition, these and off-shore fisheries have been depleted by over-fishing by non-Indians. These activities evidence an unawareness of or lack of concern with treaty provisions. In the first two decades after the treaty making, the Indians were able to enjoy their treaty-protected fishing rights without much difficulty. Later, the State actively opposed treaty fishing provisions and sought to curtail Indian rights for the benefit of non-Indian citizens.

V. **Specific Conclusions**

A. Interpreting the Treaty

It was the clear and unequivocal intent and understanding on the part of both Indians and whites at the treaty-signing that the reservations were to be residential bases from which the Indians were to continue to utilize the total environment, including specifically all of their fishing locations, in order to maintain themselves and to contribute to the economy of the entire population. Also it was clear that there was no intention of creating a class society with Indians on the bottom economic rung. The treaty commission clearly undertook to provide the Indians the means of participating and prospering in the economy of the Territory. The contribution was seen to be primarily in the fisheries. Indian understandings were similar.

No post-treaty regulations as to time, place, manner or purpose of their taking fish were anticipated by the Indians, nor is it likely that this was envisaged by the treaty commission. Indians did not anticipate a requirement that they permit non-Indians to fish at their usual and accustomed places, such as weirs, reef-net locations, and privately-owned halibut banks, while the Indians fished there. The "in common with" language must have been understood and intended by both parties to assure non-Indians an opportunity to engage in fishing, but not at the expense of existing Indian claims and rights. Undoubtedly the Indians understood that the non-Indians would share access to saltwater seine and troll fisheries. Indians had no reason to expect that it would become necessary for the State to limit non-Indians' harvest to provide an Indian harvest.

The very fact that the United States made treaties indicates that the federal government was concerned to integrate Indians into the new order by peaceful and legal means. Legal recognition of pre-existing Indian tenure and use rights is evidenced in the alienation of Indian lands by treaty-arranged compensation. Indian fishing rights were

specifically exempted from such alienation, and this is further attested by the fact that no compensation was arranged for their extinguishment.

In my opinion, the "in common" language was intended to allow non-Indians to fish subject to prior Indian rights specifically assured by treaty.

MAKAH ECONOMY CIRCA 1855 and the MAKAH TREATY:

A Cultural Analysis

by
Dr. Barbara Lane

In the 1850's and 1860's several Americans resided at Neah Bay and their accounts provide further corroboration for data later recorded by Waterman.

In 1941 the Makah Tribal Council prepared a list of Makah fishing places from information supplied by members of the tribe. This list (see appendix 1) contains information about in-shore and off-shore locations which do not appear on Waterman's map. He evidently inquired only about locations on land. Where they overlap, the 1941 data on land sites substantially corroborate Waterman's information.

The Waterman maps locate traditional sites attested to by archaelogical evidence, mentioned in historical documents dating from the late eighteenth century through the treaty era, and still regarded as important by Makah Indians in 1941.

Special Features of Makah Environment and Makah Trade

There were two very special features of the Makah environment which require our notice. First was the existence of a seemingly inexhaustible supply of halibut to which the Makah had access by virtue of (a) ownership of lucrative fishing banks respected by competing tribes, (b) a highly developed technology capable of efficiently harvesting the resource, and (c) intensive processing and marketing of the finished product. The halibut was so intensively fished and utilized that it not only was processed and marketed wholesale; it supplanted salmon as the food staple in this area. Swan (1868:6-7) discussed this at some length:

> The reason why the roofs of the houses are so different from those of the Chihalis and Chinooks, at the Columbia river, is that they are used to dry fish upon. Now, the Chinooks and Chihalis, as well as all the tribes on the sound and coast, store great quantities of fish for their winter's use; but the fish they dry are salmon, which require to be cured in the smoke and protected from the sun and rain. Consequently, the tribes above mentioned use pitched roofs, or roofs much more elevated than those of the Makahs. But the staple of the Makahs is halibut, which, to be properly cured, is cut into thin slices and dried, if possible, in the open air without smoke; the best portions being those that have kept white and free from any color. As the climate is very humid, it is rare that a season is propitious for the curing their fish; so they have their roofs as flat as possible, and during fair weather, in the fishing season, not only are these covered with the slices of fish, but quantities are hung on horizontal poles fastened across the ends of the uprights that form the side fastenings to the houses. The appearance of one of the lodges on a fine day in summer when plenty of fish are drying is that of a laundry with clothes out bleaching. When the weather threatens to be rainy, the occupants proceed to the roof, and by removing several boards, they can stow away their provender in a very few minutes, and again replace it in the open air on the return of fair weather.

The second feature was the unavailability of good quality cedar in the Cape Flattery area. In aboriginal and early historic times cedar was an indispensable and basic material in Northwest Coast cultures. Houses were made of cedar planks, canoes were fashioned out of cedar logs, storage containers were kerfed and bent cedar boxes and cedar baskets, and clothing was made of shredded cedar bark and woven cedar. Ceremonial masks were carved of cedar. The Makah imported most of these items a especially such basic necessities as their large canoes a house materials from Vancouver Island. Swan (1868:4) wrote

> The houses of the Makahs are built of boards and planks, split from the cedar. These are principally

made by the Indians of Vancouver Island, and procured by barter with them. There is very little cedar about Cape Flattery, and such as is found is small and of inferior quality.

Speaking of canoes, he noted that the large ocean-going canoes were imported from Nootkans across the Strait.

* * * The largest and best canoes are made by the Clyoquots and Nitinats on Vancouver Island; the cedar there being of a quality greatly superior to that found on or near Cape Flattery. Canoes of the medium and small sizes are made by the Makahs from cedar procured a short distance up the Strait or on the Tsuess River (Swan, 1868:35).

The Makah were able to import their basic needs such as housing materials and the ocean-going canoes used for sea-mammal hunting and ocean fishing because of the peculiarly rich resources available to them in their ocean territories, primarily halibut and whale. Dried halibut and processed whale oil were traded to their Nootkan relatives for cedar products. They were thus able to maintain a flourishing culture of classic Northwest Coast type even though they lacked one of the basic raw materials — good quality cedar. Colson (1953:4-5) has put it aptly:

> The Makah were primarily a seafaring people who spent their lives either on the water or close to the shore, seldom venturing more than a few miles inland. Most of their subsistence came from the sea where they fished for salmon, halibut, and other fish, and hunted for whale and seal. The excess over what they needed for consumption within the village was traded to other tribes in return for many of the raw materials and some of the finished articles used in the daily and ceremonial life of the village. There was little in their material culture *therefore* (italics mine, B.S.L.) to differentiate them from other tribes about them.

The Makah were also involved in a much wider trade with non-Nootkans up and down the coast. Swan (1868:30-31) reported

> Trade. — The Makahs, from their peculiar

> locality, have been for many years the medium of conducting the traffic between the Columbia River and Coast tribes south of Cape Flattery, and the Indians north as far as Nootka. They are emphatically a trading, as well as a producing people; and in these respects are far superior to the Clallams and other tribes on Fuca Strait and Puget Sound. Before the white men came to this part of the country, and when the Indian population on the Pacific coast had not been reduced in numbers as it has been of late years, they traded largely with the Chinooks at the mouth of the Columbia, making excursions as far as the Kwinaiult tribe at Point Grenville, where they met the Chinook traders; and some of the more venturesome would even continue on to the Columbia, passing through the Chihalis country at Gray's Harbor and Shoalwater Bay. The Chinooks and Chihalis would in like manner come north as far as Cape Flattery; and these trading excursions were kept up pretty regularly, with only the interruption of occasional feuds and rivalries between the different tribes, when the intercourse would be suspended, or carried on by means of intermediate bands; for instance, the Chinooks would venture up as far as Chihalis, or perhaps Kwinaiult; they would go as far as the Kwilleyute, and these last in turn to Cape Flattery. After a while peace would be restored, and the long voyages again resumed. The Makahs took down canoes, oil, dried halibut, and hai-kwa, or dentalium shells. The large canoes were almost invariably made on Vancouver Island; for, although craft of this model are called "Chinook" canoes, very few in reality, except small ones, were made at Chinook, the cedar there not being of suitable size or quality for the largest sizes, and the best trees being found on the Island. The Makahs in return received seaotter skins from Kwinaiult; vermilion or cinnabar from the Chinooks, which they in turn had procured from the more southern tribes of Oregon; and such articles of Indian value as might be manufactured or produced by the tribes living south of the cape. Their trade with the northern Indians was for dentalium, dried cedar bark for making mats, canoes, and dried salmon; paying for the same with dried halibut, blubber, and whale oil. Slaves also constituted an important article of traffic; they were purchased by

the Makahs from the Vancouver Island Indians, and sold to the coast Indians south.

Makah trade as of the early 1860's based on material extracted from Swan is summarized in Table 1. This table has been constructed especially for this report and is derived from data scattered throughout Swan's 1868 publication and his earlier articles. Although Swan's observations date only from 1859 at which date he became interested in the fisheries at Neah Bay, many if not all of the items in the table must have been traded for many years prior to Swan's arrival among the Makah. For example, the absence of large cedar of good quality and the consequent import of house planks and ocean-going canoes is not likely to have commenced abruptly in 1855. Mozino (1972:65), discussing Nootka Sound in 1792, mentions native trade as far south as Neah Bay and lists canoes as one of the trade items. Most of the items in Table 1 are native goods traded among Indians, rather than introduced European goods. This suggests that the trade is not a recent development. Import of ceremonial items such as masks implies some antiquity because masks were not imported as curios, but as part of a coherent ceremonial complex. The fact that so many of the items were necessities of everyday life argues against an interpretation that this was a recent trade stimulated by contact with European trading vessel.

In the late eighteenth and early nineteenth centuries and doubtless for hundreds of years before, the Makah engaged in two kinds of trade with neighboring Indians along the Strait of Fuca and along the Pacific coast. In the first instance, the Makah exported large surpluses of a limited number of marine products produced and processed in Makah territory. These were: whale oil, dried blubber, dried halibut, and dried herring eggs. This small inventory of exports was exchanged for a wide variety of native goods including both necessities and luxury items of aboriginal life. Secondly, the Makah acted as middlemen deriving wealth by importing goods for resale elsewhere. Canoes, slaves, and dentalium shell (a form of

native currency) were imported from Nootkans on Vancouver Island for sale to the Clallam farther up the Strait and to the Quileute and Quinault to the south.

When European ships began visiting the Cape Flattery area in the eighteenth and early nineteenth centuries, they regularly put in at Neah Bay to replenish their stocks of fresh and dried fish as well as to trade for furs. In addition, they purchased "train oil" (oil extracted from blubber, seal, cod, etcetera) which was used for machinery lubrication. Boit's log from the "Columbia," September 30, 1792 just after leaving Neah Bay notes

> The Indians brought a few skins and plenty of fish and some train oil which last article we much wanted.

The Hudson Bay Company established Fort Langley on the Fraser river in 1827 and Fort Nisqually in 1833. The Makah visited both of these trading posts, bringing sea otter skins and beaver skins. As the market for whale oil and dogfish oil increased in the 1840's and 1850's, the Makah brought oil for sale and imported additional quantities from Nootkans of Vancouver Island to sell to the whites. Oil purchased from the Indians was a major export of the Hudson's Bay Company. The oil was used locally for machinery lubrication in milling operations and was used domestically for lamps.

When settlement in Puget Sound created a market for cedar bark mats in the 1850's, the Makah imported the raw materials from Vancouver Island and wove mats for sale to the settlers.

Table 1. MAKAH TRADE AS RECORDED 1859-1866 BY JAMES G. SWAN

IMPORTS	EXPORTS
From Vancouver Island Nootkans	**To Vancouver Island Nootkans**
ocean-going canoes	dried halibut
yew paddles	
cedar house planks	dried herring eggs
painted tamanowas boards	dried blubber

wooden chests
water boxes

To Whites

pine bark blankets
dried cedar bark for making mats
alder, maple, and cottonwood masks
haliotis shell nose pendants
dentalium
medicine
dried salmon
dog fish oil
whale oil
dried halibut
smoked salmon
whale oil
dog fish oil
cedar bark mats
furs

From Quileute and Quinault

camas
pipe clay
ochre

From Clallam

bullrush and flag sleeping mats

Provenience Unspecified

grass mats
ash baskets

European Goods

blankets
guns
beads
pots
kettles
pans

Commerce with the whites was simply an extension of the aboriginal situation in which the Makah traded local products for items not available in Makah territory and in which the Makah imported goods specifically for export trade.

Marine products constituted the bulk of the export trade both to other Indians and to the whites. Considering the range and value of the native imports, it is clear that the Makah must have processed enormous amounts of

halibut, whale oil, blubber, and herring eggs. In addition to that which they consumed themselves and sold to other Indians in order to buy native goods, they produced a considerable surplus for sale to whites. In the September 11, 1852 issue of *The Columbian*, it is noted that 20,000 gallons of whale and fish oil had been purchased from the Indians at Cape Flattery that season.

In addition to the trade with other Nootkans, with Coast Salish, and with whites, there was considerable trade among the different Makah villages. Among the Makah, as with other Nootkans, ownership rights to important resource areas such as halibut banks, salmon streams, stretches of coastline, cranberry bogs and stands of cedar were inherited or acquired as marriage gifts. Such rights were extremely valuable. They were jealously guarded and were publicly validated and reaffirmed at potlatches and other ceremonials. Colson (1953:191) gives the Makah term for such rights as tupath. Drucker (1951:258) recorded the term topatl among Vancouver Island Nootkans for territorial rights which could be transferred at weddings.

Densmore (1939:3) gives this summary statement in a preface to her report on field work with the Makah in 1923 and 1926:

> The boundaries of the territory belonging to the Makah were clearly understood in the old days, this territory including both land and water. The old people valued the water more than the land and opposed fishing by other tribes of Indians. The Makah claimed the water of Puget Sound up to Port Crescent, thence by a straight line south to Swift Shore, beyond which were the whaling grounds; from Swift Shore the line went south to a place between Ozette village and the Quileute reservation, then straight from there to Ozette Lake and thence back to Port Crescent, this imaginary line encircling their territory. Within this tribal territory there was land and water which was owned by individuals and was a source of personal wealth. Some fishing places were better than others and were owned by wealthy men. The rule of inheritance was the same with a fishing or

> hunting ground as with personal property. The Makah even had shoreline rights, and if a whale came ashore on a man's shore-line it was regarded as his property. One advantage of the potlatch was that it gave the host an opportunity to describe the exact boundaries of his land, especially along the shore. Tracts of land with cedar trees were also valuable and were inherited in a family, the trees being used in making canoes. The land occupied by the Makah was Cape Flattery, bordering on the Pacific Ocean and the Strait of Juan de Fuca. They also claimed Tatoosh Island.

Trade among the Makah villages was important because strategic resources were to be found only in certain localities and only people with inherited rights to those resources could use them. Although the areas were said to belong to individual owners, in practice these were usually household heads whose housemates shared in usufruct rights.

People from Ozette and Waatch villages owned rights on the halibut banks northwest of Tatoosh Island. They used the island as a summer village and dried halibut and salmon there. Some of the Ozette people moved up to Ozette Lake in the latter part of the year to take salmon there. Inhabitants of the Neah Bay villages used Kiddekubut as their summer village and in the fall moved to camps up the Strait to take advantage of the salmon runs in the streams and rivers draining into the Strait.

Although halibut provided the mainstay of the Makah fish food, salmon were highly valued because they added variety to the diet and because it was possible to fish in the Strait and streams and lakes when ocean fishing was impossible because of weather conditions. People from Pacific coast villages who did not own fishing rights in the Strait area would trade halibut for salmon. People who owned rights in different salmon streams traded salmon for salmon in order to obtain several varieties. Not all streams provided the same species of salmon. The only sockeye available to the Makah were in Ozette River and Ozette Lake. Sockeye were highly desired for their flavor.

Dog salmon, or chum, were available in the Lyre and Hoko rivers. They were in demand because they are lean and have better keeping qualities and are more easily dried than salmon with more fat such as the coho which could be trolled for in the Strait throughout the year. Coho were eaten fresh; whereas chum were smoked for winter stores.

Gibbs mentions seeing dried salmon stored at Neah Bay during his visit at the treaty negotiations in January 1855. His notebook entry reads in part as follows:

> The houses at Neah bay are now (Jan. '55) on a much smaller scale than before the last visit of the small pox. * * * Each house is occupied by several families, their respective portions being separated by a partition of two or three feet high. A raised platform runs around them, on which the inhabitants sit, sleep and cook, above are shelves and poles on which their property is placed and a more miscellaneous assortment could hardly be found in a pawnbrokers — Seal skins full of oil, baskets of dried halibut and salmon, apparatus for whaling, paddles, piles of mats, articles from vessels wrecked on the coast.

The importance of the fall salmon fishery is documented by the fact that Makah and Clallam fought over fishing rights on the streams draining into the Strait of Fuca. James G. Swan made a canoe trip from Neah Bay to Port Townsend with Makah Indians in November 1859. The Makah told him that they had killed some Elwah (Clallam) Indians at a river called Clochudit which empties into Crescent Bay. This had occurred some years previous to his visit (probably shortly before treaty times) and resulted when the Elwha refused to let the Makah catch salmon in their river (Swan 1971:90).

The Lyre River is farther west than Clochudit and, according to T. T. Waterman, it also lies within Clallam territory. Waterman (Bureau of American Ethnology manuscript #1864) noted that the Makah owned some sort of fishing rights in that river.

> The next stream eastward has on our maps the curious name of Lyre River. I have no idea how this name arose. The stream is the outlet of a very fine

> body of water, inclosed by the Olympics, known as Lake Crescent. The name of the river in Indian is Ku hu bu, which term also I am unable to explain.
>
> The Makah had some sort of a claim which I do not understand to fishing rights on this river. They sometimes camped here in the autumn to take dog-salmon.

The distances between the Lake Ozette fishery, the halibut banks lying northwest of Tatoosh Island, and the Lyre River fishery illustrate why it was necessary for the Makah to range widely over their territory to utilize its varied resources. The fact that some of these resources, fall salmon runs, for example, became available at about the same time in different locales, made it profitable for groups of Makah to disperse in various directions, harvest the fish in their domain, and then to trade their surplus supplies.

The Makah were using a seine to take fall salmon on the Hoko River as early as 1866. In his diary record for September 25, 1866, Swan entered the following

> Captain John and others took the seine to Hoko today to fish for salmon.

Two days later, the diary mentions

> John returned from the Hoko with about 100 salmon which his party had taken in the seine.

Swan also mentioned an Indian giving him a salmon he had just killed at Sikiu River in November 28, 1859, but neither the species nor the method of taking is noted.

There are several entries in the diaries referring to spearing of salmon in Neeah brook in 1862. According to Swan this was an uncertain source of supply. He remarked on November 15, 1862

> Peter's Dick speared a fine salmon this morning some distance up the brook at Neeah. It was the dog tooth species. This is the first salmon I have ever known or seen taken in that brook although Indians tell me occasionally run up during the prevalence of high tides and freshets in the fall.

A month later salmon were still in the brook. Swan noted on December 17, 1862.

> Indians caught several salmon in the Neeah Brook this morning. They were of the dog tooth species.

The possibility of taking fresh salmon at Neah brook during November and December must have been a tremendous advantage for the people of Neah Bay. In the previous year Swan had noted tremendous surf at Neah Bay and on December 19, 1865 he remarked that it was more than a month since the Indians had caught anything but a few perch and rockfish.

While the taking of fall run salmon in the rivers was clearly of vital importance to the Makah, it is clear that most of their salmon were taken by trolling in the summer. Trolling areas were in the ocean, Strait and in Neeah Bay itself.

Gibbs commented in a notebook entry sometime between 1855 and 1857 writing of the Makah

> Each has his own trade. One set takes halibut, another salmon — a third whales alone — or at least this is in great measure the case — Salmon are taken by trolling (Summer Salmon) This fishery commences in May. They don't take many fall Salmon.

Swan's diary entries confirm the importance of the summer salmon fishery. For example, an entry dated June 28, 1865 notes the

> Indians very busy catching salmon off the entrance to the bay.

Of particular interest are his notations regarding the date of appearance of the large-scaled silver salmon or tsowtl. In 1863 they arrived about June 14 and in 1864 the spring or silver salmon started running August 4.

The Makah were able to take fresh fish for food in sheltered waters at almost any time during the year. Despite this, they harvested and preserved vast surpluses of fish to trade with other Makah, with other Nootkans, with their Coast Salish neighbors, and in historic times, with the whites. The Makah have always, as far back as knowledge about them goes, engaged in large scale commercial fisheries, as producers, processers, and traders.

TREATY NEGOTIATIONS

It is my opinion, based on my understanding of Makah culture patterns and on a reading of the available official documents, that the Stevens party and the Makah had quite different understandings of what was agreed upon at the Treaty of Neah Bay. The difference in understandings is directly attributable to two causes: first, the inadequacy of Chinook jargon as a medium of communication for treaty purposes; and second, mutual unfamiliarity with culturally different concepts of tenure and ownership rights. The Makah asserted property rights related to their fisheries which were not understood by the Stevens party and which the Indians thought were secured to them.

1. The language of communication

The Indians who were party to the treaty could neither read, write, nor speak in English. Since they were not literate in English their understanding of the treaty as a written document had to be conveyed verbally. Since none of the Makah spoke English, the adequacy of translation or interpretation is critical in evaluating how and what the Makah understood.

According to the official record of documents relating to the negotiation of the Treaty of Neah Bay, Governor Stevens and his party had the assistance of a Klallam Indian (Captain Jack) who spoke the Makah language. Klallam is a Salish language; Makah belongs to a completely different linguisitic stock called Nootkan. The order of difference between Klallam and Makah is like that between English and Finnish. Knowledge of one affords no help in understanding the other. We do not know how well Captain Jack spoke Makah nor do we know whether he communicated with the Stevens party in English or in Chinook jargon. The latter is more likely, but in either case, he then translated into Makah of which his mastery is of unknown quality.

The official record also states that two Makah signers of the treaty spoke Chinook. Chinook here refers to

Chinook jargon rather than the Chinook language spoken on the Columbia river. Chinook jargon was a pidgin or lingua franca used for trade purposes between Indians and whites or between Indians who spoke mutually unintelligible languages. Its limited vocabulary (a few hundred words) and simple grammar were adequate for trade and barter purposes, but utterly inadequate to convey foreign concepts of tenure and tenancy in a legal document such as a treaty.

Under the circumstances, it is important to know just how the written treaty was translated into Chinook jargon and interpreted to the Indians. Surprisingly, there seems to be no official record of the Chinook version of any of the treaties Stevens negotiated in western Washington. The official records do include a translation into Chinook by B. F. Shaw of a speech Governor Stevens gave in English at the Point Elliott Treaty and a speech made in Chinook by Shaw, who was the official interpreter at all the treaties in western Washington. Both of these Chinook texts convey very simple ideas of greeting and friendship and do not touch the real concerns of the treaty-making at all. They give little clue as to Mr. Shaw's mastery of Chinook jargon — which on the available textual evidence may have been minimal. If we had a record of the Chinook translation of any one of the treaties, it would be possible to demonstrate directly how inadequate the jargon was for the job. The official record, unfortunately, is silent. We are told merely that "The Treaty was then read to them, interpreted clause by clause and explained." I suppose an alternative test would be to ask the government to provide a Chinook text that could adequately convey the meaning of the treaties, a task I believe any competent linguist would declare impossible. Whatever was understood in Chinook then had to be translated into Makah.

2. Indian-white mutual unfamiliarity with foreign concepts of tenure and ownership rights

It seems clear to me that at the treaty negotiations the Makah asserted property rights which were not

understood by the whites because those kinds of rights were unknown to whites at that time. Even today these rights are known only to people who happen to be concerned with Nootkan ethnology.

At the time that the treaty was signed, no whites resided among the Makah and they enjoyed a reputation for being fierce and difficult. Part of this reputation was earned by their custom of seizing all goods and ships that wrecked on their coast and claiming them for their own. Worse yet, they equally seized and claimed as their booty any survivors of these ship-wrecks. This behavior was evidence to the whites of the cupidity and savagery of the Makah. Actually, it was the exercise of well-defined property rights among the Nootkan peoples (of which the Makah are the southernmost and only representative in the state of Washington).

We may discuss this perhaps as the law relating to ownership of flotsam and jetsam. From time immemorial the wastes of the Pacific have beat upon the shores of Cape Flattery bearing exotic treasures from unknown lands and distant ships. Throughout Nootkan territory on both sides of the Straits of Juan de Fuca, beach ownership was carefully demarked as to boundary lines. Where a village of several long houses was situated along the shore, each house-owner had ownership rights to anything the tides or waves deposited on his section of beach. Old men who were past their prime physically would station themselves on the beach propped up against a wooden backrest, or the wall of a house, and spend the day talking with their cronies, perhaps occupied at some sedentary task, watching the sea to call out and claim for the house-owner anything of value that drifted in with the tides. With the coming of the fur-trade and the voyages of exploration, ship wrecks occurred with increasing frequency off the northwest coast. The Nootkans simply carried on their age-old claims to whatever washed up on their beaches. Hence their view of ship-wrecked sailors as booty.

I suppose this kind of property right might belikened

to our notion of salvage rights. As I understand it, a ship adrift belongs not to the owner, but to the first vessel to get a line on her to tow her ashore. With the Nootkans, the issue was upon whose beach property the booty came to rest.

Stranded whales were a particularly valuable item which from time to time washed ashore. These might be whales which had been wounded at sea by a hunting party, but which had gotten away. They belonged not to the unsuccessful hunters, but to the owners of the beach on which the whale came ashore.

One of the Makah headmen tried to assert this property right at the treaty but he was not understood. According to the official record of the treaty proceedings, the headman, Tse-Kaw-wooth said that "If whales were killed and floated ashore, he wanted for his people the exclusive right of taking them. * * *" Governor Stevens replied by saying "Whoever killed the whales was to have them if they came ashore." The Governor's statement presents a clear case of cross-cultural non-communication.

Another kind of property right which the Makah asserted at the treaty talks relates to ownership of ocean tracts. In the official record of the treaty proceedings, one of the entries reads:

> *Tse-Kaw-wooth* - He wanted the sea - That was his country.

Tse-Kaw-wooth was the leading man of the Ozette village and was chosen by Stevens as head chief for the Makah at the time of the treaty. From later reports we know that the Ozette owned important fishing rights on the halibut banks northwest of Tatoosh Island. It seems likely that these were what Tse-Kaw-wooth was asserting rights to at the treaty.

Drucker (1951:247) has described Nootkan ownership concepts as follows:

> The Nootkans carried the concept of ownership to an incredible extreme. Not only rivers and fishing places close at hand, but the waters of the sea for miles offshore, the land, houses, carvings on a house post,

> the right to marry in a certain way or the right to omit part of an ordinary marriage ceremony, names, songs, dances, medicines, and rituals, all were privately owned property.

The Stevens party were familiar with the concepts of foreshore and riparian rights, but the notion of offshore rights comprising privately owned sections of ocean extending many miles from land was a foreign concept and one which the whites clearly did not comprehend at the treaty talks.

The boundaries of privately owned sea territories were described by reference by natural landmarks such as mountain peaks, points of land, islands, rocks, and so on. The Cape Flattery area and the Pacific coast extending south to Cape Alava provide a number of distinctive natural landmarks which the Makah used to define their sea properties. Waterman's maps 1 and 2 included with this report provide some idea of the number of named points along the shore and foreshore. In addition to these, Colson (1953:42) notes that:

> The mountains of Vancouver Island are used by fishermen as landmarks for locating the fishing grounds, and they bear Makah names know to the older men.

Drucker (1951:249) gives an example of how sea locations were marked:

> The area on the map was a favorite halibut fishing place in the former chief's territory. It was located by crossing two ranges, a north-south one formed by tsawunape (ts) and a prominent point on Nootka Cone (nc), and an east-west one formed by two peaks on Flores Island.

We do not have maps of the sea tracts claimed by the various Makah leading men at the time of the Makah treaty and apparently it is too late now to chart such information with any certainty. Nevertheless, it is clear that property concepts among the Makah agree in essence with those described in greater detail for the Nootkans across the Strait.

POST TREATY DEVELOPMENTS

In aboriginal times the Makah enjoyed a high standard of living as a result of their marine resources and extensive maritime trade. With the advent of Europeans to the area, new markets developed, Makah marine pursuits were intensified, and Makah wealth increased. The upswing continued until about 1870 when further developments reversed the trend.

Whatever the awareness of these latter four witnesses to the treaty, I am confident that the four men who were actively involved in the negotiations understood the commercial value of the Makah fishery and the extent of Makah trade with whites.

I am less certain about the extent of knowledge held by these men regarding Makah trade with other Indians. Simmons and Shaw must have known in a general way, but possibly did not appreciate the full role of this trade by Makah surplus of marine resources to other Indian groups. Gibbs refers to Makah trade with Vancouver's Island in that same 1854 report submitted through McClellan to Stevens, but it is unclear whether he means trade with Indians on Vancouver Island or trade with the Hudson Bay Company at Victoria. Both, of course, took place and whichever he meant, it is evidence of a commercial and trade value to the Makah.

In sum, I am convinced that the treaty negotiators appreciated and were aware of the extensive and lucrative trade carried on by the Makah based solely on their marine resources. They were undoubtedly more aware of that aspect of the trade in which whites were involved, than of that exclusively among Indians. The part of the trade which was with whites was in itself sufficient to impress the governor and his party.

(b) Stevens found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights. Much of the official record of the treaty negotiations deals with this. Stevens found it necessary to reassure the Makah that the

government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits. I can only interpret the language as promise of economic aid for commercial development. According to the records of the proceedings of the treaty commission,

> (Tuesday, January 30)
>
> Gov. Stevens informed them that so far from wishing to stop their fisheries, he intended to send them oil kettles and fishing apparatus.
>
> (Wednesday, January 31)
>
> * * * * The Great Father * * * knows what whalers you are, how you go far to sea to take whales. He will send you barrels in which to put your oil, kettles to try it out, lines and implements to fish with.

The treaty party landed at Neah Bay on the evening of Monday, January 29th. The record does not indicate that any discussions about the treaty took place the first evening. Discussions are reported on the Tuesday and the Wednesday. On the latter day the treaty was signed. On both the Tuesday and the Wednesday, Governor Stevens promised the Makah equipment to develop their oil extracting and fishing industries. I remarked earlier that, in my opinion, these promises can only be seen as related to commercial development. Why else would the Makah require barrels to put up the oil? They had watertight wooden boxes as well as other native containers for storage of oil meant for home consumption. Why would they need kettles to try out the oil, lines and fishing apparatus? As we have seen, the Makah had an intensive pre-treaty marine economy and an extensive trade based squarely upon it. The only conceivable inducement that Stevens' promises at the treaty ground could offer was in terms of increased efficiency and expansion of this commerce. In this connection we may take note of a separate but related point. Governor Stevens' promise of kettles and fishing apparatus makes it clear that there was no intent that the Indians be restricted to aboriginal equipment and techniques.

* * *

EXCERPTS
from the
Findings of Fact
of the
Indian Claims Commission
in
The Snoqualmie Tribe of Indians
vs
United States

May 7, 1965

(Exhibit G-17(O))

FINDINGS OF FACT

The Commission makes the following findings of fact.

1. The petitioner herein, the Snoqualmie Tribe of Indians, is an identifiable group of American Indians having the right and capacity under the Indian Claims Commission Act to bring and maintain this suit on its own behalf. (60 Stat. 1049)

2. Along with numerous other Indian tribes and bands, the Snoqualmie Tribe of Indians participated in the Point Elliott Treaty of January 22, 1855 (12 Stat. 927). Under this treaty of cession, the Snoqualmie Tribe of Indians relinquished to the United States all right, title, and interest to a certain portion of the overall area ceded by all tribal participants. The particular tract now claimed to have belonged aboriginally to the Snoqualmie Tribe of Indians, the petitioner herein, was described by and large in the original Snoqualmie petition as being situated in the watershed area of the Snoqualmie River from its headwaters to its mouth.

p. 282

6. While notable cultural distinctions can be drawn among many of the tribes and bands that lived along the rivers, streams, and shores of northwestern Washington, eye witnesses to the events of 1850 point to one common

cultural characteristic among all groups. We find an almost universal and paramount dependence upon the products of a marine economy to sustain the tribal way of life. Indeed, fishing and its collateral pursuits were of prime necessity, while hunting and gathering activities for the most part were of secondary importance. The historical, scientific, and other reports concerning this period generally indicate an abundance of marine products that are readily available to the native inhabitants.

In 1853, shortly before he was to treat with the many Puget Sound tribes, Governor Stevens made the following general observation on the way of life of these Indians.

> All these tribes live on the different water courses; or the bays & Inlets of the Sound, subsisting on Roots & Berries, and the various species of fish which abound in the waters. But few of these Indians ever leave this basin, but roam about the Sound leading for the most part an idle life. They have all, however, singled out a few spots in their domains, which, they wish to reserve; and contemplate the sale of the rest of their lands to the whites. These spots are not only permanent places of residence, but, are hereditary. Near them are the graves of their relatives and friends and they cherish an affection for them, which, I have scarcely ever seen equalled. Those are their homes, and from them they roam about the Sound in every direction, going where the fish Roots & berries abound most at the different seasons of the year." (Def., Ex. 73)

The topographical features of the land away from the rivers and streams contributed to the Indians' need to engage in fishing as their principal means of subsistence. The adjacent land was quite fertile, but the heavily wooded areas proved difficult to penetrate. What animals that were taken in hunting for the most part included the deer, elk, or bear that had descended from the higher elevations to the river beds for water. The tribal fishing rights were of such importance to these northwest Indians, that invariably their rights to continue fishing at the usual and accustomed places were explicitly spelled out in many of the treaties of cession under which they relinquished their aboriginal rights.

Article 5 of the 1855 Point Elliott Treaty contains the usual and customary language followed by the treaty makers of this period, and it reads as follows:

> "Article 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, * * *." (Art. 5, 12 Stat. 927)

7. Most of the authorities familiar with the tribal activities of the Snoqualmie and Skykomish Indians during the mid 1800's pictured them as living along the Snoqualmie and Skykomish rivers in separate and extended villages. There they subsisted primarily by fishing, and incidentally by hunting and root gathering, with some effort toward farming a potato patch.

* * *

POST 1974 DECISION; MOTIONS, ORDERS, INJUNCTIONS, FINDINGS AND DECISIONS IN U.S. V. WASH. (U.S. DIST. CT. # 9213)

Motion for intervention of Purse Seine Vessel Owners Association

March 15, 1974

Intervenor Purse Seine Vessel Owners Association alleges:

I.

Purse Seine Vessel Owners Association is a Washington Corporation composed of 175 owners and/or operators of purse seine fishing vessels who commercially fish for salmon within the waters of the State of Washington.

II.

The Final Decision of this Court, filed and entered on February 12, 1974, will have an adverse effect on the interests of intervenors, in that the livelihood of intervenor's members will be substantially impaired because harvestable salmon previously available to said members will be substantially reduced in the future.

III.

This Court has retained continuing jurisdiction of this controversy, and further proceedings are anticipated which will also have a substantial effect on the opportunity of intervenor's members to earn a livelihood.

IV.

Intervenor meets the requirements of FRCP Rule 24(a) "Intervention of Right", which provides in part:

> "Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

(1) Intervenor's members have an interest in the property (privilege of fishing of salmon commercially) which is the subject of the action;

(2) Their ability to protect such interest will be impeded by commercial fishing restrictions which may be adopted by this Court as recommended by plaintiffs; and,

(3) The State Department of Fisheries cannot adequately represent the interests of these members since said Department represents competing fishing interests relating to the taking of salmon, such as the sport fishery and that of other commercial gear which is in competition with the fishing gear used by intervenor's members. Intervenor, therefore, feels that it should be given the opportunity to speak for itself, rather than rely on a spokesman who must also represent its competition.

V.

In its Final Decision, this Court stated its desire to have all interested parties before the Court so that their views could be heard and considered. Intervenor believes that its present status as amicus curiae does not give sufficient opportunity for meaningful participation in the further proceedings before the Court, particularly in view of the fact that any regulations concerning commercial net fishing which may be subject to the approval of this Court will directly affect the interests of intervenor's members.

/s/ _____
JOSEPH T. MIJICH
Attorney for Intervenor-defendant
Purse Seine Vessel Owners Association

U.S. v. WASHINGTON

District Court: No. 9213

RULINGS ON POST DECISION MOTIONS

March 22, 1974

Following entry of Final Decision #I (FD#I) on February 12, 1974 a number of motions for reconsideration and other purposes were served and filed. After briefing, all pending motions were heard on oral argument March 5, 6, 18, 19 and 20, 1974. During argument, oral and tentative rulings were made on a number of said motions and ruling on others was deferred for further consideration by counsel and the court. The court fully reviewed all the proposals of counsel pertaining to said motions, and having considered each motion this order is entered as formal and final ruling on each and all of said motions.

1. **Motions of Northwest Steelheaders Council of Trout Unlimited and Purse Seine Vessel Owners Association to intervene as parties defendant.**

The motions of these organizations to change their status from amicus curiae in this litigation to intervenor defendants is found by the court to be untimely and unnecessary in each instance because their interests have been and will continue to be adequately represented by the State of Washington, its Game Commission and Fisheries Department and their counsel and therefore each of said motions is hereby denied. Both organizations may continue to act as amicus by serving and filing briefs, both in this court and on appeal, and in any proceeding in this court during appeal. Either of said amici may apply for permission to participate in some other particular in any future specific proceeding.

2. **Washington Reef Net Owners Association's motion to amend or make new Findings, Conclusions and Judgment.**

The court finding said motion without merit in all particulars, it is hereby denied.

3. **Yakima Nation's motions for (a) Reconsideration of FD#I re state power to regulate federal treaty right fishing and (b) for approval of self-regulating status.**

Motion 3(a) was heard, considered and denial thereof is hereby confirmed. Motion 3(b) is granted subject to adoption of a regulation by the Yakima Nation comparable to that filed with the court by the Quinault Tribe on 3/18/74.

4. **Quinault, Makah, Lummi and Quileute Tribes' motion re adjudication of allocation of propagated and natural fish.**

The court has jurisdiction to adjudicate such issue in this case but hereby reaffirms the ruling stated in FD#I providing for initial adjudication by state courts.

5. **Lummi tribe motion for post FD#I order re Lummi reef net fishing.**

The parties involved have reported to the court that they are near reaching an agreed solution. Therefore, ruling on this motion is deferred, subject to reconsideration when the parties submit their final report.

6. **Fisheries' motion for reconsideration.**

This motion includes a considerable number of written questions submitted during argument. Each particular question presented has been considered and in some instances oral ruling was made thereon. Rulings on all questions posed by Fisheries are specified in Exhibit "A" attached hereto and by this reference are hereby made a part hereof. Said rulings are hereby confirmed as the formal and final order of said motion in each and all particulars.

7. **Game's motion for clarification and amendment of Final Decision #I.**

The oral decision on 3/6/74 holding that treaty right fishermen may sell or otherwise deal commercially with steelhead taken per tribal regulations at usual and accustomed places is hereby affirmed. The motion is otherwise denied, except as provided in the rulings on the Fisheries' motion.

8. **Motions for attorneys' fees and costs.**

By agreement these motions will be heard and determined at an early date following briefing on a stipulated schedule.

Exceptions to any of said rulings by any party aggrieved thereby is hereby noted.

IT IS SO ORDERED.

Upon entry hereof the Final Decision #I and the Declaratory Judgment and Decree entered herein 2/12/74 become unreservedly final and reviewable as provided by 28 U.S.C.A. 2201.

Dated this 22nd day of March, 1974.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER

July 18, 1974

The Court having heard oral argument on June 28, 1974, and considered written submissions previously made by the parties on matters considered at said June 28 hearing,

IT IS HEREBY ORDERED:

1. The Motion of the Swinomish Indian Tribal Community to intervene as an additional Plaintiff in this matter and to file its proposed Complaint in Intervention dated April 22, 1974, is granted.

2. The Motion of the Tulalip Tribes of Washington to intervene in this matter and to file its Complaint in Intervention dated May 23, 1974, is granted except as to the Cross-claim against the United States and the State of Washington. Decision on the right to file the Cross-claim is reserved for later determination.

3. The Motion of the Suquamish Indian Tribe to intervene as an additional Plaintiff herein and to file its Complaint in Intervention dated May 31, 1974, is granted, subject to the other provisions of this Order.

4. The Motion of the Port Gamble Band of Clallam Indians filed June 7, 1974, to intervene as an additional party Plaintiff to this action for the purpose of asserting its claims as set forth in its Proposed Complaint in Intervention attached to said Motion is granted except as to those portions of paragraphs numbered 25 through 29 of the Proposed Complaint which relate to matters other than the regulation or limiting of fishing by non-Indians. Decision on the right to file the excepted portions of the Complaint is reserved for later determination.

5. The granting of all of the foregoing Motions to Intervene is subject to the further express limitation that nothing in this Order shall be deemed to constitute revision or modification of any portion of the Final Decision No. 1 of this Court and of the related Orders, Judgments and Decrees heretofore entered in this matter and nothing in this Order shall entitle any of said Intervenor-Plaintiffs to reopen any matter previously determined in said Final Decision, Findings of Fact, Conclusions of Law, Orders, Judgments and Decrees and said Intervenors shall be bound by all such determinations except as the same may be subsequently modified or set aside on appeals previously filed in connection therewith. Each of said Intervenor-Plaintiffs shall, prior to filing its actual Complaint in Intervention, conform said Complaint to the limitations set forth in this Order.

6. The Motion of the Washington State Commercial Passenger Fishing Vessel Association to intervene in this matter is denied without prejudice to the right of said

Association to file such a Motion subsequently after first seeking relief through the courts of the State of Washington.

7. Until further Order of this Court after a full hearing to be held at the earliest possible date upon request of any party hereto, regulations adopted by the International Pacific Salmon Fisheries Commission shall be presumed to be controlling with respect to fishing by any treaty tribe or its members and the Defendants may enforce the provisions of said regulations as incorporated in the regulations of the Defendants against members of such tribes.

Dated this 18th day of July, 1974.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MEMORANDUM DECISION ON PLAINTIFFS' REQUEST FOR DETERMINATION AND INJUNCTION

September 12, 1974

In *United States of America, et al. v. State of Washington, et al,* this court, at the instance and with approval of counsel for all parties, assumed jurisdiction over all matters adjudicated in Final Decision #I relating to Indian treaty fishing rights in the case area and other related matters. Following a lengthy and extensive trial, during which there was recorded in evidence voluminous and detailed information concerning many aspects of Indian treaty fishing, this court rendered what is designated as Final Decision #I. That decision included specific Findings of Fact and Conclusions of Law regarding the historical and biological facets of Indian treaty fishing rights; it also specifically defined the extent of those Indian treaty rights as well as the privileges and

obligations of non-Indian fishing and the control thereof by the State. Recognizing that the appellate procedures in this case will certainly take up to two years or longer, the court and all counsel agreed that procedures were required to deal with the many important questions concerning fish runs and seasons that would take place before a Circuit or Supreme Court decision would finally determine all issues adjudicated in Final Decision #I. For these reasons, the court retained continuing jurisdiction over all such matters, including development of an interim program for implementing some of the essential provisions of Final Decision #I, subject to certain limitations accepted and approved by counsel for all parties.

Paragraph 5 of the Interim Plan and Stay Order entered by this court on March 22, 1974 obligates defendants State of Washington, Washington Department of Game, and its Director, Carl Crouse, Washington Department of Fisheries, and its Director Thor Tollefson (hereinafter "defendants") to make significant reductions in the non-Indian fishery as deemed necessary to achieve the objectives of the court's definition of Indian treaty fishing rights. In carrying out this order the court anticipated that defendants would promulgate and enforce regulations reducing the non-Indian fishery. Defendants have promulgated certain regulations establishing reductions in the non-Indian fishery, but have been unable to enforce them by reason of certain directives and orders of the Thurston County Superior Court in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, No. 50370, *Washington Kelpers Association v. Tollefson*, No. 50552, and *Puget Sound Gill Netters Association v. Tollefson*, No. 50757.

At the hearing 9/2/74 on Plaintiffs' Request for Determination and Injunction, the court directed defendants to advise the court not later than September 6, 1974 of any alternative means or methods of regulation which the defendants could propose to effect the required "significant reductions" in non-Indian fishing. By response received by this court on September 6,

> "* * * defendant Department of Fisheries has concluded that the regulatory enactments promulgated by it in response to and in good faith compliance with this Court's Final Decision No. 1, of February 12, 1974, and the Interim Plan and Stay Order of March 22, 1974, were correct and appropriate actions to take."

No additional or alternative regulations were or have been proposed by defendants. Therefore, it now appears that in order to effectuate the prior orders of ths court, and to preserve its jurisdiction over the subject matter, further orders of this court are necessary to clarify the scope of jurisdiction assumed by it and the duties imposed upon defendants under Final Decision #I.

The principal questions presented by plaintiffs' request are whether this court is empowered to protect its earlier rulings from incursions such as have taken place in the three state court proceedings referred to above and, if such jurisdiction exists, whether this court in its discretion should exercise said authority, and if so, in what form. This court fully adopts the legal arguments recited on pages 5 through 16 of "Plaintiffs' Request for Determination Regarding Relaxation of Restrictions on Non-Indian Fishing" as if set forth fully herein (copy attached hereto) Exhibit "A"; and refers particularly to the following cases: *Atlantic Coast Line; Thomason; Shelton; Donelon; Leiter Minerals, U.S. v. Wood; Alonzo v. U.S.* Based upon the legal arguments and decisions referred to immediately above, this court is not only satisfied that it has jurisdiction to enjoin the state court proceedings referred to, within the express exceptions to the anti-injunction statute, 28 USCA § 2283, but also believes it has an urgent duty to take such action to the extent shown necessary in order to effectuate its judgment and protect the federal treaty rights declared therein.

It is clear beyond reasonable question that the three state court injunctions referred to above have to some extent prevented defendants from complying with this court's order to make "significant reductions" in the non-Indian fishery in order to make available to treaty

right fishermen a sufficient portion of the harvestable resource to guarantee an opportunity for them to harvest 50% of said resource. Interference with the exercise of Indian treaty fishing rights indisputably is within the jurisdiction of this federal court, and state court proceedings instituted by non-parties to this law suit cannot be allowed to frustrate either final determinations based on exhaustive research and evidence or the jurisdiction of this federal court.

Data submitted by the United States Fish and Wildlife Service (copy attached hereto), Exhibit "B" which includes Department of Fisheries statistics, indicate that through August, 1974, with the exception of the Nisqually River chum harvest in January which for management purposes would be considerd part of the 1973 run, Indian fishermen in the case area in 1974 have caught less salmon of each species than they caught in 1973, both in terms of total numbers of fish caught and in terms of the percentages of Indian harvest as contrasted with total non-Indian commercial harvest. Estimates indicate that through August, 1973, Indians had taken 123,370 salmon, or 3.5% of the total as compared with 3,404,710 salmon harvested by non-Indian commercial interests; through August of this year, Indians have harvested 89,402 salmon, or 2.4% of the total as compared with 3,628,513 salmon harvested by non-Indian commercial fishermen; when the sport catch through August of 1974 of 837,099 salmon is included, the Indian share of the total harvest is 2.0%.

These figures illustrate in the most startling manner the gross inequities between Indian and non-Indian harvest, and the complete failure and inability of defendants to comply with this court's orders to make significant reductions in non-Indian fishing and to afford to Indians an opportunity to catch approximately 50% of the harvestable resource at their usual and accustomed grounds and stations. Because by their nature substantial fish resources will be lost for this year to plaintiff tribes if not harvested during the currently ongoing seasons, the immediate threat of substantial economic harm and

serious hardship to many treaty right fishermen convinces this court that prompt action is required to protect federal treaty rights that this court has found are constitutionally guaranteed as the law of the land and to assure the viability of this court's Final Decision #I, unless and until it be modified or reversed.

In all court litigation in which the United States has an interest, including cases involving the interpretation and application of treaties duly enacted as required by federal law and the national Constitution, the Attorney General of the United States, acting through the Justice Department and United States Attorneys, is the official authorized to speak and act for the people of the nation in such matters. In this instance, the United States Attorney, presumptively in the national interest has requested that this court enjoin enforcement of the injunctions issued in all three of the above referred to state court proceedings. Plaintiff tribes, as descendants of signatories to treaties with the United States, have joined in that request.

Rather than consider the state court proceedings in toto, upon the record now presented this court finds it necessary to consider the injunctions separately and therefore will discuss each of them in the order of issuance. It must be recognized, however, that each of the three state court proceedings was instituted by litigants none of whom was a party to this federal court action. Additionally, none of those state court proceedings joined the United States or the plaintiff tribes, the real parties in interest who could be, if not irreparably, at a minimum grievously, injured by state court injunctions preventing enforcement of the Department of Fisheries regulations promulgated for the express purpose of making more fish available to treaty right fishermen. Finally, at none of the state court hearings were witnesses interrogated nor was any of the hearings a full scale evidentiary hearing; only affidavits of the litigants were presented, not subject to cross examination, and the state court judges could only act upon the materials presented to them.

Beyond question, the state court judges who issued

the restraining orders involved herein performed their judicial functions in accordance with established law and practice in the state courts, and in an able and responsible manner beyond criticism in any particular whatever. However, it is clear from the cited authorities that the circumstances above recited can and should be considered by this court together with the full record before it, significant portions of which were not available to the state courts, in determining what action if any to take with regard to these state court proceedings.

(1) In the *Commercial Passenger Fishing Vessel* case, plaintiffs therein obtained a temporary injunction preventing enforcement of a Department of Fisheries regulation reducing the personal use salmon angling daily bag limit in Washington coastal waters and the Strait of Juan de Fuca from three salmon to two salmon. The record herein shows that representatives of some plaintiff tribes opposed enactment of this regulation by the Department of Fisheries, on the ground that such reduction in non-Indian fishing would not to any appreciable extent achieve its stated purpose to make more fish available for harvest by plaintiff tribes in the case area, because the runs of fish to which that regulation applied would return almost entirely to the Columbia River and its tributaries for spawning. Upon the evidence before it, this court finds that plaintiffs herein have not sustained their burden of showing that enforcement of that regulation reducing the daily salmon sport bag limit would achieve the purpose of making a significant number of additional fish available for harvest by treaty right fishermen. For these reasons, this court finds no reason to interfere with the state court temporary injunction currently in effect in cause No. 50370.

(2) In the *Kelpers Association* case, plaintiffs therein succeeded in temporarily enjoining enforcement of a Department of Fisheries regulation which effectively closed commercial trolling for salmon within the three mile limit under state jurisdiction. Evidence in the record before this court discloses that the total harvest by the

Kelpers Association within the three-mile limit is not substantial and that the runs of fish involved treaty right fishermen because they pass through other non-Indian commercial fisheries before reaching tribal fishing grounds. Upon the evidence before it, this court finds that plaintiffs herein have not met their burden of showing that enforcement of the regulation in question, proposing to close commercial trolling for salmon within the three-mile limit, would achieve the purpose of making a significant number of additional fish available for harvest by treaty right fishermen. For these reasons, this court finds no reason to interfere with the state court temporary injunction currently in effect in Cause No. 50552.

(3) In the *Gill Netters Association* case, plaintiffs therein obtained a temporary injunction enjoining enforcement of a Department of Fisheries regulation proposing reductions in fishing time for gill netters and purse seiners in the Puget Sound marine fishery. Unlike the evidence concerning the prior temporary injunctions, the record in this case is replete with factual data which establishes beyond reasonable question that very significant portions of the harvestable fish not taken by the non-Indian fishermen referred to would reach the usual and accustomed off-reservation fishing grounds of plaintiff tribes in substantial numbers. Plaintiffs herein have overwhelmingly met their burden of proof to show that enforcement of this proposed Department of Fisheries regulation calling for reduced fishng time for gill netters and purse seiners in Puget Sound would achieve at least partial compliance with this court's directives to make additional fish available for harvest by treaty right fishermen, and that prohibition by the state court of enforcement of that regulation presents an immediate threat of substantial economic harm and serious hardship to plaintiff tribes.

Upon the facts found as above stated and after most serious and meticulous consideration of written memoranda and oral arguments by all parties and written submissions by parties to the state court actions and by

the state court judges of Thurston County, this court finds and holds that injunctive relief in the form set forth below must issue to enjoin enforcement of the state court injunction in Cause No. 50757 as follows:

INJUNCTIONS

(1) For the reasons hereinabove stated, unless and until this court orders otherwise, it is now hereby ORDERED AS FOLLOWS:

That the Superior Court of the State of Washington, County of Thurston, is hereby prohibited and enjoined from in any manner or to any extent enforcing the temporary injunction issued by said court on August 30, 1974, in *Puget Sound Gill Netters Association v. Tollefson,* No. 50757, and from issuing any other order in said cause which in effect will prevent the Department of Fisheries from fully enforcing the regulations in question adopted pursuant to Administrative Order No. 1143.

This injunction shall in no manner whatever preclude said court from expeditiously proceeding with preparation and trial of the issues presented in said cause.

(2) IT IS FURTHER ORDERED:

That defendants, State of Washington, Thor Tollefson, Carl Crouse, Departments of Fisheries and Game of the State of Washington, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them, shall not obey, carry out, enforce or otherwise treat as having any lawful force or effect the order of the Thurston County Superior Court for the State of Washington referred to in paragraph (1) above.

Federal Rule of Civil Procedure 65(c), pertaining to security necessary for issuance of injunctions, provides in part: "No such security shall be required of the United States or of an officer or agency thereof." The application for injunctive relief herein having been made by the United States, this court may not require security therefor from the United States, and does not require such security from any parties joining in or supporting said application.

IMPLEMENTING ORDERS

For reasons not clear to this court, the Department of Fisheries takes the anomolous position of opposing entry of the injunction issued above, while asserting the correctness and appropriateness of the regulations enjoined in the state court proceedings. This court's injunction confirms the propriety of the Department of Fisheries regulations adopted pursuant to Administrative Order No. 1143. Moreover, this court has not and will not direct, limit or in any manner whatever interfere with full exercise of the prerogatives, duties and discretion vested by state law in the Directors of the Departments of Game and Fisheries, excepting to the extent necessary to enforce the judgment and decree entered pursuant to Final Decision #I and to restore or preserve the Indian treaty rights specified therein. Nothing in this Decision or in the above injunction should be construed or applied to the contrary.

However, due to the circumstances previously recited, and to aid in achieving an equal opportunity to both Indian and non-Indian fishermen to harvest fish in the case area and to compensate treaty right fishermen for not having been able to harvest the fish resource to the extent determined by Final Decision #I, this court finds it necessary in aid of its jurisdiction and to protect and effectuate its judgment, to provide as follows:

IT IS HEREBY ORDERED THAT:

(1) The defendants are required to make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the court's Final Decision #I without requiring mathematical precision, but in making such reductions shall do so consistent with the concept of permitting the full harvest of fish.

(2) Reductions in the non-Indian fishery, once adopted by the defendants in accordance with the court's prior rulings and this order, shall not thereafter be relaxed or rescinded without prior notice to this court and all parties to this action, unless consent of the affected plaintiff tribes has been obtained prior thereto.

(3) To the extent reduction in the non-Indian fishery adopted in accordance with the court's prior rulings already have been relaxed or rescinded prior to the entry of this order by reason of the temporary injunction of the Thurston County Superior Court in *Puget Sound Gill Netters Association v. Tollefson*, No. 50757, issued August 30, 1974, defendants shall cease immediately from carrying out directives, orders or policies in accordance with said temporary injunction and shall resume forthwith to implement the regulatory schemes and policies previously adopted to effect reduction in the non-Indian commercial net fishery for salmon on Puget Sound and related waters.

(4) At the earliest practicable date, and in no event later than September 23, 1974, defendants shall report to the court or its Master on the consequences of the relaxation of its earlier reductions in the non-Indian fisheries by reason of the temporary injunctions of the Thurston County Court. This report shall include the best available estimated numbers of fish which the plaintiff Indian fishermen were prevented from taking by reason of said temporary injunctions, and proposals to be implemented immediately to make available to Indian fisheries on a compensatory basis numbers of fish approximately equivalent to those lost by reason of said temporary injunctions. Defendants shall attempt to implement such proposals prior to the expiration of the time required for the submission of this report to the court if such action is necessary to ensure that the Indian treaty fishermen will have the opportunity to take additional numbers of fish in compensation for those lost by reason of the three state court temporary injunctions. Nothing in this order shall preclude defendants from taking any immediate action to reduce the non-Indian fishery in order to enhance Indian opportunities to take fish at their usual and accustomed places.

(5) If, at any time subsequent to the entry of this order, defendants are participants in legal proceedings which, in their judgment, might possibly result in an order

that could impair or otherwise affect adversely their ability to conform to the requirements of this court's Final Decision #I, or other orders in this case, defendants shall immediately so inform this court and shall serve upon all parties to this action copies of all papers filed in such legal proceedings.

(6) Defendants shall take such action as may be necessary to notify forthwith their officers, agents, employees, and attorneys, and those persons in active concert or participation with them, of the content of this order and the duties and obligations defined herein.

IT IS SO ORDERED, ADJUDGED AND DECREED, effective immediately upon entry hereof this 12th day of September, 1974.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. vs. WASHINGTON

District Court: No. 9213

ORDER FOR PROGRAM TO IMPLEMENT INTERIM PLAN

October 8, 1974

IT IS HEREBY ORDERED that the following program is approved as an initial program to implement the Interim Plan approved by this court on March 22, 1974.

It is recognized that this program is subject to modification and further refinement as additional information and further experience become available. The parties will continue to develop such information and experience and will consult frequently with each other on general and specific problems or conditions in an effort to achieve more completely and as rapidly as possible full compliance with the spirit and objectives of the Orders of March 22, 1974. Any modifications or refinements agreed to by the affected parties shall become effective upon filing

with the court without further action or approval of the court unless such further action is specified therein. Any party may submit requests for other modifications or refinements for approval or other appropriate Order by the court.

Tribes having qualified for self-regulation are not bound by the particulars of this program, other than as directed by the terms of Final Decision #1 and the Injunction entered pursuant thereto.

IMPLEMENTING PROGRAM

A. Guideline Principles for Regulating Fisheries.

Guideline Principles for Regulating Fisheries pursuant to Paragraph 2 of the Interim Plan and Stay Order shall be filed with the court no later than October 4, 1974. If agreement has not been reached to those principles for regulating fisheries, they shall be submitted to the Expert and Master for determination of those to be implemented.

B. Exchange of Information Preliminary to Regulation.

Data required to be furnished by the state agencies under Paragraphs 17 and 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order and data required to be furnished by the tribes under Paragraph 17 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished at the earliest practical time after such data becomes available, but no later than the following schedule:

1. At least sixty (60) days prior to entry of a run into the first fishery subject to state control run size predictions, numbers of harvestable fish set pursuant to Paragraph 17 of the Injunction and information concerning run size, timing and condition requested by the tribes pursuant to Paragraph 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished by the state agencies.

Until such time as predictions of steelhead run size

are possible, Game shall determine the harvestable portion of the run in the best manner practicable, after consulting with the plaintiffs to receive their suggestions. Such predictions relating to harvestable numbers of fish shall be subject to review if the tribes believe there is better information from another source. If the parties cannot agree on the best source, the court shall make a determination through the Master in consultation with its Expert advisor. All predictions of harvestable numbers shall be further subject to review during the fishing season as additional information is obtained.

2. At least fifty (50) days prior to the entry of a run into the first fishery subject to state control, the tribes shall furnish information concerning their anticipated fishing activity as requested by the state under Paragraph 17 of the Injunction.

3. At least forty-two (42) days before a proposed opening of fishing, the state agencies and tribes shall exchange proposed off-reservation fishing regulations affecting the particular fishery.

4. At least twenty-one (21) days before a proposed opening, regulations shall be adopted and filed pursuant to Paragraph 1 of the Interim Plan and Stay Order; *provided* that the time periods under Paragraphs 3 and 4 above shall not be applicable to regulations filed prior to September 15, 1974; *provided further* that for such latter regulations filed after the date of this order at least seven (7) days notice of such regulation shall be given before a fishery is opened; and *provided further* that emergency regulations are enforceable upon filing them with the court and service upon the other parties affected of a copy of such regulations and a statement of the facts and circumstances of the emergency on which the regulation is based. Any party may respond and seek immediate review. Requests for emergency consideration by the court will be given priority and determined rapidly.

The 1974 Puget Sound coho fishery shall be apportioned according to the principles in the Interim Plan. It is recognized that there is not sufficient time

available to adhere to the schedule of information exchange specified in the plan. Therefore, on Monday, September 30, 1974 at 9:30 a.m. Fisheries and the plaintiffs shall meet with the Master in an attempt to reach agreement on the numbers of harvestable fish to be divided.

C. **Limitation on Harvest.**

Whenever such closure or curtailment will (1) increase the opportunity of the other fishery (i.e., non-Indian or Indian, respectively) to take more of the harvestable portion of such run, and (2) not result in overescapement for such run, the Department of Fisheries will close or curtail the non-Indian fisheries on any run of salmon when the non-Indian catches reach or are expected to reach 50% of the harvestable portion of that run. That Department may likewise close or curtail Indian off-reservation commercial fisheries on said run whenever those fisheries have taken 50% of the harvestable portion of said run. The Department of Game may close or curtail the Indian off-reservation steelhead commercial fisheries or the non-Indian sport fisheries, respectively, on any river system steelhead run whenever such fisheries have taken 50% of the harvestable portion of said run. For purposes of this Paragraph the harvestable portion of the run shall be the number determined by the Department of Fisheries for salmon or the Department of Game for steelhead and supplied in accordance with Paragraph B.1. above.

D. **Identification of Indian-Caught Steelhead.**

The parties agree that it is desirable to develop mechanisms for assuring that steelhead other than those lawfully taken by Indian treaty fishermen do not enter commerce contrary to state law. The tribes and the Indian Fisheries Commission shall coordinate efforts with the Department of Game to develop a plan for meeting the objectives of preventing unlawfully caught non-Indian fish from entering commerce and providing a means for catch reporting and shall submit their joint recommendation to the Court by November 1, 1974, for the Court's

consideration and/or official tribal and Department of Game action.

E. **Catch Data.**

1. Commercial catch reports shall be made by non-state licensed Indian fish buyers on forms (fish tickets) provided by the state agencies, except for the Quinault Indian catch which may be made on tribally issued fish tickets. Indian fish buyers will submit a copy of such fish tickets daily to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service which shall communicate to the applicable state agency by a copy of the fish ticket or otherwise data concerning the total catch by species, area of catch and tribe before the close of business of the day on which such reports are received. Copies of fish tickets reporting Indian catch purchased by state-licensed fish buyers shall be made available to the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service by the state agencies within one day of the date that such reports are received.

2. For each run of fish the state agencies shall provide the Northwest Fisheries Program Office of the U.S. Fish and Wildlife Service or to the tribes summaries of the non-Indian commercial catch no less than weekly and sport catch biweekly.

F. **Determination of Tribal Treaty Status and Fishing Areas.**

The defendants shall not, with respect to any Indian tribe or group which has not specifically been determined by this court to be entitled to an interim or permanent basis to be recognized as a treaty tribe, treat any off-reservation taking of fish from stocks of the case area by such tribe or group as treaty fishing in making any allocation of fish to treaty Indians or in restricting the fishing of tribes recognized by this court as treaty tribes pursuant to the Decree and Orders in this case, without first obtaining the concurrence of the tribes involved.

2. In order to be entitled to exercise its off-reservation treaty fishing rights, any tribe allowed to

intervene in this case to assert its claim of treaty fishing rights shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty status and tribal organizations upon which the court may make a preliminary determination as to whether such tribe is to be dealt with as a treaty tribe entitled to fish at specified locations pursuant to the Interim Plan and Stay Order pending final determination of said tribe's status after a full hearing; *provided*, however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to anadromous fish, to the same extent as non-treaty right fishermen. Any court order permitting such interim fishing may impose such special conditions as it deems appropriate and shall set a schedule for presentation of evidence, briefing, and a full hearing on such issues and determination by the court. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

G. **Non-Anadromous Fish and Shellfish.**

1. In order to be entitled to exercise off-reservation treaty fishing rights to non-anadromous fish and shellfish, any tribe party to this case shall, prior to any attempt to exercise such rights, present prima facie evidence and arguments supporting its claim to treaty entitlements to such non-anadromous fish and shellfish upon which the court may make a preliminary determination as to the tribe's entitlement to such species, pending final determination of tribal treaty right entitlement to non-anadromous fish and shellfish; *provided,* however, that nothing in this paragraph shall preclude members of such tribes from fishing off-reservation in conformity with state regulations applicable to non-anadromous fish and shellfish, to the same extent as non-treaty right fishermen.

Following such preliminary determination, off-reservation fishing areas shall be opened only to the extent that tribes so established to have entitlement to non-anadromous fish and shellfish adopt and file with the court and defendants tribal regulations for the non-anadromous fishing activities of their members specifying the areas to be opened to fishing by tribal members. Any party disputing a tribe's claim of treaty entitlement or the recognition of specific usual and accustomed places shall cooperate in allowing the matter of final determination of such matters to be made promptly and as rapidly as the court calendar and the interests of justice permit.

2. The biologists of the defendants and biologists for the tribe shall meet to formulate general principles to be utilized as guidelines to be flexibly applied in the adoption of specific fishing regulations applicable to particular species of non-anadromous fish and shellfish. Such guideline principles shall be filed with the court no later than November 1, 1974.

3. The parties, or any of them, may invoke the continuing jurisdiction of this court in order to determine:

a. The procedure and/or method for adopting management principles with respect to any particular species of non-anadromous fish or shellfish;

b. The species taken at treaty times, where (usual and accustomed grounds), and by what tribes (who are entitled to exercise treaty entitlement);

c. Questions of allocation between plaintiff tribes and non-Indian fishermen of the harvestable portion of the specific species on non-anadromous fish or shellfish;

d. A timetable for the taking of evidence regarding any particular non-anadromous species or shellfish; and

e. Such other matters as the court may deem appropriate.

H. **Expiration of Interim Program**

This Order for Program to Implement Interim Plan

shall continue in full force and effect until further order of this court.

DATED this 8th day of October, 1974.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MEMORANDUM DECISION RE PRELIMINARY INJUNCTION — #1

January 20, 1975

Pursuant to oral comments at the hearing January 14, 1975, this Memorandum Decision has been prepared to further explain the Court's reasons for issuing the Preliminary Injunction entered that date. A brief explanation of this Court's views as to possible application of the Pierce County Superior Court Memorandum Decision in *Dept. of Game v. Puyallup Tribe, Inc.*, PCSC No. 158069 and dated 12/23/74, (hereinafter *Puyallup III*) to litigants in this case is contained in the filed copy of the transcript of proceedings before this Court on January 9, 1975 which is incorporated herein by this reference.

The controversy leading to issuance of the Preliminary Injunction involves the Department of Game's premature attempt to exclude all hatchery propagated steelhead from the harvestable shares available to all treaty-right fishermen. Although this Court has deferred trial of environmental issues in this case to a later time, and has abstained from ruling on the precise issue before the State Court in *Puyallup III*, the prior Decision, Judgment, Decree and other orders entered by this Court have never recognized a distinction between natural and artificially propagated anadromous fish resources in determining the scope of treaty fishing rights. The following language from pages 2 and 3 of the Declaratory

Judgment and Decree, entered February 12, 1974, is pertinent:

> "In addition and specifically for the purposes of interpreting all provisions of this decree, the following definitions shall be controlling:
>
> "1. *Anadromous fish:* Any fish which *spawns or is artificially produced* in freshwater, reaches mature size while rearing in saltwater and returns to freshwater to reproduce, and which spends any portion of its life cycle in waters within the Western District of Washington.
>
> "2. *Adequate production escapement:* In an approximate number of *anadromous fish*, that level of escapement from each fishery which will produce viable offspring in numbers to fully utilize *all natural spawning grounds and propagation facilities* reasonable and necessary for conservation of the resource, as defined in the Decision of the court.
>
> "3. *Harvestable stock:* The approximate number of *anadromous fish* which is surplus beyond adequate production escapement and Indian needs as defined in the Decision; that is, the number remaining when the adequate production escapement and Indian needs are subtracted from the run size." (Emphasis added)

Following issuance of the PCSC Memorandum Decision, which held that Indians of the Puyallup Tribe fishing at their usual and accustomed places in the Puyallup River System (including saltwater approaches thereto) did not possess a treaty right to harvest hatchery propagated steelhead, the Game Department notified the Court and counsel by letter dated 12/24/74 and received 12/26/74 that it intended to revise the numbers of steelhead harvestable by treaty Indians to exclude hatchery fish. This action was not in compliance with the following provisions of the Court's order of October 8, 1974, approving a Program for Implementing the Interim Plan:

> "1. At least sixty (60) days prior to entry of a run into the first fishery subject to state control run size predictions, *numbers of harvestable fish* set pursuant

to Paragraph 17 of the Injunction and information concerning run size, timing and condition requested by the tribes pursuant to Paragraph 18 of the Injunction and Paragraph 7 of the Interim Plan and Stay Order shall be furnished by the state agencies.

"Until such time as predictions of steelhead run size are possible, Game shall determine the harvestable portion of the run in the best manner practicable, *after consulting with the plaintiffs to receive their suggestions.* Such predictions relating to harvestable numbers of fish shall be subject to review if the tribes believe there is better information from another source. If the parties cannot agree on the best source, the court shall make a determination through the Master in consultation with its Expert advisor. All predictions of harvestable numbers shall be further subject to review during the fishing season as additional information is obtained." (Emphasis added)

Counsel for the Game Department thereafter filed with the Court on 1/2/75 a notice dated 12/31/74 entitled "Closure of Green River Treaty Indian Commercial Steelhead Fishery" which purported to order a closure of Muckleshoot Tribal fisheries on the Green or Duwamish Rivers. This action did not comply with paragraph 19 of the Court's Injunction entered March 22, 1974, which states as follows:

"19. In order to accommodate unforeseen circumstances as readily as possible, consistent with conservation necessity, defendants may utilize procedures for making emergency regulations affecting taking of fish under their jurisdiction and control; *provided* that they shall adhere in every respect to the requirements of the Washington State Administrative Procedures Act and the regulations under it, and that the approval of such emergency regulations by this court where otherwise required by Final Decision #1 and this Injunction or the consent of all affected tribes has been obtained; *provided, however,* that *emergency regulations are enforceable by the state upon filing with the court and service upon the tribes affected (or their counsel of record, if any) a copy of such regulations and a statement of facts and circumstances of the emergency on which the regulation is based.* Any such tribe may respond and seek immediate court review. Requests for emergency consideration by this court will be given priority and determined speedily." (Emphasis added)

This Court has found and held and hereby reaffirms that the actions of the Game Department did not comply with the prior Decree and orders of this Court because Game: (1) failed to consult with plaintiffs prior to recomputation of the treaty-right harvestable portion of the steelhead runs for rivers other than the Puyallup; (2) failed to enact emergency regulations consistent with the requirements of the Washington State Administrative Procedures Act; and (3) failed to file with the Court and serve upon the affected tribes or their counsel copies of a properly enacted regulation and a statement concerning the alleged emergency upon which it was based. These actions and inactions of the Game Department, and the purported enforcement efforts taken by Game Department agents in removing Muckleshoot fishing nets from the Duwamish River represent conduct not legally justified, and presented a substantial danger of immediate and irreparable injury to the Muckleshoot plaintiffs, requiring issuance of the Preliminary Injunction dated January 14, 1975, which is incorporated herein by this reference.

It should be emphasized that these unauthorized activities by the Game Department, its Director, officers and agents, occurred despite the fact that procedures exist for proper and prompt presentation of such controversies to this Court. For example, paragraph 25 of the Injunction of March 22, 1974, at pages 15 and 16 establishes the following procedure pursuant to this Court's continuing jurisdiction:

"25. The parties or any of them may invoke the continuing jurisdiction of this court in order to determine:

"a. whether or not the actions, intended or effected by any party (including the party seeking a determination) are in conformity with Final Decision #I or this injunction;

"* * *

"d. disputes concerning the subject matter of this case which the parties have been unable to resolve among themselves;

"* * *

"In order to invoke such jurisdiction, the party shall file with the clerk of this court and serve upon all other parties (through their counsel of record, if any) a 'Request for Determination' setting forth the factual nature of the request and any legal authorities and argument which may assist the court, along with a statement that unsuccessful efforts have been made by the parties to resolve the matter, whether a hearing is required, and any factors which bear on the urgency of the request. Any party shall have an opportunity to respond to, join in, or supplement the request within seven days of its service or such other time as may be directed by the court. The court may then decide the matter, hold a hearing, or refer the request to the special master to hear evidence and legal argument, as soon as is practicable. * * *"

Counsel for the Game Department and counsel for amicus curiae Northwest Steelheaders have urged that this Court give full faith and credit and apply collateral estoppel to the State Court Decision in *Puyallup III*, and thereby hold that all plaintiff tribes in the case area possess no treaty rights to harvest hatchery propagated fish. Neither the law nor the factual setting presented justifies such a result. Initially, it must be recognized that the State Court Decision in *Puyallup III* is a "memorandum decision," that Findings of Fact, Conclusions of Law and a Decree have not yet been entered, and that therefore, the State Court's determination is neither a final decision nor judgment at this time. In that case, even a final judgment by the Pierce County Superior Court must be limited to consideration of the Puyallup Indian fisheries on the Puyallup River system vis-a-vis the state hatchery program for steelhead released into that river system. In addition, all plaintiffs in this case, other than the Puyallup Tribe, were not parties to or in privity with parties to, the State Court decision. Also, it is possible that the issue before the state court and the issue to be brought

before this Court concerning the possible relationship between environmental factors and artificial propagation may not be identical. For these reasons, this Court foresees serious questions as to whether the full faith and credit and collateral estoppel doctrines, even if properly applicable, would in any way affect the jurisdiction of this Court, except as to the Puyallup Tribe and the Game Department solely with respect to hatchery propagated steelhead in the Puyallup River system. See *Bernhard v. Bank of American Nat'l. Trust & Sav. Ass'n.*, 19 Cal.2d 807, 122 P.2d 892 (1942); *Henderson v. Bardahl Int'l. Corp.*, 72 Wn.2d 109, 431 P.2d 961 (1967).

However, this Court expresses no views as to the merits of the State Court decision at this time, having expressly abstained and reserved ruling on the matters before that Court, but recognizes that interpretation of federal treaty provisions is a federal question which can only be finally determined by the federal courts. Nevertheless, the Preliminary Injunction issued January 14, 1975 expressly excluded from its coverage any action taken by the Department of Game, its Director, officers and agents "necessary to comply with the judgment or orders of the State Courts with reference to fishing by or under the authority of the Puyallup Tribe and its members that may be issued in the case of *Department of Game v. Puyallup Tribe, Inc.* # 158069, Superior Court of the State of Washington in and for Pierce County * * * ."

For the reasons above set forth, this Court entered its Peliminary Injunction on January 14, 1975. By agreement of counsel, the motions of plaintiffs to include the State of Washington and Department of Fisheries within the coverage of that Injunction shall remain under advisement by the Court until such time as the motion may be noted for hearing.

IT IS SO ORDERED this 20th day of January, 1975.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION 1975 CHUM FISHING

October 27, 1975

THIS MATTER having come on regularly for hearing pursuant to plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, and the Court having considered the pleadings, the evidence presented, and the argument of counsel, the Court makes the following Findings of Fact:

(1) The statistical data presented establish that the Indian treaty fishermen have taken significantly fewer coho than the non-treaty fishermen.

(2) The evidence clearly supports the fact that non-treaty fishermen engaged in a substantial fishery on the 1975 coho salmon run in direct violation of regulations issued by the State of Washington and orders of this Court.

(3) Due to unexpected circumstances including unauthorized fishing by non-treaty fishermen and problems of enforcement notwithstanding bona fide efforts by the Director of Fisheries, the Indian treaty fishermen have been significantly hampered in their ability and opportunity to harvest their share of fish to a substantial and significant extent.

The Court makes the following Conclusions of Law:

(1) Due to unforeseeable circumstances resulting in Indian treaty fishermen being denied their opportunity to harvest up to 50% of the salmon returning to their usual and accustomed grounds and stations. An equitable adjustment in the 1975 Chum fishery is necessary and appropriate.

(2) Indian treaty fishermen will suffer irreparable harm if further non-treaty fishing is permitted in Puget Sound Area outside the northern portion of Puget Sound Fishing Area No. 1.

3. No security is required inasmuch as this Injunction is granted on the motion of the United States Rule 65 F.R.C.P.

THEREFORE, IT IS HEREBY ORDERED that the State of Washington, its Director of Fisheries, their agents, officers, employees, and all persons acting pursuant to their authority are enjoined and restrained from promulgating or enforcing any regulation or otherwise authorizing any non-treaty commercial salmon fishing in any portions of the Strait of Juan de Fuca, Puget Sound, and any waters connected therewith, easterly of a line from Bonilla Point to Tatoosh except that portion of Puget Sound Salmon Fishing Area I lying northeasterly of a line projected from Partridge Point Light to Smith Island Light and northerly of a line from Smith Island Light to traffic separator buoy BW "R" to Trial Island Light until it first obtains the concurrence of the affected treaty tribes or the prior approval of this Court, or until treaty fishermen have taken 60,000 chum salmon, said amount to be determined in the first instance by the Fisheries Advisory Board. Thereafter, the defendants may authorize a joint treaty and non-treaty fishery.

Said defendants are further ordered to rescind any regulation already in effect which opens to non-Indian commercial salmon fishing during the remainder of 1975 any areas as described herein above.

The previously announced experimental purse seine fishery by permit only for surplus hatchery male chum salmon in Hood Canal up to a limit of 7,500 fish is exempt from the provisions of this Injunction.

DATED this 27th day of October, 1975.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER ESTABLISHING FISHERIES ADVISORY BOARD

October 28, 1975

In order to promote the goals established in Final Decision #I — increased communication between the parties (384 F.Supp. 312 at 329-330), consultation before tribal or state regulations affecting treaty fishing are adopted (384 F.Supp. at 341, 420) — and to establish a more orderly procedure for making day-to-day management decisions, thereby reducing the need for adversary proceedings,

IT IS HEREBY ORDERED THAT

1.) There shall be and is established a Fisheries Advisory Board composed of the following:

a.) One member selected by the State of Washington. Unless the State provides otherwise, the State representative shall be the Director of Fisheries (or his alternate) in those situations where the matter under consideration primarily concerns species or areas under the jurisdiction of the Department of Fisheries, and the Director of Game (or his alternate) when the matter under consideration primarily concerns species or areas under the jurisdiction of the Department of Game.

b.) One member selected by the plaintiff Indian tribes or by an organization representing such tribes. Unless the tribes provide otherwise, the Indian representative shall be the Executive Director of the Northwest Indian Fish Commission (or his alternate).

c.) A non-voting member appointed by the Court who shall Chair the Board. The Court hereby appoints Dr. Richard Whitney, the Court's technical advisor in this matter, as the non-voting Chairman. If Dr. Whitney is unable to serve during any period that the undersigned Judge is unavailable to designate an alternate, the Master is hereby authorized to designate such an alternate.

2.) The Board shall consider any matter regarding the fishing resource that is submitted to it by the Court or by any of the parties. The Board shall advise the Court on technical aspects of the case and make recommendations on questions of management and regulation of the resource. The Board shall be vested with such other powers and authority as agreed by the members and delegated to it by the Court.

3.) The Chairman shall convene the Board on his own motion or at the request of any party or of the Court. The Chairman shall give to the public, the parties to this case and to members of the Board such notice as is praticable taking into account the urgency of the matter to be considered. Meetings shall be open to attendance by any person or group. Only board members as indicated in Paragraph 1 above shall be formal participants; however, the Board shall establish procedures for receiving input from other interested individuals and groups.

4.) The Board shall prepare a written report of its proceedings after each meeting which shall be filed with the Court and served on all parties and amici. Such reports shall include a summary of topics discussed, conclusions and recommendations agreed to by the members, and, in the case of questions which the Board has been unable to resolve, a statement of the various positions put forth and any recommendations or solutions proposed.

5.) Nothing contained herein shall affect the right of any party to judicial determination of any matter within the Court's continuing jurisdiction, as specified in previous orders of the Court, provided that the matter has first been submitted to the board for consideration and an aggrieved party seeks review of the Board's determination or the Board has been unable to reach agreement; provided further, that if the matter for determination is of such an emergency nature that delay would threaten serious harm to the resource, then submission to the Board shall not be required prior to submission to the Court.

6.) The Board shall establish such other and further

procedures for its deliberations as it deems advisable and shall include a description of such procedures in its reports to the Court and parties.

DATED this 28th day of October, 1975.

/s/ _____
GEORGE H. BOLDT
Senior United State District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER RE SAMISH, SNOHOMISH, STEILACOOM, DUWAMISH AND SNOQUALMIE TRIBES' TREATY STATUS

March 19, 1976.

The Court has fully reviewed the hearing transcripts, exhibits, affidavits and memoranda of counsel and concludes therefrom that upon the showing thus far made, it would be difficult, if not impossible, to render a sound and well reasoned decision as to any of the five petitioning tribes. The decision as to each tribe will be limited solely to treaty status for the exercise of fishing rights but in the opinion of the Court this requires further submission of the factual data stated below.

No one has contested the applicability of the standards for treaty entitlement stated in the Ninth Circuit Court of Appeals, as follows:

> "Whether a group of citizens of Indian ancestry is *descended from a treaty signatory* and has *maintained an organized tribal structure*, is a factual questions which a district court is competent to determine." (Emphasis added) 520 F.2d at 693.

Apparently counsel for the tribes have submitted all information available to them pertaining to "organized tribal structure." However, if any party desires to present further evidence on that subject, such party may apply therefor, in writing, promptly after receipt of this Order.

Under the Circuit Court mandate, every group of persons of Indian blood must establish their descent from

a treaty signatory. While counsel for each of the five tribes has submitted current or dated tribal membership lists, only the Samish list contains information concerning blood quantum as to individual persons on the Samish tribal roll. A showing of individual tribal descendency from a treaty signatory is necessary. Although the Court is reluctant to require the submission of individual Indian blood quantum information, there have been serious disputes among the parties concerning the validity of certain persons being named as enrolled tribal members. Also, counsel have argued that waiver or abrogation of treaty rights by individual Indians is an issue in these proceedings and the Court believes that blood quantum information, among other factors, may have some relevancy.

Accordingly, counsel for each of the five tribes shall serve and file on or before Tuesday, June 1, 1976, the following information: A current list of the complete names and addresses of all persons listed as tribal members; the cities, states or other geographical locations where each person listed has established residence during his or her lifetime; and identification of the specific tribal blood quanta by fraction, of each person enrolled by each tribe. For example, a Steilacoom enrolled member may have one-quarter Steilacoom, one-eighth Puyallup and one-eighth Nisqually blood.

On or before Tuesday, June 1, 1976, counsel for each tribe shall submit the above specified data, in writing, serving and filing copies thereof upon the counsel of record in these proceedings. Counsel for any party may serve and file a memorandum, responsive to the above specified information reported by any tribe on or before Monday, June 14, 1976 and reply memoranda shall be served and filed on or before Monday, June 28, 1976.

IT IS SO ORDERED this 19th day of March, 1976.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER ON CERTAIN QUESTIONS RE: FISHERIES MANAGEMENT

April 14, 1976.

The Court's Fisheries Technical Advisor has propounded certain questions which he believes require resolution by the parties or the Court in connection with the further implementation of this Court's prior orders, and he has actively sought consultations with and recommendations concerning these questions from all of the parties. He has held consultations with such representatives as sought to participate and has considered all views submitted orally or in writing by any party hereto. Thereafter, the Court held hearings at which the Technical Advisor's report and recommendations together with all written memoranda and oral argument of the parties were considered. The Court having considered all of the foregoing and recognizing the need for an interim tentative determination of the issues presented to apply to the development of a management program for the coming year hereby Orders and Decrees as Follows:

In the preparation and implementation of a salmon fisheries management program for the case area for the year 1976 to continue the progressive implementation of the Orders and Decrees of this Court in this case, and particularly the Order of October 8, 1974, for a Program to Implement the Interim Plan, as extended by the Minute Order of April 5, 1976, the principles and guidelines set out below as answers to the questions shall apply. These answers are intended to implement the prior Orders of this Court and nothing herein is to be applied so as to change any provisions of Final Decision No. 1 or other prior Rulings or Orders of the Court as affirmed by the Court of Appeals. The Court hereby reaffirms its intention, as previously expressed, that these principles and guidelines are to be applied so as to progressively advance toward the

full and early realization of the opportunity for treaty fishermen to take their treaty-secured entitlement as set forth in Final Decision No. 1. The questions and responses are as follows:

1. Are fish of Canadian origin to be counted in the same set of books as those of United States origin? and
4. Are shares to be calculated on a stream-by-stream basis, or a regional basis, or for the case area?

Response: The shares which treaty and nontreaty fishermen are to be accorded the opportunity to harvest shall be calculated on a river-system by river-system basis wherever practical. This shall be based upon the system of origin and shall apply regardless of where the fishery occurs. Further clarification is presented in the responses below. In some cases, for more effective management or because data for stock separation do not exist, the sharing must be on a regional basis.

Shares will be calculated on a regional basis for South Puget Sound and Hood Canal, and on a river-system by river-system basis for the remainder of Puget Sound and the Washington coast (including the following combinations: Nooksack-Samish, Stillaguamish-Snohomish).

Canadian stocks passing through usual and accustomed fishing areas will be considered as a separate "river system" as will each other major salmon stock originating outside the case area.

All parties shall manage the salmon runs so as to insure that salmon in sufficient numbers return to each region or each river system or each combination as described above to allow treaty fishermen a fair opportunity to harvest their shares.

Nothing contained herein shall limit the Court's authority to make equitable adjustments to the full extent provided for in Final Decision No. 1 and the Injunction of March 22, 1974.

2. Are shares to be calculated separately for chum salmon stocks that differ in the timing of their runs?

Response: No — not for stocks within the same region or river system or combination described above — but they shall be managed separately.

3. What is an appropriate on-reservation share?

Response: This will be negotiated on a reservation-by-reservation basis between the state and each respective treaty tribe. Each tribe may initially inform the state what the tribe believes will be its fair and reasonable on-reservation catch and how the amount was calculated. If the state does not agree with the amount or the method of arriving at the estimate of the amount, the state may request supporting data from the tribe to be used in carrying forward the negotiations. The tribal estimate shall govern unless it is shown to be significantly inaccurate.

5. Are fish caught by foreign fishermen within United States contiguous waters to be counted in the non-Indian share?

Response: No. For the present, such fish shall not be counted in the non-Indian or treaty Indian share.

6. Do fish caught outside of three miles (i.e., outside State territorial waters) count in the shares?

Response: Such fish originating in the case area which are harvested by

(a) Washington fishermen outside of the territorial limits of the State of Washington, and

(b) other United States fishermen and landed in the State of Washington shall be included in the total number from which shares will be determined.

The Court reserves its exercise of equitable discretion to determine the number of fish harvested by the above classes of fishermen that will be included in the allocation until presented with evidence upon which to base the extent of such discretion. See also answers to questions 7 and 8.

7. Are juvenile fish caught in the sport fishery to be considered equally with mature fish taken by commercial and Indian fisheries?

8. Are fish in the offshore troll fishery to be considered equally with mature fish taken on their way to the streams?

Response: For purposes of determining the appropriate off-reservation allocation, all runs will initially be computed as those harvestable numbers of salmon that would return to treaty fishing areas in the absence of nontreaty fishing as clarified under No. 6. The reservation, ceremonial and subsistence catch adjustment (see question 3) will then be subtracted before equal catch shares are computed. Each projected run size will be a net result of accounting for natural mortalities, additional Canadian interceptions, and direct fishery-related wastage, such as hooking mortality and net "drop-out" which are not reflected in actual landings. The first two factors would take place in the absence of nontreaty fishing and reduce projected run sizes, while the third factor has an opposite effect.

These factors shall be used in recomputing the actual harvest in a sport fishery, a fishery on juveniles, or a troll fishery, whether the harvest is made by a treaty fisherman or a nontreaty fisherman.

9. How do we determine whether one party or the other is unable to harvest its 50%?

Response: There is little doubt that nontreaty fisheries can harvest greater than their 50% of any case area salmon stock, and the issue has been over the fishing power of treaty fisheries.

Treaty tribes should submit to the State, along with their proposed regulations, documentation of their expected fishing power for upcoming fisheries. the documentation should include descriptions of fishing gear, estimates of the number of units of each type of gear, the times and places the gear will be fished, and a statement of the tribe's anticipated harvest level or intent to take their full share.

If the State disagrees with the tribe's estimate of fishing power, the State must show that the tribal effort will not be sufficient with a critical evaluation based on

some factual information. The evaluation must be based on projected estimates of increased effort and/or estimates of effectiveness of any new techniques planned by the tribe.

If in the future it is a nontreaty fishery that has questionable fishing power, the responsibilities outlined above will be reversed.

10. (a) If the State negotiates with Indians to take surplus fish at the hatcheries, will the fish be counted as part of the 50%?

Response: All agreements should be negotiated on a tribe-by-tribe basis. Hatchery surplus fish used for ceremonial, subsistence or charitable purposes shall not count in the Indian share. The number of fish taken at the hatcheries for commercial use shall be subject to a reduction on an equitable basis to reflect the reduced value of those fish. The nature and extent of such reduction shall be negotiated by each tribe.

(b) Will fish sold on bid to non-Indians or donated to institutions for the needy count in the non-Indian share?

Response: No. The surplus fish are taken by the State government and used for charitable purposes and the funds derived from the disposal of the fish are used for State governmental purposes. Thus the fish shall not count in the non-Indian share.

11. What is the definition of a test fishery?

Response: A test fishery is a fishery allowed on a limited basis for the purpose of acquiring technical or management information including run strength, timing, composition, gear selectivity, exploitation rate, and enhancement possibilities. Any fish taken in test fisheries are not to be sold for personal profit.

Procedural guidelines governing test fisheries shall be estimated in the Jurisdictional Guidelines which will be a part of the Joint Management Plan to be finalized April 16, 1976.

12. Is there a time schedule within which the Court is willing to allow the Department of Fisheries to operate in moving toward providing the full 50% harvest opportunity for Indians?

Response: The Washington Department of Fisheries indicates that it can fully provide treaty Indian fishing opportunities in 1976 and subsequent years for all usual and accustomed areas of tribes in the case area for coho, chum, sockeye, and pink salmon stocks. Full fishing opportunities can be provided for Coastal, Northern Puget Sound, and Canadian chinook salmon stocks but precise catch sharing for inner Puget Sound chinook runs may not be attained immediately. This latter situation is complicated by offset harvest by treaty and nontreaty fishermen, expended artificial production that has not been stabilized, and an emergent treaty fishery on blackmouth. Restrictions of the nontreaty recreational fishery beginning in 1976 will, however, hasten the process of equitable catch division.

The parties having not yet fully considered the application of the foregoing principles and guidelines to the steelhead fisheries, they shall presently be applicable only to the 1976 salmon fisheries management.

This order shall be effective until March 1, 1977, or until otherwise ordered by the Court.

IT IS SO ORDERED this 13th day of April, 1976.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

TEMPORARY RESTRAINING ORDER

July 31, 1976

This matter having come on for hearing before me this day upon motion of the plaintiff-intervenor Makah, Lummi and Quileute Tribes, supported by other intervenor tribes having rights in waters subject to the

provisions of the Convention between the United States and Canada of 1930 establishing the International Pacific Salmon Fisheries Commission, supported by affidavits and exhibits, the Court having adduced testimony and being satisfied that unless restrained, the actions of the respondents State of Washington and the United States will cause said plaintiff-intervenors irreparable harm, now therefor

IT IS HEREBY ORDERED that the United States of America, its officers, employees and agents and the State of Washington, Department of Fisheries and its officers, employees and agents are and they are hereby restrained from implementing or enforcing the 1976 regulations of the International Pacific Salmon Fisheries Commission so as to deny any of said tribes the right to fish during any times when fishing is permitted by said regulations in Convention waters, including the troll fishery west of the Bonilla Point-Tatoosh line, provided however that said petitioner-intervenor tribes shall be restricted to fishing no more than five days per week, at least two of which shall be days permitted by the International Salmon Fisheries Commission in areas east of the Bonilla Point-Tatoosh line. The specific days that Indian fisheries shall be as established by regulation of the tribes authorized to fish hereunder, which tribes shall however consult with Dr. Richard Whitney, the Washington State Department of Fisheries and the National Marine Fisheries Service in order to insure that such fishing is consistent with conservation requirements; and provided that tribal fishing shall commence no sooner than 7:00 p.m. Monday, August 2, 1976. This Temporary Restraining Order shall remain in effect until further order of this Court and upon determination of plaintiffs' motion for preliminary injunction which shall be heard at 9:30 a.m., August 10, 1976.

DATED this 31st day of July, 1976.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MINUTE ORDER MODIFYING TEMPORARY RESTRAINING ORDER

August 5, 1976

This matter having come on for hearing on the motion of the United States for interpretation and dissolution of the Temporary Restraining Order herein, dated July 31, 1976, the Court having heard the matter by telephone conference call this date, and the parties appearing as follows:

United States by Assistant United States Attorney James Waldo

State of Washington by Assistant Attorney General James Johnson

NOAA appearing by Attorney Edward Evans

The Makah and Lummi Tribes by Attorney Alvin J. Ziontz

The Lower Elwha, Port Gamble, Suquamish and Nooksack Tribes by Attorney Alan Stay,

Dr. Richard R. Whitney having participated in the conference call as Court Advisor, and the Court after hearing arguments, the Court enters the following Order:

I. The Temporary Restraining Order of July 31, 1976 herein is modified to provide that Tribal Fishermen exercising treaty rights in convention waters of the IPSFC shall be entitled to fish for a period of three days per week, subject to the following conditions:

(A) Such three days shall be a continuous period;

(B) Such three days fishery shall be completely available at such times and places and in such manner as is practical and feasible for said Treaty Fishermen;

(C) Such fishery shall NOT be subject to action which conflicts with these conditions or constitutes harassment of said treaty fishing;

(D) In the event IPSFC changes its present regulations concerning permitted fishing days in waters East of the Bonilla Point-Tatoosh line, Indian Fishermen shall be entitled to fish one day over and above days permitted to Non-Indian Fishermen;

(E) It is the intention of the foregoing conditions to provide Indian Fishermen with the right to continue their fishery uninterrupted from the opening time set by the Commission for net Fisheries to the closing time prescribed for net fisheries provided that this is not construed so as to conflict with any of the foregoing provisions.

II. As modified this Temporary Restraining Order shall remain in effect until the hearing on the Preliminary Injunction or until further Order of this Court. Said hearing shall be on August 18, 1976 at 9:30 A.M.

The plaintiff tribes shall have until August 12, 1976 in which to serve and file any memoranda, briefs or other submissions in support of their motion. Responding parties shall respond on or before August 17, 1976.

III. Treaty fishing shall continue from 3:00 P.M., August 5, 1976 through 9:30 A.M. August 6, 1976.

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The foregoing Minute Order Modifying the Temporary Restraining Order entered on this 5th day of August, 1976 by Rosemary Freeny, Deputy Clerk in Charge, Tacoma Office of the Clerk by direction of the Court, The Honorable George H. Boldt, Senior United States District Judge.

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U.S. v. WASHINGTON

District Court: No. 9213

MINUTE ORDER

August 19, 1976

Now on this 19th day of August, 1976, the Court directs the Clerk to enter the following Minute Order:

In a telephone conference with counsel of approximately forty-five minutes in length, the question of whether paragraph I(D) of the Minute Order entered August 5, 1976 should be interpreted as requiring a one day fishery for treaty fishermen during the present total closure of American sockeye fishing. Upon conclusion of the presentation of all counsel, the Court orally announced to counsel the rulings of the Court which are confirmed by this Minute Order:

1. National interests, in the opinion of the Court, require that in the present situation Indian fishery should not be approved by the Court when all American fishing is prohibited.

2. As promptly as possible, counsel shall attempt to agree upon a method of providing the treaty fishermen with an equitable adjustment for their lost opportunities to catch fish; and

3. If sockeye fishery by Americans be opened at any time hereafter, treaty fishermen shall have the opportunity to take fish in accordance with paragraph I(D) of the Minute Order entered August 5, 1976.

IT IS SO ORDERED THIS 19TH DAY OF AUGUST, 1976, 12:30 P.M. PACIFIC DAYLIGHT IME.

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The foregoing Minute Order entered by Rosemary Freeny, Deputy Clerk in Charge, Tacoma Office of the Clerk by Direction of the Court, The Honorable George H. Boldt, Senior United States District Judge.

U.S. v. WASHINGTON

District Court: No. 9213

AGREED ORDER

August 25, 1976

This matter having come on for hearing on the Court's motion sua sponte to consider the question of

mootness of the Motion for Preliminary Injunction re 1976 Fraser River sockeye, and the court having heard evidence and considered the argument of counsel does hereby determine and ORDER that:

1. The Motion for Preliminary Injunction is moot as it pertains to the 1976 sockeye season and these proceedings are therefore terminated as to that matter.

2. The evidence further establishes that the Indian Tribes having rights in the International Sockeye Fishery are entitled to an equitable adjustment as a result of the failure of the 1976 I.P.S.F.C. regulations to provide them with a proper opportunity to take their share of sockeye in 1976.

3. The parties are directed to meet as promptly as possible so that the tribes referred to in paragraph 2 above can present the Washington Department of Fisheries their proposal for equitable adjustment.

4. The Washington Department of Fisheries and the U.S. Fish and Wildlife Service shall cooperate fully in providing all reasonably available data requested by the tribal representatives in connection with the proposed equitable adjustment program.

This matter will come on for hearing September 3, 1976 at 9:30 a.m.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ORDER RE: 1976 COHO FISHERY

September 6, 1976

This matter came on for hearing before the court on September 3, 1976 pursuant to plaintiffs' motion for a Preliminary Injunction against opening the non-treaty coho fishery in Puget Sound until the treaty fishermen

have harvested a specific number of coho. The court having held a hearing thereon, considered the affidavits, testimony and other evidence offered, the recommendations and views expressed in open court by the court's Fisheries Technical Advisor, Dr. Whitney, and the written and oral arguments of counsel, now FINDS, HOLDS AND ORDERS as follows:

The Court FINDS AND HOLDS:

1. After allowing for a spawning escapement number that is not in dispute, the estimated numbers of harvestable Puget Sound origin coho salmon returning to Puget Sound Fishing areas in 1976 is 702,750 fish. Both plaintiffs and defendants agree on this figure. The numbers returning to specific areas of the Puget Sound basin as calculated by the defendants are as follows:

Strait tributaries	29,130
Nooksack-Samish	95,815
Skagit	14,380
Snohomish-Stillaguamish	81,580
Southern Puget Sound	403,815
Hood Canal	79,030
	702,750

Plaintiffs do not dispute these numbers.

2. The returning run size estimate set out in Finding No. 1 above, while the best available at this time, is only a pre-season prediction based upon pre-return indicators. It is subject to later adjustment as the runs actually pass through Puget Sound waters. On several past occasions such pre-season predictions have been found to be high and it has been necessary to invoke mid-season restrictions on those fisheries which occur in Puget Sound or tributary rivers.

3. Prior interceptions of 1976 Puget Sound origin coho salmon by non-treaty fishermen authorized by the laws and regulations of the defendant State of Washington, together with anticipated future sport harvest from such runs under existing State laws and regulations, have been calculated by the Department of Fisheries to total 405,200 fish. The majority of this figure represents fish that have already been

taken. The plaintiffs do not dispute this figure in this proceeding.

4. The treaty Indian fishing areas are primarily in those areas which the fish do not reach until after they have passed through areas of substantial non-treaty fisheries that operate under State of Washington authorization and control. Thus the principal treaty Indian fishery comes second, chronologically, to a substantial non-treaty fishery which has already operated under State control.

5. The heavy non-treaty fisheries which have occurred prior to the return of the coho run to inner Puget Sound harvest the majority of the total non-treaty share, resulting in the majority of the allowable inner sound fisheries being treaty Indian fisheries to allow treaty Indians an opportunity to harvest their share. In these circumstances the treaty fisheries assume a disproportionate share of the risk of over-estimates of run size and resultant early restriction of their fisheries.

6. Though there is a dispute as to some of the on-reservation adjustments which has not been resolved in accordance with the orders of this court the treaty tribes are entitled to the majority of the 1976 coho run returning to Puget Sound because of the above interceptions by non-treaty fishermen.

7. Defendant Fisheries have proposed to open a non-treaty commercial net fishery on Puget Sound origin coho on September 12, 1976. Treaty fisheries are presently scheduled to commence September 5, 1976.

8. According to defendants' and plaintiffs' computations most of the non-treaty share has already been taken or will be in fisheries already authorized (26% vs 19% still remaining). Only an insignificant amount of the treaty share has been taken to date.

9. The non-treaty fleet is many times larger than the total Indian fleet and in any particular area it would be extremely difficult for treaty fishermen to take their entitlement of coho in competition with the non-treaty fleet. The rate of catch for treaty fishermen is substantially higher therefore when they are able to fish during a period when they are not subjected to such competition. Therefore, treaty

fisheries must be afforded some additional time in which they can harvest coho without fishing in competition with non-treaty fishermen.

The regulations proposed by the Department of Fisheries would not insure adequate limitation on the non-treaty fisheries to allow to treaty fishermen an opportunity to harvest their entitlement.

10. Any illegal non-Indian fishery which occurs in violation of the orders of this court and in violation of the orders of defendant Fisheries pursuant to the decision and orders of this court will further impair the treaty right as defined by this court.

11. Although the loss to treaty fishermen caused by continued illegal non-treaty fishery is difficult to quantify.

Given the magnitude of the non-treaty fleet, and the adverse effects caused by its illegal fishing both in actual harvest and direct interference with the ability of treaty fishermen to harvest, it is reasonable to provide that a reduction of the total non-treaty entitlement shall be by an additional 20,000 fish, over and above the actual non-treaty harvest for each day of substantial and reasonably verifiable non-treaty illegal fishing.

12. The only way to allow the Makah Tribe some additional opportunity to participate in the harvest of the 1976 coho runs is to allow that tribe to fish for coho in Puget Sound in waters outside their usual and accustomed grounds and stations as defined by this court. Tribes with usual and accustomed grounds and stations in Puget Sound have expressed a willingness to allow the Makah Tribe to fish with them in those waters.

Upon the above stated Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. To Provide to all tribes a fair opportunity to harvest their treaty entitlement of coho salmon in 1976, except as provided in paragraph 2 below, the Defendant State of Washington and all instrumentalities thereof, including but not limited to its courts, Defendant Donald W. Moos, Washington Director of Fisheries, and the

officers, agents, employees of any of them are enjoined from authorizing, permitting or ordering any non-treaty commercial fishing in any waters of the State of Washington inside of the Tatoosh Island-Bonilla Point Line (Washington Department of Fisheries Salmon Fishing Areas 4B through 13B, inclusive) prior to 6:00 a.m. Monday, September 20, 1976.

2. Nothing in this Order shall prohibit the Defendants from authorizing a non-treaty fishery in salmon fisheries areas 7 or 7A.

3. It is further ordered that to compensate for losses sustained by treaty fishermen due to the continued illegal fishing by non-treaty fishermen which may occur in the 1976 coho season, the total non-treaty entitlement shall be reduced by an additional 20,000 fish over and above the actual non-treaty harvest for each day of substantial and reasonably verifiable non-treaty fishing in violation of Washington Department of Fisheries closures.

The Fisheries Advisory Board shall closely monitor the 1976 fishery and report thereon to the Court each day as to illegal reasonably verified non-treaty fishing.

4. The proposal for the Makah Tribe to fish in Puget Sound pursuant to the invitation or approval of the tribes having usual and accustomed grounds and stations there is hereby approved.

5. Defendants are ordered, in compliance with earlier orders of this court to negotiate with the tribes when agreement on the number of fish taken on reservation has not been reached. Any disagreements shall be resolved by the Fisheries Advisory Board,

6. The Fisheries Advisory Board is directed to consider, make findings and determine any additional matters associated with the 1976 Puget Sound coho fishery.

IT IS HEREBY SO ORDERED this 6th day of September, 1976.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MASTER'S REPORT RE: LUMMI SPRING CHINOOK FISHERY (1977)

May 17, 1977

Pursuant to the Minute Order Re: Temporary Restraining Order Re: Lummi Spring Chinook Fishery entered on 2 May 1977, Magistrate Cooper, acting as Master, held a hearing on 9 May 1977, for the purpose of determining all fact issues pertaining to the motion to enjoin that fishery. The Master considered affidavits submitted, testimony, exhibits and argument at that full hearing. A transcript of the proceedings by an official court reporter will be on file with the clerk of the United States District Court.

Based upon an examination of the pleadings, affidavits, evidence, exhibits, and testimony of the witnesses and the arguments of counsel and based upon a preponderance of the evidence creditable and inferences reasonably drawn therefrom, the Master makes the following Findings of Fact and recommended Conclusions of Law.

FINDINGS OF FACT

I.

The evidence shows a significant danger to the 1977 spring chinook run in the Nooksack River if any further fishery is allowed including that treaty Indian fishery occurring on the Lummi Reservation.

II.

Notwithstanding the experience of the witness for the Lummi Tribe, the balance of expert opinion including the testimony of Fisheries expert Phinney and the recommendation of the court's expert advisor, Doctor Whitney, indicated need for a total closure of the spring chinook fishery to continue on the Nooksack River.

III.

Nooksack River spring chinook runs of the brood cycle 1977 have shown a continued decline similar to that of other Washington and British Columbia chinook runs. The catch from that brood year in the river has shown the following decline:

Year	Catch
1957	2,281
1961	1,868
1965	1,250
1969	1,150
1973	771

IV.

Information indicating the need for such a conservation closure has been communicated to the Lummi Tribe on at least the following occasions:

(A) March 16, 1977, in accordance with the court's orders, the report "1977 Status of Spring Chinook of Puget Sound and Recommendations for Management" were distributed to the Lummi Tribe recommending protection for the Nooksack spring chinook run.

(B) April 8, 1977, a notice was sent to the Lummi Tribe notifying of the need for complete protection of spring chinook in the Nooksack River.

V.

Meetings of the Fishery Advisory Board conducted to discuss the need for conservation closure of the Nooksack River spring chinook fishery were held three times, on April 18, April 20, and April 25. Subsequent to those meetings, a report of the meetings was submitted by Doctor Whitney (Master's Exhibit 1 in these proceedings) in which Doctor Whitney concluded by recommending closure.

VI.

The expert testimony indicates that in order to protect the 1977 spring chinook run, such a closure should last until 30 June 1977.

VII.

Unless ordered by the court, the Lummi Tribe will not close its fishery.

Fron the foregoing Findings of Fact, the Master recommends the following:

CONCLUSIONS OF LAW

I.

The court has jurisdiction to enact and enforce an emergency closure upon reservation treaty fishing where clearly necessary to protect a run and where the tribe refuses to do so.

II.

The Department of Fisheries has complied with the orders of the court and procedures set up in asking the court to order this emergency closure.

III.

A clear conservation need for a closure on the Nooksack River to the taking of spring chinook until 30 June 1977 has been demonstrated.

IV.

Irreparable injury, loss and damage may result to the spring chinook run in the Nooksack River if the Lummi Tribe is allowed to continue to harvest fish from that run because all spring chinook salmon present are necessary for spawning escapement to perpetuate that run.

THEREFORE I recommend that an order enjoining fishing by the Lummi Tribe and its members in the Nooksack River for spring chinook be continued in effect until further order of the court or until 30 June 1977.

DATED this 17th day of May, 1977.

/s/ _____

ROBERT E. COOPER

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION RE: LUMMI SPRING CHINOOK FISHERY (1977) AND LUMMI STEELHEAD FISHERY (1977)

May 18, 1977

The court having reviewed the reports of Special Master Robert E. Cooper concerning Lummi Spring Chinook Fishery (1977) and Closure of Lummi Steelhead Fishery (1977) and having been informed that no counsel for any interested party seeks a review by this court of said reports, the court hereby approves and adopts said reports of the Special Master, including the Master's Findings of Fact and Conclusions of Law.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That the Lummi Tribe and its members, agents and any persons acting in concert with them are hereby enjoined from fishing for chinook salmon in the Nooksack River and are hereby enjoined from fishing in adjoining marine waters for chinook salmon whether within or without the exterior boundaries of the reservation until further order of the court or until June 30, 1977.

(2) That the Lummi Tribe and its members, agents and any persons acting in concert with them are hereby enjoined from fishing for steelhead trout in the Nooksack River and are hereby enjoined from fishing in adjoining marine waters for steelhead trout whether within or without the exterior boundaries of the reservation until further order of the court.

IT IS SO ORDERED this 18th day of May, 1977.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MOTION FOR TEMPORARY RESTRAINING ORDER AND PERMANENT INJUNCTION

July 18, 1977

Comes now the Muckleshoot Indian Tribe pursuant to paragraphs 19 and 25 of this Court's Injunction of March 22, 1974, and requests that the Court enter the following Temporary and Permanent Injunctive Relief:

1. Order the State to lift its emergency regulation closing Lake Washington to treaty fishing (number 77-42) dated June 1, 1977, a copy of which is attached hereto, and

2. Issue a Temporary Restraining Order enjoining the State from enforcing any State statutes which affects treaty fishing without first complying with the procedures established by the court, e.g. a formal determination by the court or agreement by the parties that said statute or regulation is reasonable and necessary for conservation and especially enjoin the utilization of RCW 75.12.010, or any regulation promulgated thereunder to affect treaty fishing, and

3. Issue a Permanent Injunction enjoining the State from utilizing any statute or regulation that has not been determined by the court pursuant to the procedures prescribed by *United States v. Washington*, to be reasonable and necessary for conservation, and

4. Issue a Permanent Injunction ordering the State subsequent to the imposition of an emergency conservation closure enacted pursuant to paragraph 19 of this court's March 22, 1974, Injunction as modified by the Procedures for the Court Advisory Board dated December 12, 1976 to rescind said emergency closure at the earliest possible time when the purpose and cause for such closure has ended but in no event shall such emergency closure remain in effect for longer than thirty days without a new justification, and

5. Enter an order that the failure of any State agent, employee, or attorney to comply with this order shall subject same to contempt of court, and

6. Award reasonable attorney fee to Plaintiff counsel, and

7. For such other and further relief as the Court deems just and equitable.

This motion is based upon the records and files contained herein, and the memorandum and affidavits attached hereto.

DATED this 18th day of July 1977.

/s/ _____
ALAN C. STAY, Attorney for
the Muckleshoot Indian Tribe

U.S. v. WASHINGTON

District Court: No. 9213

TEMPORARY RESTRAINING ORDER

July 21, 1977

THIS MATTER having come on regularly for hearing pursuant to plaintiffs motion for a temporary restraining order and preliminary injunction, and the Court having considered the pleadings, affidavits, and arguments of counsel.

AND IT APPEARING TO THIS COURT, that:

1. On or about June 1, 1977, the Washington Director of Fisheries adopted and filed with this Court an emergency regulation, Director's Order No. 77-42, closing Indian Treaty Puget Sound Salmon Management and Catch Reporting Areas 10B, 10C and 10D to commercial salmon fishing by treaty indians for the reason that the February forecasts of 1977 sockeye run size indicated the need for "complete protection" because the run would be below spawning escapement needs. At that time the Director represented to the

tribes and this Court that if later data, to be compiled after the run started passing the Ballard Locks counting station, indicated a run in excess of escapement needs a sport and net fishery could be authorized.

2. On July 14, 1977, the Director of Fisheries adopted an emergency regulation opening Lake Washington (Areas 10C and 10D, referred to above) to sport fishing commencing July 16th after he formally found and declared that the run size was 44,000 (now fixed at 61,000) fish more than are needed for escapement and that an emergency opening was necessary to harvest those excess fish. The Director has, however, refused tribal requests to rescind his conservation closure of the treaty Indian fishery on these same fish.

3. By the Director's own published formal finding no conservation reason exists that necessitates a continued closure of the treaty Indian fishery.

4. The application of RCW 75.12.010 and Director of Fisheries' Order No. 77-42 or other regulations of similar effect to restrict the treaty Indian fishery on the 1977 Lake Washington sockeye salmon run would be contrary to the rights of the affected treaty Indians as previously determined by this Court.

5. The affected treaty Indians would suffer irreparable injury unless the defendants are immediately restrained as herein provided.

6. The refusal of the State to remove its prohibitions on the treaty Indian fishery after ascertaining that they were not necessary for conservation as defined by this Court indicates the need to require prior approval of this Court before imposing or applying any future restrictions on the treaty Indian fishery in the waters described above.

NOW THEREFORE, IT IS HEREBY ORDERED, that the State of Washington, its Director of Fisheries, their agents, officers, employees and attorneys and all persons acting or purporting to act pursuant to their authority or in concert therewith are temporarily enjoined and restrained from (1) applying RCW

77.12.010 or subsections (608), (609) or (610) of WAC 220-28-100 as added by Director of Fisheries Order No. 77-42, dated June 1, 1977, to prohibit, restrict or any wise interfere with fishing for, taking, possessing or disposing of salmon from Washington Department of Fisheries Treaty Indian Puget Sound Management and Catch Reporting Areas 10B, 10C and 10D as described in WAC 220-22-330, dated June 10, 1976, by members of any of the plaintiff tribes in this case who have been determined by this Court to have usual and accustomed fishing places in such Reporting Areas; (2) imposing or applying any restriction on such fishing, taking, possession or dispostion during the remainder of the 1977 sockeye run without first obtaining the express approval of this Court.

IT IS HEREBY FURTHER ORDERED, that a hearing shall be held on the 1st day of August 1977, at 9:30 a.m., to determine whether a preliminary or permanent injunction shall be issued.

DATED this 21st day of July, 1977.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

FINDINGS OF FACT

June 6, 1978

1. The treaty fishing rights of the plaintiff tribes have been previously determined by this Court.

2. Since 1974 there has been increasing difficulty in enforcing treaty fishing rights. Denial of treaty fishing opportunity will result in injury to economic, cultural and governmental interests of the plaintiff tribes.

3. If the lack of enforcement of treaty Indian fishing rights by the State of Washington continues, there will be irreparable harm to the plaintiffs' rights assured them under the decision of this court.

4. The evidence has established that there have been numerous instances of violations of State regulations designed to allocate additional fish to treaty Indians, but there has been a lack of enforcement against these violators, either due to State court decisions or the enforcement policies set by the Washington State Department of Fisheries.

5. The State of Washington has indicated through its court decisions, and through its executive policy, that the Director of the Department of Fisheries is not empowered to promulgate regulations allocating additional fishing opportunity to treaty Indians as required by the decision of this court.

6. The Washington Department of Fisheries did not assist in issuing citations or serving the enforcement injunction during 1977.

7. An emergency exists because of the State of Washington's continuing inability and unwillingness to assume its regulatory and enforcement responsibilities under *Final Decision 1*. This mandates the creation of a federally-led enforcement group, which needs time to develop a comprehensive enforcement plan for the upcoming season.

8. Alternatives to direct injunction of non-treaty fishermen which have been used by this Court in previous years to obtain compliance with its orders have not sufficiently deterred violations of those orders, nor provided adequate additional fishing opportunities to treaty tribes.

9. Although the Court may speculate that if no injunction were issued, there might be less havoc in the fishery, that is not the test. The test is whether or not treaty fishing rights can be effectuated without the entry of the injunction. No alternative plan which contemplates enforcement of treaty fishing rights has been presented.

10. The Court has the authority to enjoin the fishermen who are non-parties in this case. Rule 65(d) of the Federal Rules of Civil Procedure does not enumerate the only non-parties who may be enjoined. *See also, Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington*, ____ F.2d ____, No. 773129 (9th Cir. Apr. 24, 1978).

11. Notice of this hearing has been given to approximately 2,455 of the 2,700 commercial net fishermen directly affected by the proposed injunction. Additionally, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association and the Grays Harbor Gillnetters Association have been given notice. Several of these non-parties have appeared and have been given the opportunity to address the Court and to present evidence. The fact that they are not parties to this lawsuit has placed restrictions on the scope of their participation.

12. None of the non-party associations or persons asked for intervention in connection with this proceeding. Under the reference to the Magistrate, there was no power for him to grant the status of "party" to a non-party.

13. Although both the United States and the plaintiff tribes offered to make witnesses available to the non-party participants, none took advantage of this offer.

14. Although the implementation of the treaty rights as determined in *Final Decision 1* necessarily diminishes the opportunity of the non-treaty fishermen to harvest fish, that fact is not controlling.

15. Until a better solution arrives through agreement by the parties, congressional action, or the willingness of the State of Washington and its courts to assume the State's management and enforcement responsibilities as directed by *Final Decision 1*, this Court, in its continuing jurisdiction over the resource, must provide for protection of treaty fishing rights.

16. It is appropriate to limit those circumstances under which enforcement officers may board fishing vessels for purposes of investigating violations of the injunction to those situations where they have probable cause to believe that a violation has occurred.

17. The nature of the fishery is such that an effective management and enforcement system must provide the ability to open and close the fishery on short notice.

18. The enforcement injunction presented by the Government provides a reasonable means by which to notify the fishermen of lawful openings and closings.

19. A toll-free telephone "hotline" has been used to announce fishing regulations in the State of Washington for several years.

20. Statements of several of the fishermen who appeared before this Court indicate that widespread resistance to recognizing treaty fishing rights still exists.

21. Voluntary reductions in non-Indian fishing are unlikely. An individual fisherman wishing to make a good faith effort to comply with *Final Decision 1* cannot do so unless some government tells him when he may fish without infringing on treaty rights. The State of Washington will not do this.

22. Because the non-treaty marine fishing fleet is much larger and more efficient than the treaty fleet, and because much Indian fishing occurs in the terminal areas, substantial curtailment of the marine fishing opportunity for non-treaty fishermen is necessary in order to permit treaty fishermen the opportunity to catch the share of the runs to which they are entitled.

23. During the 1976 and 1977 fishing seasons the Washington State Department of Fisheries developed a

policy of not issuing citations to violators of allocation closures.

24. The Washington State Department of Fisheries has the power to regulate the fishermen it controls in such a way as to shift the burden of providing treaty Indian fishing rights away from the net fishermen and spreading it to the hook-and-line fishermen by controlling their seasons, bag limits, gear type, and otherwise restricting hook-and-line fishing.

25. During the 1977 fishing season, there was a substantial amount of fishing during conservation closures. While most of this fishing was done by non-treaty fishermen, the State of Washington cited over 100 treaty Indians for fishing in violation of conservation closures as defined by the Washington Department of Fisheries.

26. During 1976, over 135,000 fish were taken in violation of State regulations, and during 1977, over 183,000 were taken by fishermen licensed by the State of Washington.

DATED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

CONCLUSIONS OF LAW

June 6, 1978

1. In order to provide treaty Indians with the opportunity to catch 50% of the salmon returning to their usual and accustomed grounds, it is necessary to provide them with substantial exclusive fishing time.

2. Because of State Court interpretation of its regulatory authority, the Washington State Department of Fisheries will not promulgate regulations g ing treaty Indians exclusive fishing time.

3. The failure to provide treaty Indians with substantial exclusive fishing time will cause them irreparable harm to their right to the opportunity to catch 50% of the salmon returning to their usual and accustomed grounds.

4. The rights of the treaty and non-treaty fishermen have already been adjudicated, therefore economic disruption associated with implementing the 1974 decree is not legally cognizable. Weighing the relative legally cognizable hardships, the Court finds that the plaintiffs would be more damaged if this injunction were not entered than the defendants and non-party fishermen will be by its entry.

5. It is probable that the plaintiffs would succeed at a trial on the merits.

6. The public interest will be served by entry of this injunction in that United States treaty obligations will be upheld, United States District Court orders will be enforced, and a breakdown of law and order will be prevented.

7. Fixed pre-season regulations are impossible due to the nature of the fishery.

8. In order to insure that exclusive treaty Indian fishing time can be provided, there must be a means by which this Court can order non-treaty commercial fishermen not to fish during times when treaty Indians are fishing.

9. A mechanism for authoritatively informing the fishermen of lawful fishing times must be established before the fishing season.

10. The mechanism provided for in the Government's proposed order is reasonable.

11. An allocation of the fishing opportunity between treaty and non-treaty fishermen, and enforcement of that allocation is an appropriate exercise of this Court's discretion. *Department of Game v. Puyallup Indian Tribe*, 414 U.S. 44 (1973); *Puyallup Indian Tribe v. Department of Game*, 97 S.Ct. 2626 (1977); *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975).

12. This Court has the authority and the duty to protect and effectuate its prior judgments. *Brown v. Board of Education*, 394 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Doe v. Ceci*, 517 F.2d 1203 (7th Cir. 1975); *United States v. Texas*, 306 F. Supp. 469 (E.D. Texas 1972), *aff'd*, 495 F.2d 1250 (5th Cir. 1974); *Bullock v. United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959).

13. This Court has broad discretion to fashion remedies which will protect and effectuate its earlier rulings, the more so when public interest and the rights of a large group of people are involved. *Virginia Railroad Co. v. System Federation*, 300 U.S. 515 (1937); *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973).

14. This Court is empowered to issue all writs necessary or appropriate in aid of its jurisdiction which are agreeable to the usages and principles of law. Title 28, United States Code, Section 1651.

15. This Court is empowered to punish disobedience or resistance of its lawful orders and decrees. Title 18, United States Code, Section 401.

16. In limited and extraordinary circumstances, this Court may enjoin individuals who are not formal parties to this action where they have notice of this Court's orders, they intentionally violate those orders, they are members of a class who cannot realistically be specified in advance of such violations, and their actions violate the rights of a large class of plaintiffs, interfere with the obligations and ability of defendants to comply with this Court's orders, create conditions of lawlessness and chaos in the community and interfere with this Court's ability to adjudicate the rights and responsibilities of the parties before it. *Kasper v. Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); *Bullock v. United States*, *supra*; *United States v. Hall*, 472 F.2d (5th Cir. 1972); *N.L.R.B. v. Sunshine Mining Co.*, 125 F.2d 757 (9th Cir. 1942).

17. This Court may enjoin individuals who are not parties to the lawsuit when they are in privity with one of

the parties; that is, when the party is respresenting the interests and advocating the position of the non-party. *Puget Sound Gillnetters Association, et al. v. United States District Court*, ____ F.2d ____, No. 77-3129 (9th Cir., April 24, 1978); *City of Tacoma v. Taxpayer of Tacoma*, 357 U.S. 320, 340-1 (1957); *New Jersey v. New York*, 345 U.S. 369 (1953).

18. The orders of this Court directed toward the State of Washington are binding on its citizens. Such action is appropriate in this case because the litigation had adjudicated the right of the State of Washington to authorize the harvest of anadromous fish and the rights of all its citizens to harvest those fish. *Arizona v. California*, 373 U.S. 546 (1963); *City of Tacoma v. Taxpayers of Tacoma, supra*; *Wyoming v. Colorado*, 286 U.S. 494 (1932); *New Jersey v. New York, supra*; *Kentucky v. Indiana*, 28 U.S. 163 (1930).

19. The fact that the fishermen were not participants in the ligitation leading up to Final Decision 1 does not prevent them from being bound by it. The State of Washington represented, and continues to represent, all of the non-treaty fishermen in this litigation. *Puget Sound Gillnetters Ass'n, et al. v. United States District Court*, ____ F.2d ____, No. 77-3129 (9th Cir., April 24, 1978).

20. This Court may enjoin interference with property which is under the control of this Court, and punish violations of such injunctions. *Board of Governors v. Transamerica Corp.*, 184 F.2d 311 (9th Cir. 1950); *In re Lustron Corp.*, 184 F.2d 789, 798 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951); 7 J. Moore *Federal Practice* ¶65.12, n. 1 (1976); *State v. Terry*, 99 Wash. 1 (1917). THEREFORE, IT IS ORDERED that the injunction shall issue. DATED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
Senior United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

ODER RE: ENFORCEMENT OF LIMITATIONS ON NONTREATY SALMON FISHERIES FOR 1978 AND SUBSEQUENT SEASONS

June 6, 1978

The court has fully reviewed and carefully considered the Report of United States Magistrate Re: Preliminary Injunction Involving Enforcement of Limitations on Non-Indian Treaty Salmon Fisheries for 1978, the Findings of Fact, recommended Conclusions of Law and proposed Preliminary Injunction attached thereto; the transcripts of the hearings of April 5, 6 and 24, 1978; the objections filed to the Magistrate's proposed Findings, Conclusions and Injunction and the "Final Draft" of the proposed injunction served and filed by the United States.

Upon this review and consideration, the court hereby denies the requests of counsel for certain plaintiff tribes and also counsel for the Washington Reefnetters Association for an additional hearing on the matter of the issuance of a preliminary injunction. Moreover, the court has fully considered and hereby rejects the request of the State of Washington received this date for an additional hearing. The court is satisfied that an additional hearing would serve no useful purpose.

The court hereby adopts the Findings of Fact and Proposed Conclusions of Law lodged by United States Magistrate Robert E. Cooper May 4, 1978 as modified by this court. To the extent that a Finding of Fact may be in whole or in part a Conclusion of Law, or vice versa, it shall be considered to be either one, or the other, or in both categories.

The court also has signed this date a separate document entitled Preliminary Injunction Re: Enforcement of Limitations on Nontreaty Salmon Fisheries for 1978 and Subsequent Seasons.

IT IS HEREBY SO ORDERED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION RE: ENFORCEMENT OF LIMITATIONS ON NONTREATY SALMON FISHERIES FOR 1978 AND SUBSEQUENT SEASONS

June 6, 1978

Upon the motion of the United States, together with the exhibits, the testimony of witnesses and the records and files of this case, the court finds that the State of Washington and its officers and agencies remain unwilling or unable to carry out the existing orders of this court and to prevent certain nontreaty fishermen from taking, under color of state law and in some cases in defiance thereof, salmon which under the orders of this court are to be left available for harvest by the plaintiff tribes and their members under reserved rights expressly secured by federal law.

The court further finds that this situation, if permitted to continue, will frustrate the decrees of this court, irreparably harm the plaintiff tribes and their members by substantially depriving them of their rights to harvest such salmon, imperil the perpetuation of the salmon resource and lead to a breakdown of law and order, and that to prevent such continuance, only direct action of this court, including the issuance of and enforcement of an injunction against certain nonparties, is required in the form and manner hereinafter set forth.

The court also finds that adequate public and/or personal notice of the hearing on the government's motion

for an injunction on this matter and an opportunity to be heard prior to the entry of any injunction was given to affected nonparties. The court finds that service of the notice and invitation to be heard was made by the United States Marshal's Service on some 2,445 persons who were State-licensed commercial net salmon fishermen for 1977, out of a total of 2,700. The court has considered all relevant points and authorities presented by such nonparties.

Therefore, it is hereby ODERED THAT:

1. Fishing in the waters of Puget Sound and other marine waters easterly of the Bonilla Point-Tatoosh Line (located at the western end of the Strait of Juan de Fuca) and their watersheds, all Olympic Peninsula watersheds, and all Grays Harbor and its watersheds is subject to the provisions of this order.

2. All gillnet, purse seine and reefnet fishermen licensed by the State of Washington, all other persons who attempt to net or assist in netting salmon in any portion of the waters described in paragraph 1, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, Grays Harbor Gillnetters Association, and all persons in active concert or participation with them, are hereby enjoined and prohibited from taking, attempting to take, or offering for sale, salmon of any species taken from such waters, or assisting in any of the foregoing, unless such person has, within the previous twenty-four hours, ascertained from the National Marine Fisheries Service telephone "hot-line" (toll free number: 1-800-562-5672) that such fishing in the area in which the individual intend to fish is not prohibited by this court at the time of such fishing, provided that this paragraph shall not apply to treaty Indians fishing pursuant to tribal regulations promulgated in accordance with the orders of this court. The National Marine Fisheries Service shall announce all lawful openings of nontreaty fishing and all lawful conservation closures on its "hot-line" and shall maintain a written copy of all such announcements for a period of at least 60 days beyond the end of the calendar year in which the announcement was made.

3. All fishermen described in paragraph 2 are hereby prohibited from possessing salmon of a particular species in any area in which at that time fishing for that species by such person is prohibited by paragraph 2 of this order; provided that this paragraph shall not prohibit fishermen from transporting salmon caught in an open area through a closed area for the purpose of selling the catch.

4. Personnel of the National Marine Fisheries Service, the Coast Guard, the United States Marshal's Service and the Washington Department of Fisheries and persons lawfully deputized by any such agency may board fishing vessels for the purpose of investigating suspected violations of this injunction.

5. At the direction of any enforcement agent described in paragraph 4, all persons described in paragraph 2 are hereby ordered to stop their vessels, permit boarding by enforcement agents, permit themselves and their vessels to be photographed, permit their catch to be examined, identify themselves and their vessels to the satisfaction of the boarding enforcement agents, and produce either a valid Washington Department of Fisheries net salmon fishing license or a valid treaty Indian identification card for the then-current fishing season which, by this order, all fishermen are required to carry when engaged in any salmon fishing activity described in paragraph 2. Any fisherman failing to identify himself as provided herein may be placed under arrest and shall be taken before a United States Magistrate for proceedings pursuant to Rule 5 of the Federal Rules of Criminal Procedure.

6. The United States, through the Coast Guard, the National Marine Fisheries Service, the United States Marshal's Service, and such other agencies as may be appropriate, may serve copies of this injunction and other relevant orders or process on fishermen described in paragraph 2. All Officers and Petty Officers of the United States Coast Guard and the National Marine Fisheries

Service assigned by their respective superiors to carry out the provisions of this order are hereby appointed as process servers and agents of the court within the meaning of Title 18, United States Code, Sections 1501 and 1509. The orders, citations and papers required to be served by enforcement agents under this order are found to be judicial writs and process of this court within the meaning of Title 18, United States Code, Sections 1501 and 1509.

7. The State of Washington and the United States are ordered to maintain reasonable surveillance of the fishing areas affected by this order and to cite any fishermen who, having had notice of this injunction, thereafter continues or engages in any act prohibited by paragraphs 2 or 3 of this injunction or fails to do any act required by paragraph 5, to appear before the United States District Court to be ordered to show cause why he should not be held in contempt.

8. Nothing in this order shall relieve the defendant State of Washington or its agencies, officers and employees of any obligation under prior orders of this court including, but not limited to, the obligation under paragraph 8 of the Injunction of March 22, 1974 (384 F. Supp. at 415-16), to diligently and vigorously enforce, as far as circumstances permit, their applicable statutes and regulations in order to safeguard the fish resources from depletion or destruction due to unlawful fishing by persons subject to the state's jurisdiction.

9. The issuance of this injunction is necessary to prevent irreparable injury to the plaintiff tribes and their members and to the salmon resource for which there is no adequate remedy at law.

10. The issuance of this injunction is necessary in aid of this court's jurisdiction and to protect or effectuate this court's judgments.

This injunction shall remain in effect until further order of this court.

IT IS HEREBY SO ORDERED this 6th day of June, 1978.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

U.S. v. WASHINGTON

District Court: No. 9213

MINUTE ORDER

June 15, 1978

Now on this 15th day of June, 1978, the Court directs the Clerk to enter the following Minute Order:

Finding of Fact #16 was inadvertently included in the Findings of Fact filed by the Court on June 6, 1978.

Accordingly, said Finding of Fact is hereby stricken.

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The foregoing Minute Order was entered by Rosemary Freeny, Deputy Clerk in Charge, Tacoma Office of The Clerk by Direction of the Court, The Honorable George H. Boldt, Senior United States District Judge.

/s/ _____
JOE R. ROMANE, CLERK

U.S. v. WASHINGTON

District Court: No. 9213

MOTION FOR TEMPORARY RESTRAINING ORDER RE: STRAITS CONSERVATION CLOSURE

October 13, 1978

The Makah Tribe and the United States respectfully move this Court for an order temporarily restraining the State of Washington and the Washington State Department of Fisheries and all officials and employees of the State of Washington from enforcing its conservation closure, dated October 5, 1978, against any treaty Indians fishing pursuant to Tribal regulation in catch reporting areas 4B and 5.

This Motion is made on the following grounds:

1. After the State of Washington enacted its

conservation closure on all fishing in the Straits of Juan de Fuca, the Makah Tribe, pursuant to the orders of this Court, convened a meeting of the Fishery Advisory Board on Monday, October 9, to contest the State's assertion that said closure was required for conservation purposes. At the Fisheries Advisory Board meeting the Makah Tribe demonstrated that the total expected treaty catch of chum in areas 4B and 5 during the time that the runs which the State desires to protect are passing through would be approximately 2,000 fish. Of these number, the vast majority are Canadian origin chum and only approximately 400 (20%) are from Puget Sound stocks. Of this total, the Makah Tribe demonstrated that only 60 chum (15%) were among the Puget Sound chum in need of protection. These 60 fish represent such a small percentage of the total that there is no sound conservation basis for terminating the tribal fishery.

2. At the Fishery Advisory Board meeting the State representative advised that the State would authorize an all-citizen chum fishery in areas 7 and 7A. It was estimated that approximately 25,000 chum of Puget Sound origin will be taken in the all-citizen fishery of which approximately 15%, or in excess of 3500 chum, are from Puget Sound runs in need of protection.

3. Based on this technical data and other considerations, Dr. Whitney, the Court's Technical Advisor, pursuant to ¶6 of the Court's Memorandum Order and Preliminary Injunction Re: Salmon Allocation for 1978 and Subsequent Seasons, dated August 11, 1978, recommended that the State's conservation closure not be enforced against treaty fishing occuring in Areas 4B and 5 provided that the total Tribal harvest of chum during the period that the threatened runs are passing through the area do not exceed 2,000 fish. The Technical Advisor's recommendation was communicated to this Court, to the United States and to the Tribe.

4. On Friday, October 13, a telephone conference call

was held between Steven Anderson, undersigned Attorney for the Makah Tribe; Alan Stay, Attorney for the Lower Elwha Tribe of Klallam Indians; George Dysart, Attorney for the United States; and Jim Johnson, Attorney for the State of Washington. During the conference call Mr. Johnson advised counsel for the Tribes and the United States that the State had not been formally advised of Dr. Whitney's recommendation and would continue to enforce its conservation closure against any Indian fishermen fishing in Areas 4B or 5 pursuant to any Tribal regulation adopted pursuant to Dr. Whitney's recommendation.

5. The Makah Tribe has adopted a fishing regulation implementing Dr. Whitney's recommendation which authorizes treaty fishing in Areas 4B and 5 with a limitation that no more than 2,000 chum be taken during the time that the threatened runs are passing through those fishing areas.

6. In light of the fact that only approximately 60 chum from the Puget Sound runs that need protection will be caught by the treaty fishing in Areas 4B and 5, and in light of the fact that the Tribal chum fishery will be totally preempted in the event the State's conservation closure remains in effect, it is not reasonable and necessary for purposes of conservation that the State conservation closure be applied to the treaty tribes and the recommendation of the Court's Technical Advisor should be followed and the Indian treaty fishery allowed.

Therefore, for the reasons stated above, the Makah Tribe and the United States respectfully move this Court for an order enjoining the State from enforcing the conservation closure against the above described Indian treaty fishery. In addition to the grounds stated above, this Motion is supported by an attached memorandum and will be supplemented by an affidavit to be filed with the Court on the morning of October 16 before the hearing.

Respectfully submitted this 13th day of October, 1978.

ZIONTZ, PIRTLE, MORISSET
ERNSTOFF & CHESTNUT

/s/ _____
STEVEN S. ANDERSON
Of Counsel for the Makah Indian Tribe

JOHN C. MERKEL
United States Attorney

/s/ _____
BY GEORGE DYSART
Special Assistant to the United States Attorney

U.S. v. WASHINGTON

District Court: No. 9213

PRELIMINARY INJUNCTION RE: LIMITED CHUM FISHERY

November 3, 1978

The court having held a hearing on the motion of the United States and the Makah Tribe to restrain the State of Washington and its Department of Fisheries from enforcing its closure against treaty Indians in State of Washington Commercial Salmon Management and Catch Reporting Areas 4B and 5 and having called for and received further briefing from the parties, hereby Finds, Orders and Decrees as follows:

1. The defendants have failed to present any evidence that a limited treaty fishery as requested by the plaintiffs for said Areas 4B and 5 would have any meaningful impact on Puget Sound area salmon stocks for which no harvestable surplus is forecast to be available.

2. A fishery by treaty tribes in said Areas 4B and 5 limited as herein provided will afford those tribes an opportunity to harvest some of the harvestable surplus of Canadian-origin chum salmon that predominate in Areas 4B and 5 at this time.

3. The defendants have determined that a harvestable surplus exists with respect to these Canadian-origin chum salmon and have authorized an all-citizen fishery on said chum stocks, including a fishery in areas in which there will be very limited incidental catch of chum from U.S.-origin runs for which no harvestable surplus is forecast.

4. No evidence has been submitted to show that a total closure of treaty fishing in Areas 4B and 5 at this time is reasonable or necessary for the conservation of any stock of fish that would be affected by the fishery authorized herein.

Now, therefore, it is hereby ORDERED, ADJUDGED AND DECREED:

1. The Makah and Lower Elwha Tribes, having heretofore been found by this court to have treaty fishing grounds in State Commercial Salmon Management and Catch Reporting Areas 4B and 5, or either of them, may authorize a fishery for chum salmon in said Areas 4B and 5 to take not to exceed 2,000 chum salmon combined total for the two tribes.

2. The defendant State of Washington, its officers, agents, servants, employees, attorneys and all other persons in active concert or participation with them who have actual notice of this order, are hereby enjoined from restricting or interfering with the treaty fishery herein authorized.

3. The Fisheries Technical Advisor shall monitor the fishery herein authorized and immediately report to the court any indication that said fishery is having a meaningful impact on runs needing protection from harvest.

4. The parties, under the direction of the court's Fisheries Technical Advisor, shall further explore and report back to the court as to appropriate standards or

guidelines governing fisheries in mixed stock areas where there may be some impact on fish from runs which are not the target of the fishery.

Dated this 3rd day of November 1978.

/s/ _____
GEORGE H. BOLDT
Sr. United States District Judge

TESTIMONY POST 1974 IN U.S. V. WASH.
(U.S. DIST. CT. WESTERN WASH. # 9213)

Testimony of DONALD McKERNAN
July 11, 1975

And I have been heading the United States delegation in bilateral negotiations with Canada and expect to continue in that role at least through this year.

Q. And what is your position heading those negotiations with Canada?

A. I am Chief Negotiator for the United States Government. I should like to add, Your Honor, not representing the United States Government today. I am here as simply my individual capacity.

(Transcript of Proceedings, July 11, 1975, p. 131, l. 3-11)

A. There will be some informal discussions in August and formal negotiations with the Government of Canada will be held in late September. These negotiations are of longstanding nature. They have been, they are very complicated. They include not only renegotiation of the sockeye treaty, sockeye and pink salmon treaty, but they also include some additional disagreements and disputes involving the troll fisheries off the coast of Washington and British Columbia and they involve a dispute in the northern boundary where the United States fishermen in Alaska intercept some of the runs of salmon from Northern British Columbia, and in turn the Canadians intercept some of the chum salmon and pink salmon runs from Southeastern Alaska. So, we are really talking about the entire complex species of Pacific salmon from approximately the Columbia River to the northern end of the Southeastern Alaska.

Q. And the Fraser River runs managed and regulated by the International Pacific Salmon Fisheries Commission are part of that intricate negotiation?

A. Yes, they are.

(p. 132, lines 4-24)

Q. You have heard Mr. Moos testify why, in his opinion, the IPSFC has been so successful, its ability to singlehandedly regulate and rapidly regulate the fishery. Generally, what is your opinion of why the IPSFC has been so successful?

A. Well, I agree generally with what Mr. Moos has said, but in addition to this, the Commission has been blessed with outstanding directors and outstanding scientists and outstanding staff.

(p. 134, lines 13-21)

Q. Had the Commission's regulations in the past, to your knowledge, been adopted verbatim by Canada and the United States and enforced by those nations?

A. Yes.

Q. Do you know any instance where either government has repudiated those proposed regulations?

A. Not the national government, no.

Q. Have you heard Mr. Moos' testimony today?

A. Yes, all but a very small part of it.

Q. He has testified as to the possible disruption of his regulatory system with certain unilateral actions to be taken in this nation to affect the harvest of the fisheries. By the way, do you believe that Mr. Moos' categorization is correct, that possibly does exist?

A. Yes.

Q. What effect, in your opinion, would such a disruption have, or the perception of the Canadians that our unilateral actions have been violated somehow, of the Commission. What effect would that have, and I understand you can only speak in general terms of these negotiations, what effect would that have on your negotiations, these international negotiations with the nation of Canada?

A. Well, I, in the first place, I don't want to try and presume to know what Canada would do or would want to do; and secondly, I can assure you that I

would do my very best to minimize any adverse effects. But obviously a complication by one side or the other would have some effect on the other side. Once again, however, as a chief negotiator of this problem I would certainly do my best to minimize any effects and would try and put forward the best, in the very best light the United States action.

(p. 135, line 15 - p. 136, line 22)

Q. But in your view such disruption could cause problems in the international negotiations with Canada?

A. Yes.

(p. 137, lines 6-8)

Remarks of
HONORABLE GEORGE H. BOLDT,
U.S. District Court Judge
October 25, 1975

A factor that has been mentioned but not sufficiently emphasized in my opinion has been disturbing me deeply, not merely for the purposes of this case but for the dignity and honor of the people of this great, wonderful area where I have lived for 50 years. Mr. Moos told us that there have been 300 citations of non-treaty fishermen over a relatively short period, and that out of all of the 300 only one individual has been penalized by the civil and criminal processes of the state. We have indisputable evidence that substantial numbers of non-treaty fishermen willfully and deliberately have obstructed treaty fishermen to a very substantial extent, even in the period where they were entitled to exclusive fishery. This is outlaw fishing, and the Court can do nothing but condemn it as an arrogant and flagrant, as well as unlawful, effort to defeat the basic purposes and intent of *United States v. Washington*. I would be derelict in my duty if I did not recognize that

situation at an appropriate time. And this is an appropriate time because I am completely satisfied that the treaty take of chum, as well as other runs, has been substantially diminished from what it would have been had there not occurred this willful violation of the law and the failure to enforce the law.

(TR.,p.43, line 15 - p. 44, line 12)

Testimony of CHRISTOPHER DLUGOKENSKY,
Fisheries Management Biologist,
United States Fish & Wildlife Service

August 8, 1977

Q. (By Mr. Stay) Mr. Dlugokensky, will you tell the Court, please, where you are now employed?

A. I am employed by the United States Fish & Wildlife Service in Olympia.

THE COURT: Will you speak up, please.

THE WITNESS: I am employed by the United States Fish & Wildlife Service in Olympia.

Q. (By Mr. Stay) In what capacity?

A. Fisheries Management Biologist.

Q. And would you tell the Court where you received your formal education, if any?

A. I received my formal education from the Evergreen State College in Olympia, Washington.

Q. And did you graduate?

A. Yes, I did. I received a bachelor's degree.

Q. In what?

A. Population dynamics and fisheries biology.

(TR., p. 30, lines 5-22)

Q. Now, Mr. Dlugokensky, with regard to the coho problem you were asked to investigate, have you arrived at any conclusion as to the effect of the adopted State regulations as we have? Could you tell the Court?

A. Our conclusions are that there will not be the allocated treaty harvest of coho.

Q. You mean that the treaty fishermen will not be able to harvest their full allocation?

A. That is correct.

Q. And for chinook have you arrived at any conclusion?

A. The conclusion we have arrived at is that the nontreaty allocation for chinook has almost been reached in most cases.

Q. Has it been totally reached in any case?

A. Yes, it has.

(TR., p. 36, line 13 - p. 37, line 2)

Q. Now, Mr. Dlugokensky, what I would like to do now if I might is kindly go through your methodology in arriving at your conclusions that the coho regulations are in fact going to receive the treaty allocation. Now has the State proposed coho fishing within Puget Sound?

A. Yes, it has.

Q. And in what areas have they done it?

A. The State has proposed coho fishing in the various mixed stock areas, particularly in areas 6B and 9, which primarily I am dealing with, and in Southern Puget Sound areas 10 and 11, and also for Southern Puget Sound coho, the terminal areas; that being 10, Elliott Bay, 11A, Puyallup, Commencement Bay, 13A, Carr Inlet.

For Hood Canal stocks, there is a 6B and 9 mixed stock interception area for Snohomish-Stillaguamish stocks. There are harvest areas 6B and 9 and areas 8B and 8C. For Skagit stocks there are interceptions that will occur in areas 7 and 7A and in area 8. And for Nooksack-Samish stocks interceptions in area 7 and 7A, and the terminal fishery in area 7B and C.

Q. Would it be fair to say, Mr. Dlugokensky, that there are planned fisheries throughout Puget Sound?

A. Yes.

(TR., p. 37, line 15 - p. 38, line 12)

A. By stock. In this case, taking all of the run sizes, in this case 159,500 fish as they pass through, 24% of those fish will be intercepted in this 6B and 9 fishery before they reach the terminal areas A, B and C.

Q. And that will be the nontreaty, all-citizen fishery?

A. That is correct.

Q. And that is based upon the adopted State regulation?

A. That's right. We used — in determining which year to base past fishing effort and how we arrived at these figures, we used the 1973 year.

Q. Why was 1973 used as a basic year?

A. 1973 was used because the total run size of coho returning to Puget Sound was 850,000 fish. The projected 1977 return for all coho is 825,000 fish.

Q. Is there a similarity in the total coho run?

A. That is correct, and also the regulations which were in effect in 1973 are similar to the regulations that are in effect which are the exact regulations which are in effect in the mixed stock area for 1977.

(TR., p. 44, lines 5-24)

Q. Moving on to South Puget Sound stock, what have you determined to be the treaty and nontreaty allocation of coho bound for South Puget Sound areas?

A. We determined the treaty fishermen will take all of the harvestable and some of the escapement, almost all the escapement fish destined for South Puget Sound according to the regulations.

Q. The prior interceptions are what?

A. The prior interceptions of South Sound fish are 104,900 ocean interceptions.

Q. By nontreaty fishermen?

A. By nontreaty fishermen. In area 6B and 9, 75,400 fish, and in area 10 and 11, the mixed stocks, the interceptions of Southern Puget Sound coho will be 173,000 fish.

Q. May I ask for a correction. Did you mean the treaty or nontreaty fishermen would take all the available harvestable fish?

A. The nontreaty.

Q. So you have projected fisheries in the ocean in area 6B and 9, and areas 10 and 11. Are there other prescribed fishing areas and seasons under State regulations?

A. Besides the nonterminal harvest areas, there are also terminal harvest areas fisheries planned for area 10A, which is Elliott Bay, area 11A, Commencement Bay, and 13A, Carr Inlet.

Q. Based upon your analysis, how many fish do you anticipate the nontreaty fishermen will harvest under that basis?

A. Based upon our analysis, nontreaty fishermen will harvest all of the available fish.

(TR., p. 50, line 11 - p. 51, line 17)

Q. In 1973, Mr. Dlugokensky, you indicated that there were fisheries in the mixed stock area 6B, 9, 10 and 11. I assume some fish escaped to the terminal areas. Who harvested those?

A. The treaty fishermen.

Q. There was a treaty fishery in the river in 1973?

A. This is correct.

Q. Under the State proposed regulation, do you anticipate there being available fish for a treaty fishery in the rivers under those regulations?

A. Under the escapement of those regulations, there will be a minimal of no treaty harvest of fish in those rivers.

(TR., p. 52, line 15 - p. 53, line 2)

Q. (By Mr. Stay) Mr. Dlugokensky, again, this is a breakdown of the projected nontreaty harvest, based upon State adopted regulations?

A. That is correct.

Q. Would you describe for us what the figures show?

A. The figures show that there would be prior outside interceptions of 13,500 fish. In area 7 and 7A, interception on those stocks are approximately 2,700 fish. A terminal area harvest in area 8 of approximately 3,800 fish. The breakdown in the Skagit stocks —. The allocation is 14,100. The projected nontreaty harvest is 20,000 or 71%. Then the treaty harvest is 8,200 or 29% of the fish.

Q. From your analysis, Mr. Dlugokensky, did you find any run of coho where the treaty fishermen would have available to them their allocation as prescribed by this Court?

A. No, we did not.

Q. Are you familiar, Mr. Dlugokensky, with the size of the treaty fishing fleet and their ability to harvest fish?

A. I am.

Q. Have you studied the size of the fleet?

A. Yes, I have.

Q. And have you examined their previous catch per unit of effort fisheries?

A. That is correct.

(TR., p. 56, line 20 - p. 57, line 21)

Q. Do the treaty fishermen have the capacity of harvesting their allocation?

A. Yes, they do.

Q. If the treaty fishermen have to harvest in conjunction with the nontreaty fishermen, will they be able to take their allocation?

A. They will not.

Q. What are the reasons for that?

A. The relative size of the fleet and the catch per unit effort data between Indian and non-Indian fishermen. The nontreaty fishermen are still more efficient with their gear types.

(TR., p. 58, lines 12-23)

Q. (By Mr. Stay) Mr. Dlugokensky, I would like to clear up one part of your last testimony before we had the break. I asked you whether or not you had an opinion on the ability of treaty fishermen to harvest their allocation if these regulations were left in full force and effect. And could you repeat for the Court what that opinion was?

A. My opinion was that the fleet sizes of such disparity and there are more nontreaty fishermen than there are treaty fishermen. And the second point was that in many areas but not all the catch per unit effort is significantly higher on the nontreaty side.

Q. And that leads to what conclusion, then?

A. That leads to the conclusion that these regulations as they are proposed or have been adopted will not lead to treaty fishermen realizing their allocation.

(TR., p. 65, line 24 - p. 66, line 14)

Q. Moving now to the Stillaguamish-Snohomish system, which is the next page, would you indicate whether there is or is not an allowable harvest there?

A. Because of the significant ocean and sport interceptions of 3,600 fish, the treaty Indian share for Boldt allocations are 2,800 fish. We expect that the nontreaty fishermen will overharvest their allocation on the Stillaguamish-Snohomish stocks.

(TR., p. 69, lines 18-25)

Q. So that would you repeat, now, for the record, whether there is or is not a nontreaty harvestable

number remaining for harvest in the terminal area of the Stillaguamish-Snohomish?

A. There is not a harvestable nontreaty allocation of Snohomish-Stillaguamish stock.

Q. And the reason for that?

A. The reason for that is because of the ocean sport interceptions, which are projected to take more than the allocation.

(TR., p. 71, lines 15-24)

Q. So in summary, Mr. Dlugokensky, can you tell us what areas there is a predicted nontreaty harvest on the regulations where there is no allocation remaining? What areas are those?

A. That would be South Puget Sound and the Snohomish-Stillaguamish.

(TR., p. 72, lines 20-25)

Testimony of PHILIP R. MUNDY,
Tribal Biologist
August 8, 1977

Q. (By Mr. Stay) Mr. Mundy, will you describe to the Court where you are presently employed?

A. Would you repeat the question?

Q. Where are you presently employed?

A. Point No Point Treaty Council.

Q. And what are your responsibilities there?

A. My job title is fisheries program investigator. I coordinate the activities of the fishery biologists who work for the tribes of the Point No Point Treaty Council.

Q. Now, Mr. Mundy, could you describe for the Court you formal education in the fisheries area?

A. Yes, I have a Bachelor of Science degree from the University of Maryland, a Master of Science degree

from the University of Alabama. I currently am a Ph.D. candidate in fisheries at the University of Washington.

Q. Would you describe, please, your work experience in the fisheries area?

A. I worked in 1974-75 as a consultant to the managers of the Icelandic Salmon Fisheries as an employee of the United Nations. I worked in 1976 and this year as a consultant to the managers of the Crystal Bay Sockeye Salmon Fisheries, Alaska Department of Fish & Game. During the year I was employed as an advisor in the management of the Indian fisheries in the Point No Point Treaty Council area.

(TR., p. 96, line 15 - p. 97, line 24)

Q. And would you tell the Court upon what you base your opinion?

A. Well, as I see it here, the issue is whether or not the State regulations will provide the tribes that I represent the opportunity to harvest their fair share of the salmon. I think it is clear without going into detailed analysis, that should the State regulations be imposed or should they be allowed to stand, that we will not be able to harvest our fair share of the salmon. It is certainly clear in the case of the coho. It has been so stated by the Department of Fisheries. We will be precluded from harvesting our share in Hood Canal of the harvestable coho.

Q. Does this fishery, does it appear to resemble any other fishery which you are familiar with, either presently or historically?

A. Historically, this looks like pre-Boldt decision regulations. In other words, this makes no allowance or no exceptions for the Indian opportunity to harvest.

(TR., p. 113, line 12 - p. 114, line 5)

Testimony of WESLEY WHITNER,
Tribal Witness
August 8, 1977

Q. (By Mr. Stay) Mr. Whitener, are you a member of any Indian tribe?
A. Yes, sir, I am.
Q. What tribe is that?
A. The Squaxin Island tribe.
Q. And within the Squaxin Island tribe you hold an elective office?
A. Yes, sir, I do. I am a member of the Tribal Council.
Q. And on the Tribal Council do you have any particular duties?
A. Yes, I am tribal treasurer.
Q. In addition to your current tribal government obligations and duties, are you involved in any way in the fishing industry?
A. Yes, I fish myself. I am one of the tribal fishermen.
Q. How long have you been fishing?
A. Well, legally and illegally for a long time.
Q. Have you been fishing since this Court made it legal for you to fish off-reservation just like you had done before?
A. Beg pardon?
Q. Have you been fishing since 1974, at least?
A. Yes, sir.
Q. What kind of gear do you fish with, Mr. Whitener?
A. I use just a small skiff and handpulled gear.
Q. How big is your skiff?
A. Mine is 18 feet.
Q. And you say "handpulled gear", how does that work, how is that fishing gear used?

(TR., p. 121, line 23 - p. 122, line 25)

A. It is all by manual labor. You have to pull your gear and set it out the same way. It is an outboard motor.
Q. Are you familiar with the type of gear geneally used by Squaxin Island fishermen?
A. Yes, I am.
Q. Could you describe that generally for us. What kind of gear is generally used for the tribe?
A. The general use of gear that we have is all hand gear. There is a few not that have a couple of reels, but is all.
Q. Couple of —?
A. Reels.
Q. That is power reels?
A. Power reels, yes.
Q. Are you familiar with the projected fishery in Budd Inlet, area 13B for chinook?
A. Yes, sir.
Q. Could you tell me if you can what relative importance this chinook fishery has to the Squaxin Island tribe as compared to any other fishery, if you know?
A. It is of a real economic importance, and especially to those that make it their livelihood.
Q. And have you been able to calculate what the value of that fishery would be to you this year?

(TR., p. 123, line 1-25)

A. This year, yes. The value of the fish on the projection of 13,150 fish will be $295,875 for 90 fishermen. That would give an average of $3,287.
Q. So if you were able to take all of the available fish, it would average out to approximately $3,000 per fisherman.
A. That's right.
Q. Are all the fishermen the same type, Mr. Whitener? Are they all part-time or full time or what?
A. No, there is some that fish weekends. There are just

periodic fishermen that can get out when they can. Many of them have steady employment and they fish or — like myself, I am a retired Social Security, so I fish to —.

Q. So the figure you gave us of $3200 was an average of how much you get for fishing?

A. That's right.

Q. Now, what would happen in your opinion as a fishermen if the nontreaty fishery was allowed in that area?

A. It would really hurt.

Q. In what respect? How would it hurt?

A. Well, especially to the men who are fishing for a livelihood. It would wipe them out.

(TR., p. 124, line 1-23)

Testimony of GORDON SANDISON,
Director, Washington State
Department of Fisheries

August 8, 1977

THE WITNESS: Gordon Sandison, Olympia, Washington, Director of Fisheries. S-a-n-d-i-s-o-n.

DIRECT EXAMINATION

Q. (By Mr. Dysart) Mr. Sandison, I have asked the clerk to give you some documents that we may be referring to later so that you will have them in front of you. It won't be necessary right now.

Would you please state your present position, Mr. Sandison?

A. I am Director of the Washington State Department of Fisheries.

Q. And how long have you been director?

A. Six weeks.

(TR., p. 134, lines 11-25)

Q. Mr. Sandison, Exhibit 109 is a letter signed by you; is it not, to the Department of Ecology?

A. That is correct.

Q. With regard to an application of the Squaxin Island Indian tribe for a fish trap permit from the Corps of Engineers. Is it not correct that in that letter you recommended that the application be denied?

A. That is correct.

Q. And what is the reason that you state for denial of that application?

A. Because of the laws of the State of Washington; historically, initiative 77 that allowed all fish traps or fixed appliances except for test purposes.

Q. Were you aware when you wrote that letter that the statute which is cited by you, RCW 75.12.060 is a statute which this Court has specifically found to be not applicable to Indian treaty fishing and has specifically enjoined your predecessor and the State of Washington in general from applying in any manner so as to restrict or impair the Indian treaty fishery?

A. No, I guess — no, I didn't.

(TR., p. 143, lines 5-25)

Q. Well, that brings me to my next topic. Why was it, Mr. Sandison, in the case of the Lake Washington fishery that after your staff informed you that the reason for the June emergency closure; namely, an anticipated very low run no longer existed, and that there was in fact now at that time expected to be 44,000 surplus fish available for harvest — that number subsequently increased beyond that — but at that time 4,000— why was it that you then declined to lift that emergency closure which had been invoked at the time when the run forecast was a very low one?

A. What closure? You mean the —

Q. There was a closure of the Indian treaty fishery adopted by your predecessor in the early part of June, was there not, the first, I believe, week in early June, closing Lake Washington to all sockeye fishing, both treaty and nontreaty?

A. That's right, oh, all right, yes.

Q. The subsequently, as the run actually entered the lake and as the counts came through the Ballard Lock and they got better, your staff then ascertained that the original prediction was understated and that, in fact, there were estimated at that time to be 44,000 surplus; is that correct?

A. That is correct.

Q. By July 14. And at that time, is it not correct that you issued an emergency regulation opening a sport fishery because of the surplus and the need for harvest?

A. That is correct.

Q. Why did you not similarly lift the emergency closure on the treaty Indian fishery at that time?

A. Because again there was a statute of the State of Washington which did not permit commercial fishing in Lake Washington.

Q. Has that statute been subsequently changed or repealed?

A. It hasn't been repealed, it has been overruled.

Q. By whom?

A. By this Court.

Q. Had it been overruled at the time you did finally lift the emergency closure on the morning of July 21?

A. No, we lifted it first as I recall.

Q. Why did you feel you could lift it on July 21st and not on July 14th?

A. I think probably — and so many things happened, and my recollection may be faulty. We just didn't get around to talking about it a couple days before.

Q. Now, who do you mean by "we" didn't get around to talking about it? Do you know whether your staff got around to talking about it? Wasn't the subject brought up before the Fisheries Advisory Board of this Court?

A. I have no knowledge of that. I have had no discourse with them over this.

Q. You were not aware that a request had been made for the lifting of that closure; you, personally, you personally were not aware that a request had been made to lift that closure and that that request was then brought to the Fisheries Advisory Board, and that your representative on that board declined to recommend —?

A. I knew that he declined to lift it. And it was one of those things that we were going to talk about and really didn't get to, I suppose. I don't even remember who the representative on the board was.

Q. Did he do that pursuant to instructions from you, or was that done on his own?

A. I don't recall speaking to him prior to his going to the meeting.

(TR., 150, line 6 - p. 152, line 21)

Q. Paragraph number five, the interim plan. Defendants will make significant reductions in the non-Indian fishery as are necessary to achieve the ultimate objectives of this Court's decision without requiring mathematical precision. But in making such reductions will do so consistent with the concept of permitting the full harvest of the fish. Have you made specific reductions in order to achieve the objectives of the Court's decision?

A. No, we haven't, based on the ruling of the Washington Supreme Court.

(TR., p. 161, line 20 - p. 162, line 5)

Q. (By Mr. Stay.) Mr. Sandison, Mr. Dysart talked to you a moment about some State statutes which were specifically enjoined by this Court in Final Decision No. 1 way back in February of 1974. You indicated that you have read them or were familiar with them.

Is it your position that they are not to be enforced against treaty fishermen?

A. First let me say the fact that I read them doesn't make me familiar with them. I am reading a great many things all day long. And I probably do not have the world's most retentive memory. Enforcing the law is one of those things where, again, I will not make a move until I have been able to work with counsel. I know fully well that because of the Washington Supreme Court decision that if the Department of Fisheries was to arrest a non-Indian fisherman we probably couldn't get a conviction in any of the State courts. So each question has to be taken into consideration on its own merits.

Q. So you are telling me today that you cannot tell this Court whether or not you would or would not enforce statutes which have been specifically enjoined by this Court against treaty fishermen. You can't answer that question yes or no?

A. No, I cannot answer it yes or no.

(P. 170, line 14 - p. 171, line 13)

Remarks of JAMES M. JOHNSON,
Assistant Attorney General,
Washington State Departments
of Fisheries and Game

August 26, 1977

I do wish the Prosecutor was here, Your Honor, because as the Prosecutor, he could tell the court the probability in the event you order the State to enact and enforce some regulations. A prosecutor could tell this court, perhaps more convincingly than I have argued, the

probability of a prosecutor in the State of Washington prosecuting for such violations of such order, which I think is very low. And if prosecution were undertaken by a prosecutor, the probability of ever achieving a conviction, which is even lower yet.

(TR., p. 31, lines 9-18)

Testimony of WAYNE C. LEWIS,
Special Agent in Charge of Enforcement,
National Marine Fisheries Service

September 22, 1977

Q. Mr. Lewis, what is your occupation?

A. Special agent in charge of the Enforcement Division of the National Marine Fisheries Service.

Q. Mr. Lewis, in that capacity, have you been responsible for the enforcement, on the federal side, at least, of the temporary restraining order which was entered by Judge Boldt on August the 31st in this case?

A. Yes, I am.

(TR., p. 14, lines 15-22)

Q. What was the level, what was the number of boats that your agents saw fishing on the weekend of September the 2nd, the whole Labor Day weekend?

A. I am really not certain. That was an open area to Indian fishermen. There were several Indian fishermen in the area, and they did board the vessels and determined that they were, in fact, Indians.

Q. How many notices were served that first weekend?

A. Approximately seven.

Q. Okay, was it your feeling that you had reached all the boats that were fishing illegally that weekend with the seven notices?

A. Yes.

(TR., p. 16, lines 1-13)

Q. The following weekend, which would have been the weekend starting September the 9th, did you receive any help on your patrol from the State of Washington Department of Fisheries?

A. The state offered its assistance in the form of aerial patrols. I believe they were conducting daily aerial patrols of the fishing area. And there was an exchange of information as to the number of vessels that they sighted.

(TR., p. 17, lines 8-16)

Q. Did you receive assistance last night from the state of Washington as far as serving —

A. Sandy Miller, Chief of the Washington Fisheries Patrol, called me yesterday afternoon and said that they would have a vessel patrolling the Vashon Island area and they would be serving notices. We received a report this morning from Olympia that the state had in fact served five notices last night.

(TR., p. 19, line 19 - p. 20, line 1)

Q. Mr. Lewis, have you or have any of your enforcement officers had any occasion, any responses from nontreaty fishermen as to what their feelings about Judge Boldt's order is?

A. Yes.

Q. Could you briefly summarize those for us?

A. Briefly, the non-Indian fishermen are extremely upset about the way that they feel they are being treated by their government, feel that they are being treated unfairly. And I would say approximately one-fourth of them have told us they are going to fish in violation of any Court order.

Q. One-fourth of them have said they are going to violate any order of this Court?

A. That restricts their fishing and makes the distinction between the fishing seasons based on ethnic origin.

Q. I see. You indicated that on the morning of the 21st, Tuesday night, Wednesday morning, that a large number of nontreaty fishermen returned to the docks in the Seattle area, apparently having fished that night?

A. That is in the Port Townsend area.

Q. Port Townsend area. Can you describe for us what the scene at the dock was; what the reaction of, the feelings of the nontreaty fishermen there seemed to be?

A. As reported to me, and this is hearsay, it was a carnival atmosphere, laughing and joking. There were several tons of fish being loaded by the fishermen.

(TR., p. 22, line 12 - p. 23, line 13)

Q. And if I understand you correctly, you have been stopping — your officers have been stopping nontreaty fishermen and serving them copies of that order?

A. Yes.

Q. The order directs you in paragraph three to draft and serve copies of a notice upon any fisherman fishing in violation of these closures. Where in that order do you find a directive from the Court that you should stop legal fishing in order to serve copies of that order?

A. We do not stop legal fishing. We have boarded vessels that have been engaged in fishing during an open season. It has been the interpretation of the United States attorney that the purpose is to serve notice on the fishermen of the Court order, and to do that during the open and closed season.

Q. And the United States attorney has told you you could do that even though they are fishing legally?

A. Yes.

Q. Despite the fact the order directs you to serve it only on illegal fishing?

A. Yes.

(TR., p. 24, lines 4-25)

Q. To your knowledge, have these tribal or BIA officers or any of them participated in the efforts of serving notice or citations of violation of this Court's order?

A. No, and specifically, I have requested that they do not.

Q. You asked that they do not?

A. Yes.

Q. Why is that, Mr. Lewis?

A. Because we have had several threats by non-Indians over the telephone, and exchanges between our officers that the first Indian that boarded their vessel, they are going to shoot them. And what we have been attempting to do all summer long is keep the level of confrontation at a minimum. And we have requested the Indians not to board non-Indian boats.

Q. Have you had similar threats to your officers?

A. Yes.

Q. Do you know if similar threats have been directed to the state officers?

A. No, I don't know.

(TR., p. 31, lines 7-25)

Q. (By Mr. Johnson) Let's see, Mr. Lewis, you mentioned that you do receive notice of violations observed by Fisheries patrol or Fisheries planes, is that correct?

A. Yes.

Q. Have you received notice of such violations in the South Sound or Vashon Island area?

A. Yes.

Q. And how often have you received such notice?

A. (No response.)

Q. About how many times, if you recall?

A. We get a report from the — from Sandy Miller's office daily, approximately 8:30 a.m. And he informs us of what the state observed the night before.

(TR., p. 38, lines 7-20)

Testimony of WINFIELD "SANDY" MILLER,
Chief of Fisheries Patrol,
Washington Department of Fisheries

September 22, 1977

Q. (By Mr. Sim) Mr. Miller, if the Court takes no action this weekend which continues or creates some kind of restraining order as to the fishery, will the Department of Fisheries issue citations under state regulations to fishermen fishing illegally?

A. In view of the State Supreme Court decision, I would say no.

(TR., p. 65, lines 19-24)

Remarks of The Honorable GEORGE BOLDT,
District Judge,
Western District of Washington

October 25, 1975

THE COURT: First, I wish to make it clear that in my judgment, particularly during the last several months or year, I believe that the State Fisheries Department has made a bona fide and genuine effort to begin the enormously difficult problem of putting *United States v. Washington* into effect. If we did not know it otherwise, newspaper accounts almost every day show what an extremely difficult task has been layed upon the Fisheries Department. Of course, heavy tasks have been laid upon others as well, including the treaty Indians. Thus, in what I will say further, I mean no discredit in any way to anyone excepting those whom I will specifically refer to in a moment.

(TR., p. 42, line 21 - p. 43, line 7)

Testimony of LYLE L. NELSON,
Patrol Sergeant,
Washington Department of Fisheries
March 28, 1978

Q. Have you had any difficulties getting successful prosecutions on those citations?

A. I think, as I recall, we either got prosecutions on all cases or they were bail forfeiture type situations. As I said, they were minor infringements versus large.

Q. How would the change, or would the change to managing the fishery on a quota basis affect the days on which you would patrol or your men are patrolling?

A. How would it affect the days?

Q. Yes, or would it affect the days.

A. I am not sure I understand your question. If it was managed on a quota basis we, of course, would be patrolling on open days as well as closed days to make sure that either the opening and closing hours are abided by or the fact that no one fishes on a closed day. The normal patrol-type activity.

Q. Is it your understanding that the days to be fished have been agreed upon the two sides?

A. Yes.

Q. And do you know of any difference in the days to be fished under a quota basis management, different from an allocation basis management?

A. The only days I have become familiar with are the Monday, Wednesday, Thursday concept.

Q. To what extent, if any, then, will the change — assuming there is a change made to a quota basis management, to what extent, if any, will that affect your enforcement activities?

(TR., p. 179, line 1 - p. 180, line 3)

A. I am assuming you are meaning changing from the present allocation situation to a quota situation. Well, this, of course, will have a definite effect upon the enforcement because the allocation, of course, we have been told by the State Supreme Court several times, we cannot adopt or promulgate regulations based upon allocations. It has to be strictly conservation. Due to this fact, we have had prosecutors, namely the prosecutor in Whatcom County as well as the Judge in Whatcom County advise us that they will not prosecute cases based upon allocation. And this, of course, throws a very definite wrench into the works, so to speak, from an enforcement standpoint. If we go into the concept as we were discussing that —

Q. May I stop you there? Have they advised you of that point personally, the Judge and the Prosecutor?

A. Yes.

Q. On more than one occasion?

A. Yes.

Q. When would some of those have taken place?

A. Oh, over the past, since the advent of the Boldt decision. Of course, the first year was no problem. Then we started getting into the allocation issues. And I am sure as we are all aware, many salmon violations that were cited were of course dismissed by various courts throughout Puget Sound based upon the allocations. And Whatcom County, of course, was one of them.

Mr. McKechron, the Prosecutor, has told us that he will not prosecute the cases based upon allocation.

Q. Were any of the six or eight nontreaty fishermen whom you have cited in the last three years cited for allocation closures, for violation of allocation closures?

A. No, as I recall the ones we have cited have either been failure to display their pennant or were on the fishing

grounds without their license, kinds of things like this.

(TR., p. 180, line 4 - p. 181, line 12)

Q. Do you have any reason to believe any other fishermen intend to violate allocation closures this year?

A. Just based upon conversations that I have either heard directly or secondary that the possibility is there, yes.

Q. How many fishermen have you talked to directly about that who engage in the herring fishery?

A. Oh, three, maybe four different individuals.

Q. Could you recount the substance of the conversations, what exactly have they threatened to do?

A. No threats as such. Of course, it has been the type of discussion that you would have with an individual over a cup of coffee. And during that period of time, they voice their disgust with the total allocation issue and voice the fact that they are getting kind of fed up with it themselves. And they might quit being one of those that stays on the beach while everybody else goes fishing, this type of thing.

MR. SCHLOSSER: I don't think I have any further questions.

CROSS-EXAMINATION

Q. (By Mr. Dysart) Sergeant Nelson, pursuing a little further this matter about the prosecutors advising you. You say Mr. McKechron, the Prosecutor, advised you of this?

A. Yes.

Q. Are you the senior Washington Department of Fisheries enforcement officer for that area?

A. For the district, yes.

Q. He told you personally this?

A. Yes. And I was told in his office one day. He has told both Officer Phillips and Officer Osmondson, who is now in Olympia. He has told them directly that he didn't want any more allocation cases brought in.

(TR., p. 181, line 13 - p. 182, line 20)

Q. Now, when you bring in a case of a violation, there is nothing on there that reflects it is an allocation case, is there?

A. Not on the citation itself.

Q. What does the citation show?

A. The citation, well, of course, show the violation that took place. The wordage could be "did unlawfully take and fish for salmon for commercial purposes with a gill net." And also on the citation will be either the WAC number of the RCW or possibly the order number of the emergency regulation that may have been effective during that particular fishery.

Once the respective prosecutor, whoever he may be, in this case, Mr. McKechron in Whatcom County, sees what the order number is for the emergency regulation which, during most of officiaries, we operate on emergency regulations — if he sees what order number it is, reads that emergency regulation, and it is very obvious upon reading the regulation to establish whether or not it is an allocation regulation. And that is where he makes his decision. In other words, if one fishery user group, be it treaty or nontreaty, has been stopped or curtailed to allow the other group to catch their fair share, so to speak, then we get into the allocation issue.

Q. But the citation is essentially fishing in a closed season?

A. Closed season, closed area, whatever, yes.

Q. Now, you mention Judges have told you this. Are these District Court Judges or Superior Court Judges?

(TR., p. 182, line 21 - p. 183, line 25)

A. This was a District Court Judge.
Q. And on what occasion did he tell you this?
A. Well, this has been, two, three years ago when they first started getting into the problem with the salmon fishery.
Q. Before the Washington Supreme Court decisions of 1977?
A. Yes, yes.
Q. And what did he give as the basis for telling you that?
A. Basically, there again, the same thing, the allocation issue that we in fact did not, the Department of Fisheries or the Director of Fisheries did not have the authority to promulgate regulations based upon allocation.
Q. Did he make any ruling in a Court to that, or did he just tell you out of Court?
A. No, as I recall, we had a number of fishermen in the courtroom at the time for fishing violations. And it was based a blanket dismissal, based upon that fact.
Q. So it was an actual ruling in a court case, it was not just a conversation the Judge had?
A. No, this was in the courtroom, yes.
Q. Do you by any chance recall the name of the case or the time?
A. Right off hand I don't. It was in Whatcom County.
Q. It was in Whatcom County District Court. Have you ever heard a Superior Court Judge in Whatcom County take that position, also?
A. No.
Q. And you say that was several years ago. When was the time that the Prosecuting Attorney, when was the most recent time the Prosecuting Attorney told you this?
A. Fall of 77.
Q. Fall of 77?
A. Yes.

(TR., p. 184, line 1 - p. 185, line 8)

Q. Now, you say he looks at the order and determines whether it is going to be deemed an allocation closure. What do you do as an enforcement officer, and you have an officiary directive that says either that particular area is closed or that particular day is closed? What do you do to determine whether that is an allocation closure that you were told not to prosecute or to prosecute or that it may be some other type of closure that you should bring to the prosecutor? How do you make that distinction?
A. Well, if it is a conservation closure, it is very obvious. It states on the regulation or the emergency order, this order shall be closed to treaty and nontreaty fishermen from this point forward, so to speak. This clearly is a conservation that is closed to everyone. If the order reads in such a manner that it states that treaty fishermen only or nontreaty fishermen only may fish area 7C from August 1 through August 10, these are all hypothetical. This shows me or tells me through years of experience that this is in fact an allocation issue.

I will make the respective prosecutor, whoever he may be, Whatcom County, Skagit, San Juan, aware of the problem.

Due to the allocation issue, our normal enforcement action during the past two or three years has been to physically go out on the fishing grounds. And if, in fact, someone is fishing in violation of the order, the allocation order, we attempt to identify the individual, boat name, boat numbers, was his gear in the water, how many fish did he catch, where he was fishing, and approximately to a geographic location, pretty much get all the why, what, when and where type facts, put this in writing and then present it to the respective prosecutor. And then if he, of course, feels like prosecuting, we do. If he doesn't, well then

(TR., p. 185, line 9 - p. 186, line 18)

Q. Now, under the Washington regulatory pattern, isn't it true that the regulations are named in terms of fishing is open or, examples being given here, Monday, Wednesday, and Thursday, from certain hours rather than fishing is closed during —

A. Yes.

Q. So the order is going to reflect that fishing is open?

A. That is correct, yes.

Q. And if it is not during one of those days that fishing is open, then it is closed?

A. Then it is closed.

Q. By standard regulation, permanent regulations of the department; is that not true?

A. Yes.

(TR., p. 186, line 19 - p. 187, line 7)

Testimony of GEORGE E. MARSHALL,
Deputy Special Agent, Northwest Region,
National Marine Fisheries Service

April 5, 1978

Q. Mr. Marshall, did you have discussions with the State Department of Fisheries enforcement officers regarding what types of enforcement operations they would assist in and which ones they would not assist in during 1977?

A. Yes.

Q. Could you tell us, please, what operations they were willing to assist in and which ones they were not willing to assist in?

A. Generally, they indicated that they could not participate in allocation closures, that they were enforcing conservation closures but not allocation closures, and that they were not going to hand out the notices such as we were, the notice and the citations.

Q. Did the State Department of Fisheries to your knowledge serve notices pursuant to the, either the

temporary restraining order or preliminary injunction?

A. I have no knowledge that they did, and the indication to me was that they did not.

Q. And how about citations pursuant to any of those three orders?

A. No, I am not aware of any they served.

Q. Excuse me. Did I interrupt you?

A. No.

Q. Mr. Marshall, when you indicate conservation and allocation closures, by allocation closures do you refer to those closures which are directed only against nontreaty Indians?

A. Yes.

Q. So those would be closures during times when the treaty Indians are permitted to fish and nontreaty persons are not permitted to fish?

A. Yes. That is correct.

(TR., p. 93, line 1 - p. 94, line 7)

Testimony of DAVID GIBLER,
Senior Resident Agent, Seattle,
National Marine Fisheries Service

April 5, 1978

Q. Mr. Gibler, how are you employed?

A. National Marine Fisheries Service.

Q. And in what capacity?

A. My title is Senior Resident Agent. I am stationed in Seattle.

Q. Mr. Gibler, during the 1977 salmon fishing season, were you involved in South Sound enforcement under the provisions of the three different orders of this Court?

A. Yes, I was.

Q. And what was your relationship with the enforcement effort under those orders?

A. Well, I assisted in some manner or degree in planning the patrols. And basically, the on-scene supervision as well as actually delivering notices and boarding vessels.

Q. All right. You were an on-the-water supervisor?

A. Yes.

Q. During most of this time?

A. Yes.

Q. When notices were being served on fishing vessels and citations were being issued, when they were fishing contrary to regulations, how long would the contact you would make with the vessels usually take?

A. Just serving the notice might be, maybe take 15 minutes at the most, depending a little bit on the individual fisherman. When the notice was served, pertinent parts were explained to him, we asked if he had any questions. If he had any questions, those were explained. So it varied a little bit.

Q. Mr. Gibler, did it take longer when you were issuing citations?

A. Yes.

Q. And about how long did it take?

A. Probably a half hour or twenty minutes.

Q. During the period of time that you were either serving a notice on one vessel or issuing a citation on a vessel, what in your experience were the other fishing vessels who may be in the area doing?

A. They generally left.

Q. Is it fair, then, to say that when you would make one enforcement contact in an area, that would have been the only vessel you would be able to catch in that area?

A. Generally, that is true. Sometimes fishermen generally seem to communicate among groups. If you have

a group from one port, they generally communicate, and a group from another port may not be communicating. That is particularly true on the CB channel, so you might come into an area and board one boat that happened to be from Port Ludlow and be able to board on another boat from another area. Sometimes, you move down to Hood Canal and another group would move in behind you while you were down there and wouldn't realize you were there.

Q. Mr. Gibler, you have made some mention of CB radios. Can you explain what you mean by CB radio?

A. Most of the fishing vessels are equipped with a citizens band radio. And there is quite a bit of communication back and forth, and they also apparently have some ground station as to the Coast Guard cutters, or patrols that are in the area.

Q. That is for the positions of those?

A. Yes.

Q. And in your enforcement efforts, did you have occasion to monitor these CB radios?

A. Yes.

Q. Did you have occasion where you would hear references on the CB radios of the enforcement efforts that you were undertaking?

A. Yes.

Q. Mr. Gibler, approximately how many other situations where you were either serving a notice or citation were you personally involved in the 1977 enforcement scene?

A. I don't really know. I just, somewhat guessing, I suppose maybe 50 to 75 of the notices and maybe 10 of the citations.

Q. Okay. So somewhere between 60 and 85 contacts where you were dealing with a boat out on the water?

A. Yes.

Q. And of these contacts, what relation would that number of contacts be to the number of boats you

actually saw fishing during closed times during the 1977 season?

A. Oh, I would say it was probably two or three times as many that we saw in the area that would leave before we could get on board.

Q. Mr. Gibler, when you are having these enforcement contacts with commercial fishermen, did any of them make statements to you indicating their intention to fish at any time the Indians were permitted to fish?

A. Yes, sir.

(TR., p. 116, line 1 - p. 119, line 14)

Testimony of WINFIELD "SANDY" MILLER
Chief of Fisheries Patrol
Washington State Department of Fisheries
April 5, 1978

Q. Mr. Miller, what is your occupation?

A. I am the Chief of Washington State Fisheries Patrol.

Q. And how long have you had that position, Mr. Miller?

A. Since July of 1977.

Q. Approximately nine months?

A. Yes.

Q. What was your position before that?

A. Assistant Chief.

Q. All right, now, how long were you Assistant Chief?

A. About two years.

Q. And how long have you totally been involved in fisheries enforcement in the State of Washington?

A. Twenty-five years.

Q. All with the Washington State Department of Fisheries?

A. Yes.

Q. Mr. Miller, during 1977, August and September of 1977, did you become aware of certain orders of this

Court directing enforcement directed against individual fishermen?

A. Yes.

Q. Was the State of Washington directed to undertake certain enforcement responsibilities pursuant to those orders?

A. Were we directed to?

Q. Yes.

A. By injunction?

Q. Yes.

A. Yes.

Q. Pursuant to the orders of this Court, did you issue orders to the enforcement persons subordinate to you with regard to what actions they should take?

A. Yes.

Q. What orders did you issue to the people who worked with you with regard to their issuing citations for contempt of court?

A. That we wouldn't participate directly in that action.

THE MAGISTRATE: Excuse me just one minute, Mr. Miller. Can you speak up just a little more. It is difficult to catch your words.

Q. That is, Washington State Department of Fisheries enforcement officers would not issue contempt citations?

A. Yes.

Q. What orders did you issue to the men who worked with you in regard to the service of notices of the preliminary injunction and the temporary restraining orders?

A. We did participate initially in posting of some notices.

Q. Posting of some of the notices?

A. Yes.

Q. And where did this posting occur?

A. In the Port Townsend area.

Q. Did you participate at all in personally serving the notices on any of the fishermen?

A. No.

Q. When I say "you" I am speaking of the Department of Fisheries.

A. No.

Q. With regard to the enforcement of what is referred to as allocation closures, did you give any orders to the men who worked there?

A. No.

Q. You did not.

A. Allocation areas?

Q. Yes. Let me ask the question a different way. What did you tell your men to do with regard to the enforcement of closures on allocation?

A. Our efforts were concentrated almost entirely on conservation closures.

Q. Now, Mr. Miller, during 1977, the Washington State Department of Fisheries did, at the direction of the Federal Court, enact several regulations which in essence allocated fish so that the treaty Indians could get a larger share than they otherwise would have done; is that correct?

A. I am a little bit — I won't be able to testify to that.

Q. Were there regulations which were promulgated by the Director of the Department of Fisheries which allows particular areas to be open for treaty Indian fishing but closed it for all other fishing?

A. Yes.

Q. And what, if any, enforcement actions did your men take with regard to those types of regulations?

A. None.

Q. And why was that?

A. We were precluded from having this authority by the Washington State Supreme Court.

Q. Mr. Miller, what has been your experience in the past

with regard to the ability to obtain convictions in cases where you had cited someone under Washington State regulations for an allocation closure?

A. It was difficult to obtain a conviction in the state courts.

(TR., p. 132, line 22 - p. 136, line 11)

Q. I will start over. I will abandon your other testimony and ask my question. During the 1976 fishing season, was your department's policy to issue citations for allocation closures?

A. Yes.

Q. And did you issue any such citations?

A. Yes, we did.

Q. And what was the — did you have any difficulty enforcing those in state court?

A. We had difficulty in obtaining convictions in state court.

Q. Is it not true that citations were thrown out on the basis that the Washington State Department of Fisheries did not have authority; that is, in the view of the Washington Supreme Court, to issue regulations which closed non-treaty fishing but left treaty fishing open?

A. Some of them were, yes.

Q. Was that also not true during the 1975 fishing season?

A. Yes.

Q. You indicated that your instructions or your department's instructions during 1977 were that you would not participate in enforcement of this court's orders; that is, you would not issue citations for violations of allocation closures. Is that what you testified to earlier?

A. Yes.

Q. And that is to say, that you would not issue citations in situations where fishing was closed to non-treaty fishermen but remained open to treaty fishermen?

A. Yes.

Q. Is there any reason why you policy during 1978 season would change in that regard?

A. No.

(TR., p. 145, line 1 - p. 146, line 6)

Testimony of SAMUEL G. WRIGHT,
Chief of Harvest Management Division,
Washington State Department of Fisheries
April 5-6, 1978

Q. (By Mr. Schlosser.) Would you give us an opinion, if you have one, as to whether the tribes at this time have a large enough fishing fleet to take 50 percent of the harvestable off reservation catch to take 50 percent of harvestable catch, if they fish only at the same time and places as the non-treaty fleet?

A. No, I think generally they don't in most areas. There is exceptions.

(TR., p. 155, lines 8-15)

Q. Could you give us an idea of the approximate share of the harvest taken by the various gear types in say, 1976, by the gear types; I mean just purse seines, gillnet, troll and sport?

A. Well, it differs quite a bit by species. In the case of chinook salmon in Puget Sound, the majority of the catch of the non-treaty share would be by sports. This grades all the way into chum salmon, where almost the entire catch would be taken by net fishermen.

Coho would be predominantly net fishery. But still significant performed by the sports fishery.

(TR., p. 169, lines 3-13)

Q. Well, in directing your staff to provide you figures on the size of the run and the size of the harvest, you also

attempt to monitor or quantify what illegal fishery is going on?

A. That is correct.

Q. Has there been considerable illegal fishing in the past several years, Mr. Wright?

A. Yes, there has been substantial fishing.

Q. Last year, the Federal Court issued an order similar to that which is sought in this proceeding. Did the illegal fishing last year after that court order was adopted, was it increased over the year before, or was it decreased?

A. Yes, 1977 was substantially worse than 76.

Q. I want to be sure we are getting this conclusion on the record. Are you saying that during the season after the Federal Court issued the injunction such as that sought here, the illegal fishing activity actually increased over what it had been in previous years?

A. Yes. I would say there was a bigger illegal catch in 77 than there was in the previous year or in any previous year, actually.

Q. Do you have any input, any influence, into the efforts made by the Department's enforcement officers and the priorities they place on the kind of regulations which they try to enforce?

A. Yes. We make flights with them, check on that. We tell them what the situation is, whether it's a conservation or allocation system.

(TR., p. 206, line 14 - p. 207, line 16)

Q. In conclusion, let's turn to that problem for a moment. Mr. Dysart asked you some hypothetical questions in dealing with runs being 15 percent, I believe, below predictions. When you identify a run that actually is below the level necessary for spawning escapement, do you as a normal course take effort to close all fisheries on those runs, sports and commercial?

A. Yes. On a run that is really down, yes.

(TR., p. 208, line 20 - p. 209, line 2)

Q. What elements go into the harvest of salmon by a gillnet fisherman? That is probably too general for you to understand what aspects of fishing contribute materially to the ability to harvest fish by a gillnet fisherman.

MR. SIM: I am going to object. I just don't see the relevancy of this line of questioning.

THE MAGISTRATE: Well, I will reserve ruling on it. And I presume that you will tie it up some way with the questions involved here.

MR. YATES: Yes, sir.

THE MAGISTRATE: All right.

MR. YATES: This is an offer of proof. I will tie it up to the opinion of this particular witness elicited by the government as to whether or not the treaty Indians are capable of harvesting their share of the fish.

THE MAGISTRATE: You may proceed.

Q. (By Mr. Yates.) Did you understand?

A. Yes, it is a whole range of things, how — the guy's experience, his gear, how hard he wants to work, a certain amount of luck, obviously. But there is, you know, there is some fishermen that consistently do well, and there is some fishermen that fish very hard, and there is some that do both, and there is the opposite end of the scale.

Q. Would it be fair to say that the willingness to work and the skill in fishing are the two major primary components in a successful harvest of salmon, of all the components that go into it?

A. Well, if everybody had the same gear, then obviously skill and ambition are the primary differences that make one guy catch more than the other.

Q. Okay. Have you had occasion to determine the type of gear by — by "gear" I am referring to well, the type of net, generally, used by a treaty Indian gillnet fisherman?

A. Well, yes, in general.

Q. Is it generally the same type of a gear utilized by non-treaty — the net?

A. In areas where they fish in common, it is pretty close. Again, there is exceptions. Where they fish, particularly some of the open water areas, it is fairly close.

Q. Well, by "fairly close" wouldn't you say they particularly use the same type of monofilament but multistrand filament net?

A. Yes, most of them use that.

Q. And as a general rule, the fishing, treaty fishermen, fish with the same type of net that non-treaty fishermen fish with?

A. In cases where they fish the same areas, it is pretty close.

(TR., p. 219, line 22 - p. 221, line 23)

Q. Now, who has borne most of the brunt of reduced non-treaty fishing resulting from the decision in *United States v. Washington?*

A. It would be, as a generality, obviously it is the net fishermen.

(TR., p. 258, lines 3-7)

Q. Could you describe, then, the value of a chinook salmon harvested — well, the value of a fall chinook salmon harvested in a bright condition in the area of Puget Sound versus the value of a chinook salmon in a condition in which it is generally found when harvested in the river mouths or the proximity of river mouths to which it is migrating?

A. Well, again as a generality, if there is a point where

you get maximum size and fairly bright fish or even with some coloration, it will get the largest, highest price per pound. When the fish starts degenerating to some extent, it will bring a lower price as it approaches spawning.

Q. And when does this degeneration usually — well, strike that. Is the amount of degeneration generally greater in the river mouths than it is away from the river mouths?

A. Yes, generally, but like I say, that is strictly a generalization.

(TR., p. 260, lines 7-25)

Testimony of PHILLIP R. MUNDY
Tribal Fisheries Advisor
April 6, 1978

Q. And how is your confederation or your office financed?

MR. SCHLOSSER: This is completely irrelevant.

THE MAGISTRATE: I will sustain the objection.

MR. YATES: Your Honor, if the Court will permit me, I will make an offer of proof to establish the relevancy.

THE MAGISTRATE: All right.

MR. YATES: The offer of proof is that the tribes derive little or no funding for management of their fisheries for revenue generation for their tribes through the harvest of salmon that occurs in Hood Canal. And this goes to the amount that is generated and to the method whereby it is utilized.

THE MAGISTRATE: I am not going to permit it. I don't think that that has any bearing on the issues before the Court today. It might in a general sense, but not for this hearing. So I am going to sustain the objection.

MR. YATES: All right.

Q. (By Mr. Yates) Would you describe for me, Mr.

Mundy, could you state whether or not the tribes that are members of the confederation derive any income from the harvest of salmon by the members of the tribes?

MR. SIM: I will object. Same area.

THE MAGISTRATE: Is this trying to get to the same point?

MR. YATES: This is to establish that the tribes will suffer no decrease in income as a result of any — will suffer a minimal decrease in income or benefits as a result of any loss of fishing that may occur as a result of the individual fisherman not receiving their harvest.

THE MAGISTRATE: Well, I am going to sustain the objection. I don't think that that is necessarily related to this. The economic impact is not anything, I don't think, that is within the extent of this.

MR. YATES: Is the Court going to preclude any testimony about the economic impact.

THE MAGISTRATE: As far as I am concerned, unless I can recieve some indication from counsel that it would be within the framework of the issues in this case, I am not going to permit it.

MR. YATES: Well, Your Honor, as I understand it, the underlying action in this case is a number of Indian tribes against the State of Washington, based upon their being deprived of certain fishing rights. As I understand it, there is no individual fisherman who has had an entitlement to fish determined by any decision in this Court, nor has any individual fisherman sought a determination by this Court as to his entitlement to fish.

The question that I assume is before this Court is whether the tribes, the treaty tribes themselves, the governmental unit comprising the treaty tribes, not the individual members of the tribes, are suffering any loss if they do not, if their members are unable to harvest their percentage of fish which the tribes have

had allotted to them by the Court. I assume that loss must include, unless counsel — unless the United States is completely eliminating from consideration from the injunction any financial aspect of this, I assume that the loss must include money. I assume, since the tribes are parties, the amount of revenue generated through fishing must be an issue before this Court.

THE MAGISTRATE: Well, in the overall picture, there must be some relevancy to the economic aspects of the case. But the Court has already made its ruling and the basic decision of the entitlement. So if they only get 25 percent, I assume there is some economic loss to the tribe, possibly to the individuals. I don't know. But whatever, this has already been ruled upon as far as the entitlement issue.

MR. YATES: I don't question that at all, Your Honor, but what I am talking about is what loss does the tribe suffer if they don't get their entitlement. The purpose of the injunction is to prevent their losing what they are entitled to. Now, what I want to establish is the value of that. I cannot conceive that a Court would conclude that it is equitable to drive into bankruptcy 600 commercial fishermen in order to sustain for another individual an income of five or ten thousand dollars, if that is what we are talking about. I have no idea of what we are talking about.

THE MAGISTRATE: Are you suggesting that I am to review the 50-50 split?

MR. YATES: Absolutely not. I am suggesting that we are in a proceeding to determine the equities of the issuance of a particular proposed injunction.

THE MAGISTRATE: It comes around a different direction, coming to the same question. And I think that is beyond the scope of this assignment on this order of reference. So I will sustain the objection to this line of questioning.

MR. YATES: All right. In order to establish for appeal the basis for the asking of that question, I

tender an offer of proof that the response to my question was established that the tribes derive little or no benefit as a result of the harvest of the salmon by their various individual members.

(TR., p. 306, line 25 - p. 311, line 3)

ARGUMENTS OF COUNSEL

April 5, 1978

MR. YATES: May I ask the Court to delineate exactly those rights which we have and do not have in this particular hearing at this point, since it is obviously — ordinarily, counsel has the advantage of knowing the rules under which a proceeding is going to be conducted prior to the proceeding. But as these rules are being developed during this proceeding, it makes it difficult for us to make any judgment as counsel for individuals on what will be an appropriate position for the client. So I would ask this Court at this point to delineate exactly what authority we have to participate in this hearing.

THE MAGISTRATE: As I think I indicated, you will have the right to present arguments, either pro se or in behalf of any commercial fisherman. Any commercial fisherman who is represented by counsel will be permitted, absent the objection of the United States Attorney and the tribal attorneys, to present testimony in support of their position.

MR. YATES: You indicated we can present testimony. Do we have the authority to subpoena witnesses?

THE MAGISTRATE: To subpoena persons?

MR. YATES: Yes.

THE MAGISTRATE: I would say no.

MR. YATES: Okay.

THE MAGISTRATE: As a non-party, I would no.

MR. YATES: We do not. Do we have the authority to use interrogatories, requests for admission, the other discovery devices contained in the rules?

THE MAGISTRATE: I would again, as a non-party, say no.

(TR., p. 20, line 13 - p. 21, line 17)

Testimony of MICHAEL GRAYUM,
Biologist, Northwest Indian
Fisheries Commission

August 21, 1978

Q. As part of your regular duties at the Northwest Indian Fisheries Commission, do you receive tribal fishing regulations?

A. Yes.

Q. Do you review those?

A. Yes.

Q. Do the tribal regulations contain estimates of tribal fishing power?

A. Most commonly, they do, yes.

Q. What is fishing power and how is it expressed in the regulations?

A. It is generally expressed as a number of units in a year that are anticipated to participate in the fishery, basically the ability of that fleet to catch fish, the fishing fleet.

Q. Based on your knowledge of the allocations sought by the Plaintiffs for Puget Sound Coho and Chum, do you have an opinion as to whether the tribes who have usual and accustomed fishing places in the Sound have sufficient fishing power to catch the number of Coho and Chums allocated in this order if the fish are made available to them in the usual and accustomed places?

A. I believe they do.

Q. What is that opinion based on?

A. On my knowledge of past years' fisheries, their anticipated fishing effort and the run size predictions, harvestable number prediction.

Q. If limits are not placed on the non-treaty harvest, will the number of fish caught be allocated to the tribes in this order actually be made available to the tribes?

A. No, it is not likely.

Q. If you know, does the State's harvest plan typically provide for all of the harvest of South Puget Sound Chum north of the Tacoma Narrows?

A. In the last, it has, with the exception possibly of Nisqually Chum, which is a particularly late run that comes in during December, January, and February when the non-treaty fisheries have been closed in the past.

Q. Referring to the Chum run, other than the late Nisqually run, if that harvest plan is used and restrictions aren't placed on the non-treaty harvest, would any Indian tribes be denied the opportunity to harvest Chum runs which might otherwise be available at their usual and accustomed places?

A. Yes, certainly the Squaxins would.

(TR., p. 41, line 3 - p. 42, line 22)

Testimony of MICHAEL GRAYUM,
Biologist, Northwest Indian
Fisheries Commission

July 20, 1978

Q. (By Mr. Schlosser) Mr. Grayum, when you receive tribal fisheries regulations, do these regulations typically contain an essence of tribal fishing power?

A. Very often, usually they do.

Q. Can you explain for us what fishing power is?

A. It is some estimate of the ability of the fishery to catch fish and it is usually expressed in number of units of gear in this case.

Q. Have you reviewed the pre-season predictions for the 1978 salmon runs which are found in the order proposed by the tribes?

A. Yes, are you referring to the first two tables in that order on page 2 and 3?

Q. Yes, I think that is correct.

A. Yes.

Q. Are you familiar with the treaty allocations, which are being sought by the United States and tribes in this order?

A. Yes.

Q. Do you have an opinion as to whether the tribes who have usual and accustomed places in Puget Sound have sufficient fishing power to catch the numbers of fish sought in this allocation order if the fish are made available to the tribal fisheries at usual and accustomed places?

A. Yes.

Q. Would you state that opinion?

A. Yes, I do think they do have the ability to take those numbers of fish.

Q. What do you base the opinion on?

A. On the estimate, the fishing effort that I have seen by the tribes compared to previous years and numbers of fish that they caught in previous years basically.

(TR., p. 28, line 16 - p. 29, line 23)

NOTICE OF
UNITED STATES WITHDRAWAL OF APPROVAL
OF
1975 IPSFC REGULATIONS

July 19, 1975

(Exhibit USA-96)
Hand written not typed

6:30 p.m.
July 19, 1975

W. L. Sullivan
Donald Johnson

I hereby withdraw for the government of the United States of America the approval given on April 11, 1975, to those parts of the regulations of the International Pacific Salmon Commission transmitted by letter of February 24, 1975, which allocate open fishing times among the various types of gear within United States convention waters.

/s/ _____
T. A. CLINGAN, JR.
Deputy Assistant Secretary
of State for Oceans and
Fisheries Affairs

LETTER, CHAIRMAN OF THE IPSFC to the DIRECTOR, WASHINGTON DEPARTMENT OF FISHERIES

July 22, 1975

(Exhibit F-82)

Mr. Donald W. Moos, Director
Washington State Department of Fisheries
Room 115, General Administration Building
Olympia, Washington 98504

Dear Mr. Moos:

It has come to our attention that you have issued an Order (1229) dated July 21 which allows fishing by Indians with any gear at any time United States Convention Waters in State Areas 1, 3 and 8 are open for fishing under Commission regulations, and which allows five days a week fishing for certain Indian tribes in Convention Waters in State Area 2.

The Commission is gravely concerned that this Order does not conform with the regulations of the Commission as approved by the United States Government, and considers it urgent that appropriate steps be taken immediately to implement the Commission regulations as approved.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ _____
W. R. HOURSTON
Chairman

LETTER, CHAIRMAN OF IPSFC to the SECRETARY OF STATE

July 22, 1975

(Exhibit JX-10)

July 22, 1975

The Honorable Dr. Henry Kissinger
Secretary of State
Department of State
Washington, D.C. 20520

Dear Dr. Kissinger:

The Commission has received information that an Order has been made by the Director of the Department of Fisheries of the State of Washington that does not conform with the regulations approved by the Commission and the United States Government for United States Convention Waters in 1975.

The Order provides 5 days a week fishing for Indians in State Area 2 for tribes that qualify, and also provides that Indians may fish with any gear at any time United States Convention Waters in State Areas 1, 3 and 8 are open to any fishermen under Commission regulations. The text of the Order is attached.

The Commission is gravely concerned with this action by the State of Washington Director of Fisheries and considers it urgent that the United States Government take appropriate steps to implement the Commission's regulations as approved. Your earliest possible consideration and response would be appreciated.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ _____
W. R. HOURSTON
Chairman

Encls.

cc: The Hon. Romeo LeBlanc
Governor Daniel J. Evans
Mr. Donald W. Moos
Mr. Donald R. Johnson
Dr. Thomas A. Clingan, Jr.

LETTER,
CHAIRMAN OF IPSFC
to the
SECRETARY OF STATE

July 25, 1975

(Exhibit JX-11)

July 25, 1975

The Honorable Dr. Henry Kissinger
Secretary of State
Department of State
Washington, D.C. 20520

Dear Dr. Kissinger:

Further to our letter of July 22, the Commission has since received information that the United States State Department has temporarily rescinded its approval of those parts of the Commission's regulations for United States Convention Waters that allocate times of fishing for each fishing gear.

This change in the regulations of the Commission does not have the approval of the Commission, nor has the Commission's Advisory Committee had opportunity to be heard as provided in the Understandings stipulated in the Protocol of Exchange of Ratifications of the Convention. The Commission must register the strongest possible

protest of this action by the State Department. The Minister of Fisheries for Canada, Mr. LeBlanc, is being advised of the Commission's views on this matter.

The current state of confusion concerning the Commission's regulations in United States Convention Waters must be ended quickly, by implementation of the Commission's regulations as originally approved by the United States Government by letter from Mr. Sullivan, the Acting Deputy Assistant Secretary for Oceans and Fisheries Affairs, to the Commission Chairman on April 11, 1975, copy of which is attached.

Yours very truly,

INTERNATIONAL PACIFIC SALMON
FISHERIES COMMISSION

/s/ _____
W. R. HOURSTON
Chairman

Encl.

cc: The Hon. Romeo LeBlanc
Dr. Thomas A. Clingan, Jr.

FISHERIES ADVISORY BOARD REPORT
Re: Illegal Fishing

November 17, 1976

TO: Hon. George H. Boldt

FROM: Richard H. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Fisheries Advisory Board Meeting, October 11 and 13, 1976, to determine the number of days of substantial illegal fishing activity by nontreaty fishermen under the coho order

On October 11, the meeting was convened at 10:45 A.M. in the office of the Northwest Indian Fisheries Commission. The tribal representative was Ron Charles, and the Washington Department of Fisheries representative was James Johnson. A court reporter was present. Witnesses provided their testimony under oath as to their observations on illegal fishing activities by non-treaty fishermen. Exhibits were offered. A transcript has been prepared.

On October 13, the Board met in the office of the Washington Department of Fisheries. Designated representatives again were Ron Charles, tribal representative, and James Johnson for the Department of Fisheries. Others present were John Clinebell, attorney for the Puyallup Tribe, and Leo LaClair of the Northwest Indian Fisheries Commission. Additional information was supplied by Mr. Johnson, based on observations by WDF personnel and citations issued. The Board could not agree on definitions of "substantial" and "reasonably verifiable" illegal fishing activity; therefore, the board members will be submitting separate reports. The chairman indicated at the beginning that he reserved the right to make a recommendation or provide a separate report, and I am therefore doing so.

It was agreed that the parties would use somewhat the same outline in their reports to the Court, and that these would include the following items: A list of the days

and number of boats where substantial illegal activity took place, and the source of the information. The report would also provide a definition of "substantial" and would discuss "reasonably verifiable illegal activity." The Indian representative indicated that they would be asking for a revised sharing formula on chums to invoke the 20,000 fish penalty that appears in the coho order, because there are no coho available to the non-treaty fishermen.

The Court will have the benefit of the reports provided by the two parties which ought adequately to define the issues. It is therefore probably not necessary or desirable for the chairman to supply any recommendations. Perhaps it would be useful, however, to point out that on at least one occasion (the night of October 5-6) there was a clear effort on the part of Puget Sound Gillnetters to organize and create a substantial fishery which was illegal by any standards, i.e., it took place to a considerable extent in areas closed for conservation purposes to *all* fishermen (See affidavit of R. Pachtel of the Washington Department of Fisheries and the testimony of several tribal patrol officers). In addition it was learned that the Whatcom County Prosecutor had notified WDF he does not intend to prosecute citations issued when allocation is the basis for closure to non-treaty fishermen. As a result, there has been substantial fishing in Bellingham Bay by non-treaty fishermen at times when it was open only to treaty fishermen. That fishing was illegal, according to this Court's orders.

FISHERIES ADVISORY BOARD REPORT
Re: Lake Washington Sockeye Fishery

July 18, 1977

TO: The Honorable George H. Boldt, Senior Judge
United State District Court

FROM: Chairman, Fisheries Advisory Board

SUBJECT: Report of meeting of the Fisheries Advisory Board convened July 15, 1977 to discuss Lake Washington sockeye fishery.

The meeting was convened by the Chairman of the Fisheries Advisory Board, Richard R. Whitney, at the request of the designated tribal representative, Bernice White, member of the Muckleshoot Tribal Council and Coordinator of Fisheries for the tribe. The designated representative of the State was Gordon Sandison, Director, Washington State Department of Fisheries. The meeting was convened by telephone conference call at 3:30 p.m. Also participating were Bob Adair, Muckleshoot Tribal Biologist, and James Johnson, Assistant Attorney General, State of Washington. The designated representatives asked me, as Chairman, to submit a report to the Court on the meeting.

Bernice White asked Bob Adair to provide information to the Board on the run size and harvestable number of sockeye in Lake Washington. Mr. Adair stated that he obtained his informatin from discussions with Dennis Austin of the Washington State Department of Fisheries. As of July 13, there were 327,936 sockeye counted into Lake Washington. The escapement goal is 350,000. The projected total run size was 395,821. On this basis, the Department of Fisheries has established regulations

opening a sport fishery in Lake Washington commencing Saturday, July 16.

Bernice White moved that a tribal net fishery be approved by the Board for next week. Motion failed for lack of a second. Mr. Johnson explained that recent Supreme Court decisions have raised some questions. The specific question in this situation: * * * can the State permit an Indian fishery in Lake Washington and at the same time prohibit a net fishery in Lake Washington?

It was moved by Mr. Sandison and seconded by Ms. White, and the designated representatives agreed that the matter should be brought to the attention of the Court as soon as possible.

I informed the designated representatives and the participants that based on the facts presented, I find that there is no basis for a conservation closure for sockeye in Lake Washington. There are harvestable numbers of sockeye available in Lake Washington. I recommend that a tribal fishery be authorized that would be closely regulated and the catch closely monitored on a daily basis as proposed by the Tribal Biologist.

HIGHLIGHTS OF 1976 MANAGEMENT
of
PUGET SOUND SALMON FISHERIES

State of Washington
Department of Fisheries

April 1977

Attachment B to Affidavit of Samuel G. Wright, August 5, 1977, filed with the District Court in U.S. v. Washington, No. 9213, on August 8, 1977.

INTRODUCTION

The 1976 fishing season marked the third year of Puget Sound (Figure 1) salmon fishery management under the legal requirements of the "Boldt Decision" (United States vs. Washington, Civil No. 9213). These require-

ments affect the manner in which the Department of Fisheries regulates the treaty Indian fishery as well as the non-Indian fishery. Although treaty Indian tribes have legally-specified authority over tribal fisheries, the ultimate responsibility for conservation of the salmon resource is embodied in the Department. Thus, the Department plays the leading role in establishing the technical basis for management of the runs and recommending harvest management considerations, as well as promulgating regulations for tribal fisheries.

Department regulation of treaty Indian fishing primarily occurs after tribal regulations have failed to accommodate conservation needs of the resource. It should be pointed out that adoption of a Department regulation for Indian fishing does not necessarily mean that all tribes failed to adopt proper regulations. Most marine and many freshwater fishing areas are within the usual and accustomed fishing area of more than one tribe. Improper regulations by any one tribe could result in Department regulation.

Curtis and Austin (1977) have summarized Department and tribal regulations for 1976 Indian fisheries. There were 33 such sets of regulations in 1976, most of which affected treaty Indian fishing in several areas. Additionally, the Department requested, and received, one reservation closure in 1976.

Procedures and authority for Department regulation of tribal fisheries are specified in numerous orders of United States District Court for Western Washington at Tacoma.[1] Procedural and biological justification requirements are quite extensive and, in some cases, complicated.

[1](a) Final Decision No. 1 Re: All Issues Submitted For Decision January 11, 1974, February 12, 1974; (b) Declaratory Judgment and Decree, February 12, 1974; (c) Injunction, March 22, 1974; (d) Interim Plan and Stay Order, March 22, 1974; (e) Order for Program to Implement Plan, October 8, 1974; (f) Order Directing Prompt Notice to Dr. Whitney when Fishery Problems Arise, November 20, 1974; (g) Order Establishing Fisheries Advisory Board, October 28, 1975; (h) Stipulation re: Notice of Regulations; (i) Order on Certain Questions re: Fisheries Management, April 13, 1976; (j) Order re: Revision of Fisheries Advisory Board, May 3, 1976.

This fact, along with the number of tribal fisheries, the developing nature of their fisheries and paucity of historic data, and the diversity of tribal philosophies and goals, makes regulation of these fisheries a monumental challenge. Superimpose on this the non-Indian commercial and sport fisheries with attendent problems, which have been greatly multiplied and magnified by the Boldt Decision, and one can begin to imagine the complexity of Puget Sound salmon fishery management.

The purpose of this report is to outline the highlights of sport and commercial management of Puget Sound salmon fisheries in 1976. Commercial highlights are presented by species, in general sequence of entry into Puget Sound fisheries, and area. Because of the overlap in timing of the stocks through a given area (Figure 2) and because one species will predominate closer to the river while the subsequent species is passing through approach areas, the report does not present an exact chronological sequence of events.

Details of the events reported herein lie in a variety of documents. These include 1976 Puget Sound status reports for each species, various court orders, minutes of Fisheries Advisory Board meetings, Department regulation hearing notices, justifications filed with the court for each Department regulation of Indian fisheries, Department news releases, and informal records.

SPORT FISHERY MANAGEMENT

In 1975 the Department attempted to regulate the Puget Sound sport fishery on the same basis as the commercial fishery, with numerous emergency closures and openings. Confusion and disruption of the fishery resulted, affirming the Department's prior belief that this approach was unworkable, as well as generally unnecessary for proper management.

Therefore, in 1976 the approach was taken that closures of the sport fishery would occur in areas and during times when the fishery is specific for a stock that required complete protection. Examples were extended

emergency closures to protect Lake Washington sockeye and Skagit River spring chinook. Numerous other closures were anticipated far enough in advance to be included in the sport fishing regulations.

Additionally, a 20-inch minimum size limit was adopted for chinook in Puget Sound to protect small blackmouth and ocean sport fishing restrictions affected Puget Sound stocks. In other areas, a maximum size limit was adopted to protect adult chinook and other measures were initiated.

COMMERCIAL FISHERY MANAGEMENT

General Problems

Several general problems relative to management of Indian fisheries in the Case Area continued during 1976. The most important of these are outlined in this section.

1. **Tribal representation**: There are many reports (e.g., catch report) that require agreement between State and tribal technical representatives. In most cases, no one was able to come forth as an authorized technical representative of all tribes, or even of any one tribe. Much time was spent with tribal representatives and agreements reached only to find later that some or all of the tribes denied that the tribal representative was authorized to speak for them. All previous endeavors therefore had gone for naught.
2. **On-reservation share**: In some cases, tribes have sought to have on-reservation adjustments equal to or larger than the entire returning run. This would preclude Indian and non-Indian fishing throughout the in-Sound migration route, as well as near the river mouth. In other instances, tribes did not respond to requests to provide the Department with their estimate on which to begin the process to establish this number as required by Order on Certain Questions Re: Fisheries Management. In many

instances, the basis for the estimate was not given as required by the court order. Even in those cases where no dispute occurs, considerable time is required to go through the required steps.

3. **Test fishing**: This subject continues to be a source of conflict. Tribal test fisheries have often been proposed or conducted without proper justification or notification. Many limited commercial fisheries have ben conducted under this guise. In a few instances, test fisheries have often been conducted that gave the results needed to justify opening the area but subsequent actual fishery results did not correspond.
4. **Overlapping usual and accustomed areas**: This problem, with several tribes having broad, overlapping usual and accustomed areas encompassing major migration routes for the various stocks, continued unabated. Regulations were conflicting and confusing, often allowing illegal fishing to go unenforced. In some cases, tribes managed their fisheries to take the appropriate number of fish only to have another tribe(s) open the area and harvest part of what should be escapement. Furthermore, many tribes adopted regulations for areas outside their usual and accustomed area in an apparent attempt to establish additional rights in this manner, even though this is counter to Federal Court orders. Interceptions of large numbers of salmon by a few tribes left some of the tribes but little better off than they were before the Boldt Decision. The situation is further compounded because some tribes have invited other tribes, who don't have usual and accustomed rights in a given area, to fish with them.
5. **Burden of proof to regulate an Indian fishery**: The nature of the burden of proof upon the Department to regulate an Indian fishery

allowed fisheries in many instances to continue to such a point that the necessary conservation measures come too late and escapement impacted.

6. **Improper harvest rates**: The tendency was for tribal regulations to place a harvest rate on the early portion of the run that would not allow for sufficient escapement. The Department then was forced to close the fishery during the latter part of the run. The catch thus came from the early segment of the run and the escapement from the latter. This occurred time and again in 1976 despite the fact that professional fishery managers unanimously agree that proper management dictates that the escapement be derived from all segments of the run.
7. **Improperly filed regulations**: The year was fraught with examples of tribal fishing regulations improperly filed or not filed. Many that were properly filed were so incomplete, vague, or all-inclusive as to be meaningless. For example, regulations may be filed that legalize a 3-day-per-week fishery, but the days are not specified. Furthermore, individual tribes commonly adopted regulations that conflicted with the "in common" regulations of the Point Elliott Treaty Areas. Even though there apparently was a contractual agreement that the in common regulations prevail in case of a conflict, tribal regulations would state the opposite. This caused numerous problems throughout 1976, making such regulations virtually unforceable.
8. **Fisheries for immature salmon**: Tribal regulations providing for troll and/or gill net fisheries for blackmouth proliferated during 1976. Fortunately, with the exception of the Lummi Indians in Bellingham Bay and Makah Indians in the outer Strait of Juan de Fuca, significant fisheries did not develop.

9. **Inaccurate catch statistics**: The formula for allocation of the catch provides incentive for individual fishermen, Indian and non-Indian, to misreport area of catch. Substantial errors thus exist in the report catch statistics. Indian fishermen have the further incentive to report catches taken in off-reservation areas as having come from on-reservation and this breakdown in the catch statistics is not reliable. Catches from areas completely removed from any reservation are reported as having been made on-reservation. This problem will be felt for many years to come and may be responsible for errors in future management decisions.
10. **Reservation boundaries**: Disputes exist with several tribes with respect to the exact seaward boundary of the reservation. Several tribes have claimed large marine areas as being on-reservation. Attempts to develop compromised definitions met with little success.

A variety of general problems likewise exists for non-Indian fisheries that have arisen or been accentuated since the Boldt Decision.

1. **Conflicting court orders**: Again in 1976, conflicts developed between orders of State vis a vis Federal court. For example, adherence to Federal court orders mandated a complete closure for non-Indian chinook fishing in Bellingham Bay after August 24. Whatcom County District Court, however, prevented the Department from enforcing the closure for allocation purposes. Various Superior Courts have also found that the Department cannot allocate between Indian and non-Indians. This question is presently before the State Supreme Court.
2. **Ambiguous legal matters**: Interpretation of legal questions complicated 1976 management. For example, the Department interpreted various

court orders as meaning treaty rights do not extend to non-mitigation State hatchery fish and adopted non-Indian chinook fisheries on that basis. A temporary restraining order required recision of those regulations at the last minute.

3. **Inaccurate catch statistics**: As with the Indian fishery, the allocation requirements provide an incentive for non-Indian fishermen and buyers to misreport the area of catch. This further complicates in-season management decisions.
4. **Non-acceptance of the Boldt Decision**: A whole host of problems under this general heading prevailed in 1976. Department rapport with the fishermen was at an all-time low, and it was difficult to gain cooperation. The problem does not end at the fisherman level but continues throughout all facets of the industry and the State judicial system.

PRE-SEASON ACTIVITIES

During the late winter and early spring, the Department held meetings with tribal and Federal biologists to explain the technical basis and procedures for determining escapement goals, escapement estimates, run size predictions, other technical considerations, and harvest management objectives. Constructive criticism of methods was solicited. In retrospect, the groups were so large that meaningful input was inhibited. The meetings did, however, represent an honest effort on the part of the Department to fully explain these aspects and to seek suggestions for improvement. The original intent of the meetings was to produce joint status reports outlining predictions and harvest management recommendations for each species but, partly due to the problem of identifying authorized tribal representatives and the diversity of tribal interests, this was not possible. Instead, the Department produced the reports with review by appropriate tribal technicians prior to distribution.

A basic flaw in Puget Sound salmon status reports in previous years was that harvest management considerations were not included. To cure this deficiency, the report for each of the five species outlined the time period during which the species would be available in the various areas and the relative harvest rate that should occur to accomplish management goals. As in the past, detailed breakdowns of expected returns, escapement goals, and harvestable numbers for hatchery and natural stocks were provided for each major drainage area. These reports were distributed to all tribal biologists, as well as every licensed non-Indian fisherman.

In retrospect, a major weakness of the 1976 reports was the emphasis on pre-season predicted numbers. Status reports for 1977 will de-emphasize this aspect and include detailed methods for revising the pre-season predictions by in-season catch statistics. This places another technical requirement on the staff but is a requisite for proper management. Such methods have been used in the past for management but will be refined and formalized for 1977.

Dr. Richard Whitney, the court's technical advisor, propounded to the court a series of 12 questions that were needed to clarify several salmon sharing and management aspects of the Boldt Decision. Under the direction of the Fisheries Advisory Board, tribal and Department technical representatives negotiated, during several meetings, agreed answers to most questions. The hearing in front of Judge Boldt, however, exemplified the problem of tribal authorization for technicians. Tribal attorneys protested that their tribes had authorized no one to represent them in the negotiations and therefore repudiated the agreed answers. The State's already-compromised position was further weakened in the answers ruled by the judge as embodied in: Order on Certain Questions Re: Fisheries Management (April 13, 1976).

Because of a U.S. District court order, representatives of the Department, the U.S. Fish & Wildlife Service, and the Northwest Indian Fisheries Commission met to develop a plan for management of salmon in 1976 and

beyond. A plan was developed in three parts: Part I — Basic Species Management Guidelines; Part II — Chinook and Coho Management Guidelines; and Part III — Joint 1976 Salmon Management Guidelines for Puget Sound and Coastal Areas of the State of Washington. Again, at the hearing on the matter, tribal attorneys disavowed that their tribes had authorized any representatives to speak for them, and no court order was ever issued on the matter. This was the third year that this management plan failed to be developed.

Hearings were held on several other issues related to salmon management matters during the year. These covered rules of procedure for the Fisheries Advisory Board, treaty status of intervenor tribes, Department regulations of fisheries research and fish planting activities, Department regulations of the presence of non-Indians aboard Indian commercial fishing vessels, he question of treaty entitlement to hatchery-reared salmon, and other matters.

Finally, the salmon catch reporting-management areas were completely revamped. Areas were redescribed to more accurately reflect actual management areas, thus removing the need for extensive wording in Department regulations. With the exception of two tribes, these uniform management and catch reporting areas have been adopted by the treaty tribes. The Makah Indian Tribe has subsequently adopted the uniform areas for 1977 leaving only the Puyallup Tribe with non-uniform areas.

SPRING CHINOOK

All stocks of Puget Sound spring chinook have experienced an extended period of gradual decline, with the decline becoming more rapid the last few years. Non-Indian sport and commercial fisheries have been closed in recent years to afford maximum protection, and several enhancement projects are underway to try to rehabilitate the runs.

Canadian Stocks

Areas 7 and 7A were open to commercial fishing for non-Indians during the 6-week period from May 15 through June 26. Five days per week for reef nets, purse seines, and gill nets were allowed during the duration of the season. This has historically been a low-key fishery, and effort was light in 1976. Indian regulations allowed several tribes to participate in this fishery but actual effort was minimal.

Skagit

The Skagit River was predicted to receive a return of 2,800 spring chinook in 1976, with an escapement goal of 3,000. The Skagit River and Skagit Bay were closed to sport fishing from April 15 through June 15 by emergency order.

The 1976 spring chinook status report recommended "* * * * West Beach, Skagit Bay, and the Skagit River upstream to Gilligan Creek be closed to *all* (both on- and off-reservation) spring chinook treaty Indian fishing from April 15 through June 15. From Gilligan Creek to Hamilton the closure should extend through July 15." Tribal regulations did not reflect this recommendation and on April 20, Department representatives met with the Skagit tribes, with all Point Elliott tribes present, and again requested that tribal regulations reflect the conservations needs of this stock. The tribes stated that a sport fishing closure in Saratoga Passage and West Beach was the condition under which they would discontinue fishing. Since these sport fisheries catch very few adult chinook, and fewer still Skagit spring chinook, but do provide considerable recreational opportunity, this was not an acceptable condition. An emergency order for treaty Indian fishing was adopted April 21 with the following provisions:

Area and closure period

West Beach: Effective noon, April 25, 1976 through June 15, 1976, inside 15-fathom line from Point Partridge on Whidbey Island to

Deception Island at western entrance of Deception Pass for any net gear.

Skagit Bay: Effective noon, April 25, 1976 through June 15, 1976, all waters of Skagit Bay inside of the western entrance of Deception Pass and northeasterly of a line drawn from Rocky Point on Camano Island to Polnell Point on Whidbey Island for any gear or method.

Skagit River #1: Effective noon, April 25, 1976 through June 15, 1976, upstream from the mouth (including all forks) to Gilligan Creek for any gear or method.

Skagit River #2: Effective noon, April 25, 1976 through June 30, 1976, upstream from Gilligan Creek and downstream of Hamilton for any net gear.

Skagit River #3: Effective noon, April 25, 1976 through July 1, 1976, upstream of Hamilton and downstream of "Old Faber Ferry Landing" above Concrete for any net gear.

Skagit River #4: Effective noon, April 25, 1976 and until further notice, all areas of Skagit River and tributaries above "Old Faber Ferry Landing" for any net gear.

A Fisheries Advisory Board meeting was convened at the request of the Skagit River tribes to ask for a closure of West Beach to sport fishing. The designated spokesmen failed to agree on the need, and the chairman recommended that there was no need for court action.

On June 17, the closure for all areas above Gilligan Creek was rescinded as appropriate tribal regulations had been adopted.

The emergency order closing the areas encompassed only the off-reservation fisheries. The Swinomish Tribe continued to fish on-reservation by trap and gill net.

To satisfy tribal subsistence needs, the Department made surplus spring chinook from Cowlitz Hatchery available to all three Skagit Tribes.

Bellingham Bay

The Nooksack River spring chinook run is difficult to predict because of a limited data base. Even though it was

felt no fishing should occur on this stock, the status report recommended that the harvest for the period April through June not exceed the 10-year average catch. This would at least stop any expansion of the fishery. Sport fishing for salmon was prohibited in the Nooksack River during the entire period of spring chinook presence.

Tribal regulations, however, allowed liberal fishing. The development of a blackmouth fishery in Bellingham Bay in 1976 during the period of spring chinook migration has made it difficult to assess that fishery.

Puyallup

The Puyallup River spring chinook run was predicted to be well below that needed to allow the run to perpetuate itself, and the obvious recommendation was that no fishing occur. Despite these facts, the Muckleshoot Tribe allowed a subsistence fishery on the White River and the Puyallup Tribe fished commercially and for subsistence. Escapement fell to the second lowest recorded level.

Green-Duwamish

The Green River contains only a remnant run of natural spring chinook plus an incipient hatchery run. Muckleshoot tribal regulations provided for a subsistence fishery. The catch was probably minor.

Other Areas

Minor spring chinook runs occur in several other areas of Puget Sound. Indian fisheries are not known to have occurred on any of these.

SOCKEYE

Puget Sound sockeye stocks consist of a minor run to Baker Lake on the Skagit River and a larger run to Lake Washington. The Lake Washington run has a potential to produce several hundred thousand fish but incubating eggs have been subjected to severe winter floods in recent years and survival has been poor. The major sockeye fishery in Washington waters is in the approach areas to the Fraser River.

Skagit

The Skagit (Baker River) sockeye run has proven to be difficult to accurately predict. Returning adults are trapped and enumerated at the mouth of Baker river. The total run size can be projected mid-way through the run by analyzing daily counts, and it was recommended that no fishing occur until it could be determined that a harvestable-sized run was present. An agreement to this effect was reached with the tribes. The run was not sufficient to allow harvest in 1976, and only an incidental catch occurred.

Lake Washington

The Lake Washington sockeye run was predicted to reach Lake Washington at a level of about 285,000 fish, well below the 350,000 escapement goal. This run is enumerated as it enters Lake Washington through Ballard Locks; and in early July, when half the run has entered the lake, the total run can be projected accurately. Any needed regulation changes can occur at that time.

The sport fishery was closed by emergency regulation, and the following recommendations were made for commercial net fisheries:

Areas 4B, 5, 6, and 6C: Minimum mesh restriction to protect sockeye from June 1 to June 26 (IPSFC control begins on June 27 — season not scheduled to open until week of July 17).

Area 6B: Minimum mesh restriction to protect sockeye from June 1 to July 25.

Areas 9, 9A, and 10: Minimum mesh restriction of 6½ inches from June 6 to August 1 to protect sockeye.

Area 10A: Minimum mesh restriction of 6½ inches from June 6 to August 1 to protect sockeye.

Area 10B: No fishery should occur from June 6 to August 1. A minimum mesh restriction of 6½ inches from August 1 to August 15 to protect sockeye if chinook fishery is to occur in this area.

Area 10C: No fishery should occur prior to August 1. A minimum mesh restriction of 6½ inches to protect sockeye during chinook fishery from August 1 to September 19.

Area 10D and Cedar River: No fishery for sockeye should occur from June 6 until sockeye are no longer present or have completed spawning.

Tribal regulations failed to adequately protect the run, and a slight modification of the above recommendations was embodied in an emergency order on June 10. On June 16, the minimum mesh size restriction for Areas 4B and 5 was removed as sockeye salmon were not present. Several additional modifications of the original regulations were necessary throughout the season to accommodate the needs of all salmon species.

Canadian Stocks

Fisheries in U.S. waters for Canadian stocks of sockeye salmon are primarily for those of Fraser River origin and occur almost exclusively during times and in areas subject to regulations of the International Pacific Salmon Fisheries Commission. Lack of sufficient gear and effort to take full treaty share by those tribes with fishing rights on these stocks and the failure of the Commission to provide what the tribes feel is adequate opportunity are major problems in this fishery. Department function is mainly that of adopting and enforcing Commission regulations for U.S. waters and providing biological input to regulations through the Commission.

At the beginning of the 1976 season in an attempt to accommodate treaty rights, treaty Indians were allowed (by the clause in one of the exceptions to Commission regulations, "Insofar as the foregoing regulations prescribe the type of gear to be used during times open to fishing for sockeye and pink salmon, such regulations shall be implemented to the extent permissible under the laws of the Parties.") the flexibility to fish any gear during any time the U.S. fishery was not closed under Commission regulation. Under strict interpretation of this closure, and because of gaps between the time one gear type closes and another opens, most of the extra time consisted of daylight

hours. The Indian fleet of primarily gillnetters was more desirous of receiving extra time at night.

The exception was subsequently interpreted to allow Indians to fish each week with any gear from the time the first U.S. gear began until the last U.S. gear came out. This was interpreted by the tribes and U.S. District Court as meaning 5 days per week because troll gear in Convention waters outside the Bonilla-Tatoosh Line was not restricted. The Commission countered by changing the language of the exception to consider only net fisheries east of the Bonilla-Tatoosh Line, effectively allowing Indian fishermen one extra night of gill net fishing.

One serious problem relating to reporting of Indian sockeye salmon catches arose during 1976. Between the closure of the fishery in U.S. Convention waters on August 11 and relinquishing control on September 19, tickets for approximately 106,000 sockeye turned up. If the Commission had not discovered the error when it did in mid-August, a very serious error in division of catch between U.S. and Canada could have resulted. U.S. fishing time had to be reduced when the unreported catch was discovered.

SUMMER-FALL CHINOOK

Prior to the fall chinook salmon season, the Department proposed seasons, to be discussed at a July 15 public hearing, for the non-Indian fishery based on the interpretation that there is no legal basis for special treaty rights on artificially-produced salmon runs derived from unilateral effort by the State of Washington. Indian shares therefore were calculated on the basis of 50% of natural and hatchery mitigation runs, plus appropriate reservation adjustments. This allowed non-Indian chinook fisheries in Bellingham Bay, Skagit Bay, Carr Inlet, and Budd Inlet.

Prior to adoption of these regulations, a hearing was held in U.S. District Court on the motion of tribal attorneys and a temporary restraining order was issued prohibiting calculation of Indian shares on any basis other than the total number of fish, regardless of natural or

hatchery origin. On July 15, at the previously-scheduled adoption hearing, the Department adopted the non-Indian regulations as proposed with a provision that the Skagit Bay, Carr Inlet, and Budd Inlet fisheries would not occur if the temporary restraining order was extended at a hearing scheduled for July 19. Because of prior interceptions in other non-Indian fisheries, the entire run to reach Puget Sound for these three areas was needed to satisfy the Indian share if shares were calculated on total fish regardless of origin. Following the July 19 hearing, the temporary restraining order was extended until resolution of Phase II of U.S. vs. Washington. Allocation calculations were subsequently made as directed by this order, and fisheries in the other three areas were cancelled.

In late August, non-Indian gill net fishermen filed suit in Thurston County Superior Court asking that the regulations adopted for Skagit Bay, Carr Inlet, and Budd Inlet be re-established. The motion was denied for Carr Inlet and Budd Inlet, but granted for Skagit Bay. By this time, however, Indian fishermen had already harvested the available number and the area was closed to all by Department conservation regulation.

Bellingham Bay

The Nooksack-Samish fall chinook run, primarily of hatchery origin, was predicted to be 98,400 fish with nearly 88,000 harvestable. Despite the large prediction, it was required that Area 7C be closed after August 31 to ensure sufficient escapement to Samish Hatchery to perpetuate the run at this high level.

Adopted regulations for non-Indians provided a 5-day-per-week fishery in Area 7C from July 18 through August 28 and in Area 7B from July 18 through September 11. In the middle part of August it became obvious that the run was well below the predicted level. The non-Indian fishery was terminated on August 24 for allocation purposes. A ruling from Whatcom County District Court, however, prevented the Department from effectively enforcing that closure.

On August 26, when other fisheries in Bellingham Bay were being reduced, the Swinomish Tribal Community, by emergency order, opened the Samish River to commercial fishing, thus jeopardizing escapement that had reached the river. No reason for the opening accompanied the regulation, and tribal officials could not be reached nor was there any prior contact with the Department by tribal officials. An emergency order was promulgated on August 27 to close the river.

Tribal regulations did not reflect the need for closure of Area 7C in September. Telephone contact was made with tribal leaders in late August without success. Even though the biological need for the closure was recognized, refusal to act was based on the excuse that an illegal non-Indian fishery was occurring in Bellingham Bay. Therefore, an emergency order was adopted on August 30 providing for a conservation closure of Area 7C until further notice. The closure was rescinded on October 19. Test fishing indicated a few chinook were still in the area but hatchery escapement goals had been assured by the continued closure of Samish River and Samish Flats.

Skagit

The total summer and fall chinook run to Skagit Bay was predicted to be 28,700 fish, providing for a commercial harvest of 7,800 with 700 of these estimated as an incidental catch that would be taken during the coho fishery. The status report recommended that 4,500 be harvested from the summer segment of the run and 3,300 from the fall segment.

Tribal regulations failed to provide for the indicated harvest rate on the summer run, and by mid-July it became evident that the run was being over-harvested due to the expanded fishery. Total effort in the river was 5 times that previously expended and effort in the bay more than double.

Tribal regulations continued to provide a harvest rate in excess of that dictated by all available information. On August 6, a meeting was held with Department staff, Dr. Whitney, and tribal technical representatives.

It was agreed that nothing could be done to undo the prior over-harvest and that there would be an estimated additional harvest of 340 summer chinook if the remaining 1,300 fish from the fall run were to be harvested. Tribal representatives proposed that they be allowed to manage the fishery according to the following schedule:

Week	Percent summer present	Total catch not to exceed	Summer run catch not to exceed
August 8	50%	300	100
August 15	30%	600	200
August 22	10%	400	40
August 29	—	—	—
		1,300	340

The fishery was to open only in the bay for a day at a time and terminate for the week once *either* of the above limits were reached. The number of summer runs in the catch was to be determined by analysis of coded-wire tag recoveries.

During the first week the river and bay were both opened, contrary to the agreement to fish the bay only. Despite the fact that the catch the first 2 nights approached 300 fish, both areas were open for two additional nights and catch for the week exceeded 670 chinook.

Prior to August 23, the numbers of chinook salmon that should be caught — per the August 6 agreement and a Fishery Advisory Board meeting on July 9 — had been exceeded, with an incidental catch during coho fishing of an estimated 700 fish still to come. The off-reservation fishery had been closed by tribal regulation but the reservation remained open. On August 23, the Swinomish and Upper Skagit Tribes suddenly opened the river and bay to commercial fishing by emergency regulation. The opening was prompted by an apparent illegal non-Indian fishery of minor proportions in Skagit Bay on the night of August 22 (13 fishermen, 57 chinook). The justification was that "A non-treaty fishery had been opened in Skagit Bay. Since this will increase the non-treaty allottment

(sic), it will also increase the treaty allottment (sic). The treaty fishery has been opened to harvest this amount." No such non-treaty opening occurred. As previously indicated, a Thurston County Superior Court judge had issued an order instituting non-Indian seasons originally proposed by the Department, but an emergency order by the Department closing the area for conservation purposes was immediately adopted. Additionally, the Upper Skagit Tribe had previously established a coho fishery to begin prior to September 5. Such an opening was unnecessary to properly harvest the coho run, which would not be present in the river in any abundance at that time, and would have even further impact on the chinook run. On August 24, a Department emergency order closed Skagit River and Bay to Indian commercial fishing until September 5, at which time the coho management period would begin. Operation of the trap and the on-reservation gill net fishery continued through this period.

Stillaguamish-Snohomish

The chinook status report forecast a weak natural run to the Stillaguamish-Snohomish system and recommended a fishery in Areas 8B and 8C to take a total of 4,100 chinook. This would appropriately harvest the natural runs to the two rivers and a proportion of the Tulalip Creek hatchery return. Any additional hatchery return could and should be harvested inside Tulalip Bay to avoid over-harvesting the natural run.

Instead, the tribe maintained a 5-day-per-week fishery throughout the run in a portion of Areas 8B and 8C and caught over 7,500 chinook. The burden of proof required for Department regulation of treaty Indian fishing precluded Department action. The Snohomish River escapement was well below the established goal.

Hood Canal

Hood Canal natural runs were expected to return at levels below escapement goals, but about 4,900 chinook were predicted to be in excess of needs at Hoodsport Hatchery. George Adams Hatchery run could support a

harvest of 6,000 fish with an incidental harvest of 1,400 Skokomish River natural chinook. About 1,400 Quilcene Hatchery chinook were expected to be available for harvest.

A total of about 12,300 chinook should have been harvested in lower Hood Canal and the Skokomish River. No information in-season suggested a higher harvest was appropriate. The total catch, however, was about 19,300. The George Adams Hatchery escapement goal was not reached.

Southern Puget Sound

Because Puyallup and Nisqually runs were expected to return at less than excapement goals, it was recommended that no commercial net fishing occur in Areas 6B, 9, 10, 11, 11A, and 13, plus the Puyallup and Nisqually Rivers. Harvestable numbers were expected to return to Budd Inlet, Carr Inlet, Duwamish-Green River, and Lake Washington.

By August 16, the total numbers of chinook available for harvest according to the pre-season forecast had been taken with no allowance made for the inevitable incidental catch during coho fishing. Most evidence at that time suggested runs were below predicted levels. On August 16, however, the Point Elliott treaty tribes opened Area 10 and much of Area 9. No justification was given in the order. A Department emergency order was promulgated immediately to close the areas. Due to court-imposed time considerations for closing Indian fisheries, a catch of over 4,000 chinook was taken before this fishery could be effectively stopped. This catch included fish bound for Lake Washington and Duwamish-Green River that had already been over-harvested and for Puyallup and Nisqually Rivers, where returns were less than escapement needs.

A Fisheries Advisory Board meeting was held on August 20 at the request of certain tribes to protest the closure. Following prolonged discussion and an unsuccessful attempt to force a simultaneous closure of the sport

fishery, the designated tribal representative conceded to accept the closure.

Lake Washington and Duwamish-Green

The Lake Washington predicted return was 9,400 chinook with an allowable harvest of 1,000. An allowable harvest of 5,200 chinook was predicted for the Duwamish-Green River with 1,000 expected to be taken during the subsequent coho fishery. Lake Washington and Duwamish-Green chinook harvests both greatly exceeded the appropriate numbers.

Throughout the management period in this area, considerable confusion occurred because of verbal transmittal of tribal regulations to the Department that were not followed by written records. Inaccurate catch records also added confusion to the management of this fishery. Several Department regulations were adopted for the Indian fishery to protect fall chinook in the river and estuary.

Puyallup River

A run below escapement needs was predicted for the Puyallup River and no fishery should have occurred. Puyallup Tribal regulations, however, provided for a Commencement Bay fishery. This was closed by the Department emergency order of August 18. An on-reservation chinook fishery continued, however, and a catch of about 2,800 chinook was taken commercially. Escapement was very poor. The closure remained in effect until September 5.

Nisqually River

The Nisqually run was expected to return at below-escapement needs. Nisqually Tribal regulations failed to fully accommodate these needs, and the off-reservation areas were closed until September 5 by the emergency order of August 18. Over 250 chinook were taken during the season, and escapement was very poor, as it has been for several years.

Budd Inlet and Carr Inlet

These hatchery runs returned at less than predicted levels. No escapement was required at Minter Creek Hatchery, and a continuing fishery was allowed. Tribal regulations adequately accommodated Capitol Lake escapement needs. Lack of proper mesh restrictions, however, allowed substantial blackmouth catches during the early portion of the fishery.

As in past years, this fishery was reduced by tribal regulation to allow a larger egg-take, needed as a result of over-harvest in other areas.

COHO AND EARLY CHUM SALMON

The period mid-September until late October encompasses the time most coho stocks pass through Puget Sound migration routes enroute to the spawning areas. Additionally, there are stocks of early chum salmon bound for various Hood Canal tributaries and inlets in southern Puget Sound that exhibit similar timing. In most areas these early chum stocks equal only a small fraction of the number of coho and cannot be managed separately.

On August 13, prior to the second hearing relative to the tribes' motion to preclude the State from excluding hatchery fish from treaty share calculations, the Department made notice of a public hearing to be held September 3 to adopt regulations for the non-Indian coho fishery. Specific regulations were not proposed because of the uncertainty of the hatchery fish issue. Numbers expected to be available to Indian and non-Indian fisheries under both possible resolutions of the issue were provided. On August 26, following extension of the restraining order rquiring that hatchery fish be included in Indian shares, specific proposals were made for the hearing. Fisheries were proposed for various days per week and for various durations, beginning September 12, to harvest the appropriate share in Hood Canal, southern Puget Sound, Bellingham Bay, and Port Susan-Port Gardner. A 3-day-per-week fishery was proposed for Areas 7 and 7A to harvest Canadian stocks.

On August 31, the Case Area tribes filed a motion for preliminary injunction asking the Department be enjoined from enacting any regulation which allowed a non-treaty fishery in any area of Puget Sound until treaty fishermen had harvested a number of coho equal to

1. the number of coho which would have returned to usual and accustomed treaty fishing areas during the 1976 season, but had been intercepted by non-treaty fisheries, plus
2. a number, to be determined by U.S. District Court, as an equitable adjustment to compensate treaty fishermen for their reduced opportunity to harvest sockeye salmon in the 1976 IPSFC fishery.

Following a hearing on September 3, at the same time as the Department regulation hearing, Judge Boldt enjoined the Department from permitting any non-treaty commercial fishing in Puget Sound waters (except Areas 7 and 7A where Canadian stocks predominate) prior to September 20. He also ordered that the non-treaty share should be subjected to a 20,000 fish reduction for each day of "substantial and reasonably verifiable non-treaty fishing in violation of Washington Department of Fisheries closures". Further, he approved a proposal for the Makah Tribe to fish in Puget Sound outside their usual and accustomed area at the invitation of other tribes. Finally, he ordered the Department to negotiate on-reservation catch adjustment agreements where none had been reached (Order Re: 1976 Coho Fishery).

As provided in the order from Judge Boldt, regulations adopted by the Department following the September 3 regulation hearing delayed the non-Indian coho fishery opening until Septembe 20. Despite the recommendations in the coho status re rt and the known time of entry of coho run into Puget So d waters, tribes variously adopted regulations for coho fishing seasons prior to the September 5 beginning of the coho management period. Openings as early as August 22 were adopted.

When the emergency order protecti chinook salmon expired on September 5, the tribes immediately began

fishing most areas of Puget Sound, with large catches of early chum salmon in Hood Canal and southern Puget Sound. The tribes had been asked to forego fishing during the week of September 5 as few coho would be present and this would be the only opportunity to allow escapement of early chum salmon past the major intercepetion areas. Such a delay would have also reduced the incidental catch of chinook salmon always present during the coho management period.

The 1976 coho salmon run to Puget Sound was initially predicted to provide a harvest of 702,750 fish. Harvestable numbers were expected for each management area. As soon as the run entered the Strait of Juan de Fuca, it became doubtful that it was of the magnitude suggested by the pre-season prediction. By September 17, there was strong evidence that the coho run was not as large as predicted. On that day, the non-Indian fisheries (except Areas 7 and 7A) scheduled to open on September 20 were cancelled to allow collection and analysis of all possible run size indicators. On September 21, non-Indians openings for inside waters scheduled for September 23 were cancelled. The run was calculated to be 40-50% below the pre-season forecast. Because of prior interceptions in non-Indian fisheries and the reduced run size, the entire run to reach inside waters was required to accommodate the Indian share, and no non-Indian fishing was allowed except in Areas 7 and 7A.

The further ramification of the lowered run size was that natural runs were below the number needed for escapement. Areas of Puget Sound through which these stocks migrate were closed to treaty Indian fishing on September 23 and further harvest was restricted to terminal areas where hatchery fish predominated to afford maximum protection to natural stocks. Indian fisheries on natural stocks were not closed in Skagit Bay and River in Port Susan-Port Gardner for Stillaguamish-Snohomish River stocks. The burden of proof requirements were such that these desirable closures were not made, and the tribes were left to manage their fisheries in these areas at this time.

Meetings were held with tribal representatives where on-reservation adjustment agreements had not been reached — without further success. A hearing was scheduled for U.S. District Court to resolve the matter. By the time a hearing could be held, the matter became moot for 1976 management because all non-Indian fisheries had been cancelled.

The portion of Order Re: 1976 coho fishery that specified a penalty for non-Indian illegal coho fishing generated considerable activity. Fisheries Advisory Board and other meetings were called to determine how many, if any, days of illegal fishing occurred that were "substantial and reasonably verifiable". The matter was not resolved through the Fisheries Advisory Board and was submitted to the court, but no hearing was held. The matter was not resolved. Although moot as far as 1976 coho allocation was concerned, an attempt was made later to have the penalty applied to the chum salmon allocation.

Nooksack-Samish

The Nooksack-Samish coho run, primarily of hatchery origin, was initially predicted to return at a level of about 102,000 fish, providing a commercial catch of about 96,000. Area 7B was left open for Indian fishing. Area 7C remained closed by Department regulation until October 19 when test fishing indicated that chinook salmon were no longer present. On September 9, Point Elliott tribes amended in-common regulations opening Area 7C in contradiction to Department conservation regulations. The Department regulation prevailed however.

Skagit

The Skagit River run was predicted to provide a total catch of 14,400 coho, with management keyed to obtaining the full escapement goal of the natural run. This would have been obtained by a moderate fishing rate. When the run entered Puget Sound well below the pre-season prediction, there should have been little or no fishing. Tribal regulations did not reflect this situation, however, and an intense fishery occurred. The Department tried to

persuade the tribes to moderate or eliminate the fishery in their own regulations. This failing, on October 8 a Department emergency order was issued closing the Indian fishery in the entire Skagit system except aa small portion of the Cascade River where hatchery coho could be harvested. The tribes then mirrored this regulation.

On October 26, Sauk-Suiattle Tribal regulations opened the Sauk and Cascade Rivers contrary to Department conservation regulations, but the Department regulation prevailed. The Swinomish Reservation fishery continued through most of the run.

Stillaguamish-Snohomish

The pre-season forecast was for a total return of about 144,000 hatchery and natural coho to the Stillaguamish and Snohomish Rivers. With management keyed to obtaining full escapement of natural stocks, a total of 64,000 coho was expected to be harvested, plus an additional number of hatchery returns to Tulalip Bay. The revised run size estimate suggested a low rate of harvest was appropriate with a total of only a few thousand harvestable fish. Tribal regulations did not reflect this situation, but the court's burden of proof requirements did not allow a State conservation closure. A 7-day-per-week Indian fishery began on September 13 and continued through the run. Although escapement was satisfactory in the Snohomish system, Stillaguamish River escapement was among the lowest on record.

Hood Canal

The coho return to Hood Canal was initially predicted to be 106,545 fish, with harvestable numbers available for all hatchery and natural stocks. With the revised run size estimate, the fishery was confined by Department conservation regulation to Areas 12A and 12D and the Skokomish Reservation wherein hatchery coho are relatively separated from natural coho. The fishery was allowed to continue in these areas throughout the duration of the coho run. Early chum salmon dominated the catch, however, as the strongest run observed in recent years occurred.

Southern Puget Sound

A total run of 446,000 coho was predicted to reach Area 10, providing a harvest of about 404,000 fish. With the revised run estimate, the fishery was restricted to Areas 10A, 11A, and 13A, with minor exceptions, wherein hatchery coho were available for harvest. The Squaxin Tribe was allowed to fish in parts of Area 13B to harvest a strong run of early chum salmon stocks with appropriate area and mesh regulations to protect coho.

The Puyallup Tribe adopted regulations opening the Puyallup River to coho fishing on September 1, nearly 3 weeks prior to entry of significant numbers of coho into the river. Upon Department objection, this opening was delayed to protect chinook salmon. The Muckleshoot Tribe adopted regulations opening the Duwamish River to coho fishing beginning September 1 despite the fact that chinook, which had already been over-harvested, would be the major species present at the time, and no coho catch would be foregone by delaying the opening. An emergency order of the Department delayed the opening. Several subsequent orders were adopted to adjust the closure to protect chinook milling in the Duwamish River. Similarily, several regulations were adopted to regulate the coho fishery in Lakes Washington and Sammamish.

Strait of Juan de Fuca

All tributary streams, except the Dungeness River, were closed to fishing for coho by Department conservation regulation. Indian fisheries occurred on all major streams regardless. The Lower Elwha Tribe was left to adopt regulations for the Indian harvest of Dungeness Hatchery coho. Regulations were numerous, including some that were not received by the Department until after the fact. Low flows, an intense Indian fishery, plus inaccurate catch records resulted in the desired hatchery escapement not being achieved.

Canadian Stocks

A 3-day-per-week non-Indian fishery for Canadian coho stocks was maintained for the duration of the run. Indian effort was light.

NORMAL AND LATE CHUM SALMON

The pre-season chum forecast was for a generally light run with harvestable surpluses to most major areas. To protect the only hatchery brood stock sources (Hoodsport and Quilcene Hatcheries) of chum salmon eggs that were needed to supply extensive chum salmon enhancement programs, Hood Canal and all migration routes for these stocks were scheduled for complete closure.

Because of the uncertainty of the chum salmon prediction and the excellent predictive value of a 1-day fishery in Areas 10 and 11, an October 18 non-Indian fishery was the only proposal for the regulation hearing. Subsequent regulations were planned on the basis of the result of that fishery.

Southern Puget Sound

Normal and late timing chum salmon were predicted to return to southern Puget Sound areas only slightly in excess of escapement needs, but the 1-day opening was to be the basis for management of the early portion of the run.

On October 6 a meeting of Department and treaty Indian technical personnel was held at the request of the latter group. The concensus was that pre-season predictions for the normal-timing chum salmon run in Puget Sound were very likely conservative because of the excellent showing of early-run chum in southern Puget Sound and Hood Canal, plus an assessment by Canadian fishery managers that their chum stocks were returning at levels approximating the good runs of 1972 and 1973. NWIFC personnel requested that the Department update the preseason predictions immediately to provide Indian tribes with a basis for dividing their allocation of the run. This was not done because of the failure of the early: normal run correlation in Hood Canal in both 1974 and 1975. All relevant data were provided to NWIFC personnel. An analysis based on this relationship appeared in an affidavit from a NWIFC staff member, dated October 13.

On October 14 a meeting of the Fisheries Advisory Board was held at the University of Washington by request of treaty Indian representatives. Their primary concern was obtaining a delay in the 1-day non-Indian fishery scheduled for October 18 in southern Puget Sound (Areas 10 and 11). At this point in time, the tribes were expecting an allowable harvest of over 280,000 southern Puget Sound chum salmon, per the October 13 NWIFC affidavit provided to the Department at this meeting, but were requesting a delay in the non-Indian fishery on the basis that significant numbers of coho were still present. On October 15 the Department delayed the non-Indian fishery until October 21.

On October 19, treaty Indians filed a motion in U.S. District Court for preliminary injunction asking for a 260,000 fish adjustment on chum salmon (due to the 1975 chum situation and a projected 1976 coho catch imbalance), plus an additional adjustment for 1976 illegal fishing which they apparently claimed to be 20,000 fish per day for 7 days. The total request was apparently 400,000 fish (260,000 plus 7 times 20,000, or 140,000). Some details of these requested adjustments were provided in the "Request for Determination and Motion for Preliminary Injunction" dated October 19 but Indian representatives failed to provide the full details by not submitting a required report on previous Fisheries Advisory Board meetings relative to illegal non-Indian fishing. Tribal attorneys were never able to receive a hearing on the motion. Also on this day, the conservation closure to protect coho salmon in Areas 10 and 11 was rescinded.

On October 21, the initial non-Indian fishery on chum salmon in Areas 10 and 11 was opened. Analysis of catch data showed that further harvest was justified. On this same date, tribal technical personnel submitted a proposal to the Department concerning a management plan for southern Puget Sound chum salmon. Subsequent analysis of this proposal showed that it would provide treaty Indians fishing in terminal areas with substantially more

than 50% of the main south Puget Sound chum for all run sizes up to about 180,000 fish. It also appeared that technical management costs of the proposal would be prohibitive, overall value of the fish harvested would be markedly reduced, and actual implementation was not even feasible at the present time.

On October 25, a telephone meeting of the Fisheries Advisory Board was held to debate the merits of a scheduled 1-day non-treaty fishery in Areas 10 and 11 on October 26-27. Department analysis was that the run size projected from the first day's fishing was conservative, but even this projection would provide adequate harvestable fish for additional non-treaty fishing. Tribal representatives challenged the State's authority to make allocation closures on treaty Indians. Without this ability, there would be no way to implement the Boldt Decision sharing concept. No concensus was reached, and the fishery occurred as scheduled. Results of the fishery indicated a stronger run than did the first opening.

On October 26, after analysis of the 1-day non-Indian fishery in Areas 10 and 11, it appeared that the run strength was not sufficient to allow non-Indians to overcome the large share imbalance that had accrued to Indians because of the large catch of early chums that had been taken primarily incidental to coho fishing. An emergency order therefore closed to treaty Indian fishing those areas of southern Puget Sound in which chum salmon were the target species.

On October 29, treaty Indians asked the court to stop a third day of non-treaty fishery scheduled for November 1-2 (see "Notice of Hearing" and attachments). The matter was referred to the Fisheries Advisory Board. On November 1, a meeting of the Fisheries Advisory Board in Tacoma discussed the merits of continued non-treaty fishery and other issues. Again, no concensus was reached and the fishery occurred as scheduled. Non-Indian fishermen were allowed 1 day per week for the rest of November and an extra day the last week. The Indian conservation closure was maintained in most areas into early January.

Squaxin Indians were allowed to fish in restricted areas of southern Puget Sound after the escapement goals of local streams were assured by continual monitoring of the spawning escapement in index areas.

On December 12, the coho conservation closure of the Nisqually River was rescinded, and a tribal fishery occurred on the late chum stock in this river system.

Nooksack-Samish

The pre-season chum salmon prediction for Nooksack-Samish indicated a harvestable number of 6,700 fish and a moderate harvest rate.

Three days of non-Indian fishing were allowed in mid-November, 1 day in each of 3 weeks. Instead of the necessary moderate fishing rate, however, Lummi Tribal regulations provided for a 5-day fishery in marine areas and the river. This level of fishing had resulted in over-harvest in prior years. In 1976 abnormally low stream flows slowed migration and increased efficiency of the fishery in Bellingham Bay. Tribal regulations failed to compensate, however. On November 18, it became obvious that run strength was insufficient to allow non-Indians to reach parity of catch, and Indian fisheries in Areas 7B and 7C and the Nooksack River were closed for allocation purposes. Analysis of subsequent data, including late-arriving Lummi Tribal catch data from as far back as November 3, indicated that the closure was necessary for conservation purposes and was so altered on November 22, and no further non-Indian fishing was allowed.

Lummi regulations continued to provide for a reservation fishery. The excuse was used that there was an illegal non-Indian fishery occurring and the tribe would not close as long as that continued. After a lengthy delay because Judge Boldt was out of town, a Fisheries Advisory Board meeting was held to discuss the reservation fishery. As the tribe still refused to curtail the reservation effort, a hearing was held before Judge Boldt on a motion of the Department. Following the hearing, the Judge issued a temporary restraining order closing the on-reservation

fishery until the end of December. As a result of the delay, approximately 2 weeks of fishing occurred after the Department was able to identify the need for the closure.

Skagit

The predicted chum salmon return to Skagit River anticipated a harvest of 12,000 fish at a light fishing rate. Non-Indian fishing was allowed 1 day per week for 3 weeks in late October-early November.

The Swinomish opened Area 8 on October 20 and fished despite the continuing Department conservation closure to protect the coho run. The Sauk-Suiattle Tribe on October 26 adopted regulations opening the Sauk River in opposition to a Department closure to protect coho salmon.

As with chinook and coho, tribal fishing effort continued much too heavily. On November 5, an emergency order of the Department was adopted, closing Area 8 and the Skagit River except that fishing was allowed 1 day per week in Area 8 and the Skagit River below Hamilton. On November 23, the closure was rescinded for Area 8 and the mainstem Skagit River when the tribes agreed that they would limit their chum salmon catch in all of Area 8 and the Skagit River (on- and off-reservation) to a total of 1,200 fish, including the incidental catch during the steelhead fishery. The Upper Skagit Tribe quickly opened a 48-hour fishery, despite immediate protest by the Department that the fishery should only open for 24 hours at a time. On November 24, an emergency order was issued by the Department that closed the Skagit River and Area 8. At that time, after only 1 night of the opening, it was obvious that the agreed 1,200 fish had been caught and the catch ended up nearly double that amount. The trap continued to fish on-reservation.

Stillaguamish-Snohomish

The pre-season forecast projected a catch of 16,500 Stillaguamish-Snohomish chum salmon at a moderate harvest rate. Non-Indian fishing was allowed 1 day per

week in each of 2 weeks in late November and early December.

Instead of a moderate fishing rate, however, tribal regulations provided for 7-day-per-week fishing. Rather than allow over-harvest of the first part of the run, on November 5 an emergency order of the Department reduced the fishery to 2 days per week to allow escapement from all segments of the run. Tribal regulations provided for an unrestricted fishery in the Stillaguamish River until a Department emergency order reduced the fishery to 2 days per week on November 8.

Hood Canal

Following the transition of Hood Canal areas from predominantly coho to chum salmon, all areas were closed to Indians throughout the duration of the run, except the Skokomish Reservation. The closure was adopted to allow maximum egg-take from chum runs to Hoodsport and Quilcene Hatcheries. Furthermore, the Indian chum catch by virtue of the strong early chum showing, was about 50,000 fish with only a small non-Indian catch. A limited-entry purse seine fishery with Department observers on board was held to harvest excess male coho salmon at Hoodsport and Quilcene Hatcheries. Fourteen different vessels participated on 7 days in late November.

AFFIDAVIT OF SAMUEL G. WRIGHT
Harvest Division
Washington Department of Fisheries

August 16, 1977

Filed: August 25, 1977, U.S. v. Washington,
District Court: No. 9213

I, SAMUEL G. WRIGHT, being first duly sworn on oath, depose and say:

I am supervisor of the Harvest Management Division under the Washington Department of Fisheries' overall Salmon Program. My staff and I are responsible, through proper application of basic professional fishery management techniques, for the development of detailed technical plans designed to achieve proper harvests of the state's salmon resources.

As of this date, I have completed a careful review of the following documents provided to me by treaty Indian representatives on August 8, 1977:

1977 On-Reservation Catch Projections

1977 Ceremonial and Subsistence Catch Projections

WDF Interception Rates for Net and for Ocean and Sport

1977 Boldt Share Allocation Over a Range of Run Sizes Entering Straits

Footnotes for Puget Sound Chinook Allocation Tables

Chinook — Strait of Juan de Fuca

Chinook — Nooksack-Samish

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Summary

The technical analyses presented by treaty Indian representatives on August 8 would effectively preclude most non-treaty commercial net fisheries on chinook and coho salmon stocks of Puget Sound origin. The only

potentials for non-treaty fisheries would be for chinook and coho in Bellingham Bay, chinook in Skagit Bay and Hood Canal, and coho in southern Puget Sound. Even some of these could be eliminated by smaller than predicted salmon runs and/or the impact of excessive on-reservation catch adjustments. During the 3-year period, 1974-1976, non-treaty commercial net fisheries on Puget Sound-origin chinook have been limited to Bellingham and Skagit Bays, with the latter area remaining closed in 1976. The only "normal" Puget Sound coho fishery occurred in 1974 when a restrictive 4-day season was allowed. Coho fishing on Puget Sound stocks in 1975 was limited to terminal areas and the 1976 fishery was completely banned. The only viable Puget Sound chum fishery for non-treaty net fishermen occurred in 1976, with a complete closure occurring in 1974, and the 1975 season being limited to a single fishing day in southern Puget Sound.

The pattern cited above can be expected to continue during the 1977 season.

/s/ _____
SAMUEL G. WRIGHT

P.4

AFFIDAVIT OF DAVID C. BURNS
Washington Department of Fisheries

August 19, 1977

Filed: August 25, 1977, U.S. v. Washington
District Court: No. 9213

I, DAVID C. BURNS, being first duly sworn on oath, depose and say:

I am assistant division chief, Fisheries Management Division, State of Washington, Department of Game;

As part of my duties, I supervise employees of the department who analyze steelhead harvest data;

At my direction, the following represents available harvest data for on-reservation steelhead catches;

(1) Figure 1: This shows trends in recorded harvest of steelhead by treaty Indians; on-reservation catches are depicted by white blocks. The general trend illustrated is that on-reservation catches by treaty Indians are increasing since the opinion was filed in *United States v. Washington.*

(2) Figure 2: This shows disparity in shares of steelhead between the all-citizen fishery and the treaty fishery;

(3) Figure 3: This shows two examples of the disparity of catches between the all-citizen fishery and the treaty fishery on rivers with reservations at their mouth.

/s/ _____
DAVID C. BURNS

FIGURE 1

BOLDT CASE AREA TREATY INDIAN HARVEST OF WINTER STEELHEAD

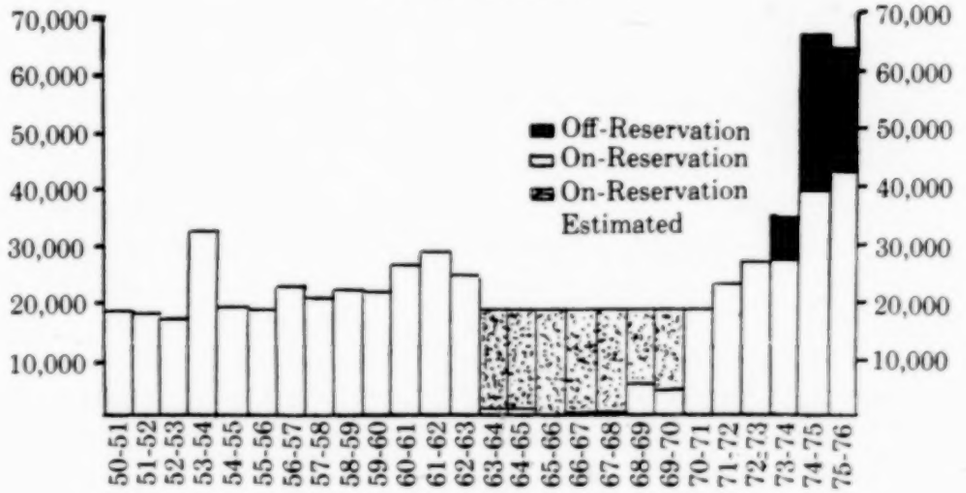

FIGURE 2

DEPARTMENT OF GAME HARVEST RECORDS

	Recorded Case Area Treaty Indian Catch	Estimate of All-Citizen Hook & Line Harvest
1969-70	4,581	50,060
1970-71	17,287	88,890
1971-72	23,441	96,207
1972-73	25,948	52,582
1973-74	34,985	51,880
1974-75	69,344	51,230
1975-76	62,926	25,878
1976-77	43,935	(Not available—probably well under 20,000)

FIGURE 3

REPORTED HARVEST OF STEELHEAD ON TWO RIVERS
WITH RESERVATIONS AT THE MOUTH

	Quillayute		Nooksack	
	Tribal	All-Citizen Hook & Line	Tribal	All-Citizen Hook & Line
1969-70	——	3,069	490	644
1970-71	7,050	6,675	——	908
1971-72	5,438	7,177	655	888
1972-73	4,711	3,101	——	875
1973-74	469	3,602	1,653	625
1974-75	10,504	4,234	4,352	622
1975-76	9,523	2,353	3,549	188
1976-77	6,917	1,764	2,725	Not available

FISHERIES ADVISORY BOARD REPORT
Re: Agreement on Salmon Management Plan

August 26, 1977

TO: Hon. George H. Boldt

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

The development of the Salmon Management Plan through months of hard work by a Technical Working Team and a Policy Development Team appointed by the Fisheries Advisory Board has been reported in the FAB report to the court of July 14, 1977. As the court's technical advisor, I convened a meeting of the attorneys to discuss the plan on August 16 at the offices of the Ziontz, Pirtle, Morisset law firm and received suggestions for modification. Those attending were all agreed that the plan should be issued by the court in the form of an order. The tribal representatives present agreed that some suggested changes should be discussed with the Department of Fisheries. I supplied Dr. Peter Bergman and Sam Wright with written suggestions and conferred with them. Further discussions have refined agreements to the point that I can report that the Board has agreed to certain modifications in the plan as filed with the court July 14. I attach a marked copy of a revision which identifies words or portions added to the July 14 version by enclosing in brackets. Also identified with brackets are sections omitted in this version which were present in the July 14 version.

The two significant sections omitted are those identified in the July 14 version as Sections 7.4, continuing to the end of Section 8; the tribal and state proposals relating to the state's suggestion that the managers' task be simplified by supplying them with instructions to achieve a sharing formula to be met on salmon runs after they have passed the Straits of Juan de Fuca on their way into Puget Sound, said formula being

devised in such a way as to take into account an appropriate troll and sport interception rate, and whatever on-reservation ceremonial and subsistence numbers that are required by the court's allocation.

The tribes do not agree with this. The tribal representatives proposed that the court follow the procedures outlined in the 12 Questions and other rulings.

Both positions are fully explained in the July 14 version.

There are a number of motions and issues before the court; rulings on which will affect the ruling with respect to the two disputed sections described above. These must be reconciled after the court rules on Mr. Johnson's motion for modification of judgment. The U.S. Motion for a Memorandum Order and Permanent Injunction which requests an allocation formula would also affect the rulings on Sections 7 and 8, and would need to be taken into account in ruling on Sections 7 and 8.

As a summary, I wish to supply the court with the attached report which states the points now agreed upon by the Fisheries Advisory Board. I believe that this statement, which represents a lot of hard work on the part of many people, is as far as the parties can go this year in reaching agreement on the technical aspects of the Salmon Management Plan. Naturally there are many points which both sides would like to see further refined. I recommend that the court adopt these agreed upon statements and order that they be implemented and encourage the parties to continue work to refine issues that may still be in dispute.

ATTACHMENT TO REPORT OF FISHERIES ADVISORY BOARD

Meeting No. 78-51

Implementation of Salmon Management Plan

June 21, 1978

Tribal Position on Shares of Puget Sound Origin Salmon in Puget Sound During the 1977-78 Run

TREATY

Species	Mgmt. Unit	Com. Catch	Cerem. Subsis.	Hatchery Fish	Total Catch	Court Share	Adjust. needed
Sockeye	Lk Wash	35,000	1,000		36,600	28,500	-0-
	Baker R	500	-0-			500	
Summer Fall Chinook	Nooksack Samish	31,500	2,300		33,800	48,600	+14,800
	Skagit	7,500	1,000		8,500	10,400	+ 1,900
	Hood Canal	14,000	1,400		15,400	15,700	+ 300
	South Sound	30,200	600		30,800	33,600	+ 2,800
	Stilly-Snoh.	7,100	2,000		9,100	11,600	+ 2,500
Coho	Straits	6,200	2,100		8,300	7,600	- 700
	Nooksack Samish	57,200	4,000		61,200	44,000	-17,200
	Skagit	10,700	1,300		12,000	12,700	+ 700
	Stilly-Snoh.	63,100	2,200		65,300	69,400	+ 4,100
	South Sound	250,800	4,400	Adult So 32,800	d288,000	314,700	+26,700
	Hood Canal	25,000	2,600		27,600	41,600	+14,000
Chum	Straits	69	-0-		69	55	- 14
	Nooksack Samish	16,800	5,000		21,800	14,000	- 7,800
	Skagit	5,000	-0-		5,000	3,000	- 2,000
	Stiliy-Snoh.	2,200	400		2,600	2,100	- 500
	South Sound	70,300	1,200		71,500	90,300	+18,800
	Hood Canal	48,800	3,600		52,400	74,100	+21,700

NON-TREATY

Species	Mgmt. Unit	Commer. Catch	Court Share	Adjust. needed	Puget Sound Sport	Ocean Troll	Ocean Sport
Sockeye	Lk Wash		27,500	-0-	19,300		
	Baker R	500	500				
	Nooksack						
Summer	Samish	41,700	46,300	-14,800	11,600	6,800	1,000
Fall							
Chinook	Skagit	3,300	8,300	- 1,900	4,700	2,200	——
	Hood						
	Canal	5,500	13,400	- 300	5,800	2,400	——
	South						
	Sound	6,500	32,700	- 2,800	18,900	8,800	1,300
	Stilly-						
	Snoh.	4,400	8,100	- 2,500	3,700	2,500	——
Coho	Straits	1,300	9,300	+ 700	4,300	2,100	900
	Nooksack						
	Samish	16,700	66,000	+17,200	16,200	11,300	4,600
	Skagit	5,100	21,700	- 700	8,500	6,400	2,600
	Stilly-						
	Snoh.	38,300	95,800	- 4,100	28,300	23,000	10,300
	South						
	Sound	231,900	341,000	-26,700	62,600	51,900	21,300
	Hood						
	Canal	17,200	50,900	-14,000	21,700	18,300	7,600
Chum	Straits	40	55	+ 14	——		
	Nooksack						
	Samish	6,200	14,000	+ 7,800	——	——	——
	Skagit	900	3,000	+ 2,000			
	Stilly-						
	Snoh.	1,600	2,100	+ 500	——	——	——
	South						
	Sound	109,100	90,300	-18,800			
	Hood						
	Canal	95,800	74,100	-21,700	——	——	——

TOTAL

Species	Mgmt. Unit	Escape-ment	Total Run	Ct. est. Prior Intercept
Sockeye	Lk Wash	435,000	490,000	
	Baker R	1,700	2,700	
	Nooksack			
Summer	Samish	5,500	100,400	10,600
Fall				
Chinook	Skagit	9,700	28,400	1,800
	Hood			
	Canal	4,500	33,600	4,700
	South			
	Sound	32,500	98,800	
	Stilly-			
	Snoh.	9,100	28,800	
Coho	Straits	8,600	25,500	12,000
	Nooksack			
	Samish	18,600	128,600	24,000
	Skagit	36,900	71,300	13,000
	Stilly-			
	Snoh.	122,100	287,300	39,000
	South			
	Sound	75,500	731,200	100,000
	Hood			
	Canal	33,100	125,600	19,000
Chum	Straits	1,900	2,000	
	Nooksack			
	Samish	6,300	10,500	
	Skagit	38,600	44,500	
	Stilly-			
	Snoh.	6,300	10,500	
	South			
	Sound	83,000	263,600	
	Hood			
	Canal	70,300	218,500	

FOOTNOTES

Species	Footnote
Sockeye	[1]Lake, Washington: Court shares have been determined according to the allocation formula of Final Decision #1 and the Twelve Questions (*i.e.*, agreed upon run size minus escapement, minus ceremonial and subsistence, divided by 2.) because the court modified 1977 sharing for the coho and chum runs only, based on the facts and equities of those runs in the August 31, 1977 Order, p. 9.
	The adjustment needed columns reflect the fact that the non-treaty fishery was not denied opportunity. A full 50% of the harvestable run was made available but the sports fishery had insufficient power to take the non-treaty share.
	[2]Baker River: Court shares are determined according to the Final Decision #1 formula. There was no ceremonial or subsistence catch because the river was closed for conservation. Commercial catches reflect incidental harvests.
Summer-Fall Chinook	[1]Nooksack-Samish: Court shares are determined on the basis of 50% of the harvestable number after deducting ceremonial and subsistence catches, as provided in the Order, p. 14. On reservation catch was not deducted from harvestable numbers in this instance since no estimate of that catch was provided prior to the Court hearing. Sharing is calculated on the entire run, not merely the percentages taken in Puget Sound because of the serious error in the estimate of prior interceptions. Actual interceptions were 183% of the estimates given in the court order.
	[2]Skagit: Court shares are determined according to the Final Decison #1 formula, applied to the total run. Actual prior interceptions were 383% of the pre-season estimates. On reservation catch of 1,100 fish is included in the treaty commercial catch column but, as required by the Order, is excluded when calculating 50% of the off-reservation harvestable number.
	[3]Hood Canal: Hard data is used for all treaty Indian catches. Prior interceptions were 174% of the pre-season estimate, therefore shares are based on the total run. On-reservation catch of 841 fish is included in the treaty commercial catch column but is excluded in calculating the off reservation shares, per Order, p. 15.

	[4]South Puget Sound: Court shares are determined by the Final Decision #1 formula. On-reservation harvest was 275 fish. The Order, p. 16, prohibited all non-treaty fishing on this stock since it was clear that their allocation would be exceeded. The shares were not specifically set out in the Order, but the methodology used on other chinook runs has been applied.
	[5]Stillaguamish-Snohomish: Court shares are determined by the Final Decision #1 formula. On-reservation harvest was 1,500 fish.
Coho	[1]Straits: Hard data has been used for all treaty catches. Total run size is in question, as is non-treaty commercial catch, because the difference between the pre-season run size estimate (59,000) and the calculated run size (25,500), is inexplicable. Treaty court share is 45% of the total harvestable coho, with no special accounting for on-reservation, ceremonial or subsistence catch. Order p. 10.
	[2]Nooksack-Samish: Court shares are determined by 60% of total harvestable numbers for non-treaty fishermen; 40% for treaty Indians. Actual prior interceptions are 134% of the pre-season estimate.
	[3]Skagit: Court shares are determined by 63% of total harvestable number for non-treaty; 37% for treaty Indians. The treaty ceremonial and subsistence catch shown includes 1,100 fish taken in the fishery, 200 whole fish taken at a hatchery and 300 spawned-out carcasses. The spawned fish have been adjusted to fresh fish values on a 12:1 ratio as provided in the Twelve Questions Order. This is based on an average value of $10.80 per fresh fish and $.88 per spawned carcass. Total run reflects the total number of fish which escaped to the hatchery. Actual prior interceptions were 135% of the pre-season estimate.
	[4]Stillaguamish-Snohomish: Court shares based on 58% of total harvestable numbers for non-treaty fishermen; 42% for treaty Indians. Prior interceptions were 158% of the pre-season estimate. National Marine Fisheries Service data may show additional illegal non-treaty harvests in areas 9A, 8B, and 8C as well as additional catch in area 9, so the non-treaty commercial catch column may have to be adjusted upward.
	[5]South Sound: Court shares are based on 52% of total harvestable number for non-treaty; 48% for treaty Indians. Prior interceptions were 136% of the pre-season estimate. The treaty ceremonial and subsistence column shows the number of fish actually taken in the

fishery. The number of adult fish taken at hatcheries is shown, but surplus jacks are excluded since they have no adult equivalents. See the Twelve Questions Order. The hatchery fish harvest has been deducted from the escapement column to avoid counting them twice.

[14]Hood Canal: Court shares are based on 55% of the total harvestable number for non-treaty; 45% for treaty Indians. Prior interceptions were 251% of the pre-season estimate. All treaty Indian catches are hard data. The pre-season ceremonial and subsistence estimate was not achieved because the area in which many Point-No-Point fishermen generally take ceremonial and subsistence needs was closed for conservation.

[15]Straits: Treaty catches are hard data. No ceremonial or subsistence catch was taken because fisheries were closed for conservation. Non-treaty harvest is based on accepted methods of calculating catch in mixed stock areas.

[16]Skagit: Ceremonial and subsistence harvests did not take place because the river was closed for conservation. Commercial catches are essentially incidental harvests.

[17]Stillaguamish-Snohomish: Ceremonial and subsistence harvests were lower than pre-season estimates because of a conservation closure.

[18]South Sound: Ceremonial and subsistence catches took 1,200 chum from the fishery. 9,400 spawned out carcasses, donated by the Quilcene Fish Hatchery, are excluded since they are shown in the escapement of Hood Canal origin chum.

[19]Hood Canal: All treaty catches are based on hard data. Non-treaty commercial catches may need to be adjusted after discussion in the Fisheries Advisory Board based upon apparently unreported illegal non-treaty catches.

U.S. v. WASHINGTON

District Court: No. 9213

AFFIDAVIT OF A. DENNIS AUSTIN RE: ILLEGAL FISHING NIGHT OF AUGUST 28, 1977

August 29, 1977

I, A. DENNIS AUSTIN, being first duly sworn on oath, depose and say:

I am a fisheries biologist presently employed by the Washington State Department of Fisheries. My present title with the Department of Fisheries is Program Leader for the Puget Sound Indian Fisheries Management Program. As such, one of my duties is to routinely conduct aerial surveys within Puget Sound to determine the distribution of purse seine and gill net fishing effort. These aerial counts of commercial net fishing activity are used to verify effort by area as reported on fish receiving tickets and document fishing in closed waters.

On the night of August 28, 1977, I made an aerial survey of commercial net fishing activity as summarized by the following information:

COMMERCIAL NET ACTIVITY - AERIAL SURVEY

Date: August 28, 1977 Flight Time: 2130-2430 hours
Pilot: Jim Chastain Observers: Dennis Austin, Sgt. Larry Johnson

Area	Time	#G.N.	Area	Time	#G.N.
4B	N.C.		9	2210-2320	0
5	N.C.		9A	2320	0
6C	N.C.		10	2325	0
6	N.C.		11	2330-2400	0
6B	2220	0	11A	2340	1
7	N.C.		12	2205	0
7A	N.C.		12A	2200	4
6A	2220	0	12B	2155	0
7B	2245	122	12C	2150	0
7C	2245	104	12D	2145	2
8	2305	5	12E	2145	0
8A	N.C.		13A	2405	12
8B	2315	2	13B-1	2420	13
8C	2315	8	13B-2	2420	3
				Total	276

These counts indicate to me that significant non-Indian illegal fishing on the night of August 28, 1977 occurred in Areas 7B and 7C. On August 17, 1977, Areas 7B and 7C were open to treaty-Indian and non-Indian fishermen by Department of Fisheries and tribal regulations. An aerial count of these areas was made on that night. This is the latest comparable count which was made when IPSFC Convention Waters were closed to non-Indian fishermen. On that date, 240 gill nets were counted in Areas 7B and 7C. Of these, reported landings indicate 70% were non-Indian fishermen. On August 28, 1977, 226 gill nets were counted in Areas 7B and 7C, not significantly different from the August 17 count. From the data, I conclude that non-Indians are continuing to fish Areas 7B and 7C despite a closure by the Department of Fisheries to all non-Indian fishermen as directed for allocation by the Western Washington U.S. District Court.

/s/ _____
A. DENNIS AUSTIN

[PLAINTIFF'S RECITATION OF A]

U.S. v. WASHINGTON

District Court: No. 9213

SUMMARY OF EVIDENCE APPEARING OF RECORD RE: ILLEGAL FISHING AND WASHINGTON DEPARTMENT OF FISHERIES FAILURE TO LAWFULLY REGULATE

April 4, 1978

In support of their pending motion for preliminary injunctive relief the United States and the Indian tribes invite the court's attention to the documented instances of unlawful non-treaty fishing in past seasons, and the continued inability or unwillingness of the State of Washington to regulate its licensees in accordance with established federal law.

These matters are all of record in this proceeding, within the meaning of C.R. 7(b)(1), Rules of the United States District Courts for the Western District of Washington, and the plaintiffs assume there is no objection to the court's continued reliance on this evidence. This memorandum summarizes the voluminous relevant portions of the official records of *United States v. Washington*, W.D. Wash. Civ. No. 9213 since entry of Final Decision No. 1.

1. Non-treaty fishermen engaged in a substantial fishery on the 1975 coho run in direct violation of State regulations and orders of the court. (Finding of Fact #2,

Preliminary Injunction 1975 Chum Fishing, October 27, 1975, docket #1555)

2. 60,000 fish equitable adjustment was provided to treaty tribes to compensate for unauthorized non-treaty fishing, problems of enforcement and other causes which resulted in substantial denial of treaty fishing opportunity. (Preliminary Injunction 1975 Chum Fishing, October 27, 1975 pp. 1-2, docket #1555)

3. Court tried to deter illegal fishing by ruling: to compensate for losses sustained by treaty fishermen due to the continued illegal fishing by non-treaty fishermen which may occur in the 1976 coho season, the total non-treaty entitlement shall be reduced by an additional 20,000 fish (beyond the actual non-treaty harvest) for each day of substantial and reasonably verifiable non-treaty fishing in violation of Washington Department of Fisheries closures. (Order Re: 1976 Coho Fishery, pp. 3-5, September 7, 1976, docket #2436)

4. The Puget Sound Gillnetters Association publicly encouraged their members to fish in violation of State conservation and allocation closures on the 1976 coho run. The Department of Fisheries sought and obtained an injunction against the leaders of the organization preventing them from encouraging, inciting or purporting to authorize a fishery, on October 8, 1976. (Report of Fisheries Advisory Board Meetings October 11, 13, 1976 and attached letter of James Johnson, Assistant Attorney General, dated October 19, 1976, docket #2636; Statement of James Johnson, designated State representative to Fisheries Advisory Board, October 11, 1976, docket #2573)

5. Witnesses observed a total of 247 non-treaty fishing vessels violating State conservation or allocation closures in several parts of Puget Sound on four nights in September-October, 1976. "The whole fleet" of purse seiners was observed illegally fishing on September 25, 1976 in area 7, San Juan Islands. (Sworn testimony before Fisheries Advisory Board, October 11, 1976, docket #2573, pp. 26-40, 89-97, 98-118; Tribal report re: Fisheries Advisory Bd. Mtg. re: illegal non-Indians fishing, docket

#2618; Affidavit of Roland H. Hatchel, Chief of Fisheries Patrol Division; Report of Richard Whitney, Chairman Re: Fisheries Advisory Board Meeting, October 11 and 13, 1976 docket #2636)

6. Illegal non-Indian fishing activity occurred continually on the 1976 Puget Sound chum run. By October 28, 1976 the activity was at a level beyond the capability of the Department of Fisheries to terminate through normal enforcement efforts. The Governor requested enforcement assistance from the United States Coast Guard. (Request for determination Re: 1976 Chum Run p. 2, filed October 28, 1976 by Assistant Attorney General docket #2571)

7. Illegal non-treaty fishing north of area 10 (Seattle) significantly reduced the availability of chum salmon between October 17 and October 19, 1976. (Report of Fisheries Advisory Board Meeting, October 25, 1976, prepared by Sam Wright, Washington Department of Fisheries, October 27, 1976, docket #2606)

8. At least 60,000 chum salmon were taken by the illegal non-treaty fishery in area 9 (Admiralty Inlet). (Report of Fisheries Advisory Board Meeting, November 12, 1976, statements of Sam Wright docket #2636)

9. In 1976 the Department of Fisheries promulgated a policy of not making arrests for closure citations in Whatcom County where the closures were for allocation. (Testimony of Bruce Gruett, Assistant Director of Fisheries before Fisheries Advisory Board, October 11, 1976, docket #2573)

10. The Department of Fisheries considered the requirement of paragraph 14 of the Injunction [384 F.Supp. 416, which bars regulations limiting tribal harvest unless the State's regulatory scheme provides an opportunity for the tribes to take an equal share of the harvestable number], and rejected it in adopting the July 22, 1977 regulations, because the Department felt, operating under the State Supreme Court decision [*Puget Sound Gillnetters v. Moos*] that it could not comply with the federal injunction. (Testimony of Gordon Sandison, August 8, 1977, 159-160 docket #3419)

11. The Department of Fisheries did not make specific reductions in the non-Indian fishery in 1977 in order to achieve the objectives of the decision in *United States v. Washington*, based on the ruling of the Washington State Supreme Court. (Testimony of Gordon Sandison, August 8, 1977, pp. 161-162, docket #3419)

12. If the Department of Fisheries arrested a non-Indian fisherman (for violation of an allocation closure) the Department probably couldn't get a conviction in any of the State courts. (Testimony of Gordon Sandison, August 8, 1977, p. 171 docket #3419)

13. Because of the State Supreme Court ruling, when a treaty Indian fishery is allowed by Department of Fisheries regulations, a non-treaty fishery must also be allowed. (Statement of James Johnson, Assistant Attorney General, Hearing of August 8, 1977, p. 195 docket #3419)

14. There is little possibility of a State prosecutor attempting to enforce Department of Fisheries regulations required by Judge Boldt. The probability of achieving a conviction were such, a prosecution to be undertaken is even lower. (Statement of James Johnson, Assistant Attorney General, Hearing of August 26, 1977, p. 31, docket #3406)

15. Significant illegal non-Indian fishing (approximately 160 gillnet boats) occurred on the night of August 28, 1977 in areas 7B and 7C (Bellingham and Samish bays). At those places and time, fishing by non-Indians was closed for allocation as directed by the court. (Affidavit of A. Dennis Austin, Washington Department of Fisheries, dated August 29, 1977 docket #3264)

16. Local State courts have thrown out citations issued to non-treaty fishermen for violation of allocation closures in the past, and the fact that the prosecuting attorney of Whatcom County will not prosecute such cases does not come as a surprise to the Department of Fisheries. (Statement of James Johnson, Assistant Attorney General, Hearing of August 30, 1977, p. 17 docket #3420)

17. The removal of fish allocated to treaty Indians

from the jurisdiction of the State has been rejected by the State Supreme Court and cannot be implemented in Washington. The State is unable to stop non-treaty fishing under such circumstances. (Statement of James Johnson, Assistant Attorney General, Hearing of August 30, 1977, pp. 19-20 docket #3420)

18. A total of 21 non-treaty gillnet vessels were observed and documented illegally fishing by Lummi Indian patrol officers in several parts of Puget Sound between August 31 and September 14, 1977. (Affidavits of Michael Jefferson, Calvin James and David Misanes, plaintiffs' exhibits 146, 147, 149, 150, 151, and 152, Hearing of September 22, 1977 [admitted pp. 102, 105, 107-112] docket #3454)

19. Illegal fishing by non-treaty fishermen harvested over 25,000 fish from the 1977 South Puget Sound coho runs, prior to September 26, 1977. (Statement of Duane Phinney, Department of Fisheries representative to the Fisheries Advisory Board, September 26, 1977, docket #3439)

20. Between September 2 and September 27, 1977 the National Marine Fisheries Service, in conjunction with other agencies, personally served 148 copies of court orders on non-treaty fishermen engaged in illegal fishing. Approximately 140 additional illegal non-treaty vessels were observed during that period by law enforcement officers but could not be cited. (Testimony of Wayne Lewis, Hearing of September 22, 1977 pp. 19-20, docket #3454; Hearing of September 27, 1977, pp. 8-9, docket #3937)

21. The Department of Fisheries did not make arrests for violations of allocation regulations during the 1977 fishing season but directed its enforcement to protection of spawning salmon in the streams. The Fisheries Patrol was aware of on-going violations of State regulations which were issued to comply with the orders of the federal court, but believed, because of State Supreme Court decisions, that it could not issue citations to fishermen engaged in such illegal fishing. (Testimony of

Winfield S. Miller, Chief of Fisheries Patrol, Department of Fisheries, Hearing of September 22, 1977, pp. 55-58, 61, 63, and 65, docket #3454)

22. Twenty-seven non-treaty vessels were observed illegally fishing in Grays Harbor during a portion of the 1977 fishing season. Although the violations were reported to the State Fisheries Patrol the State declined to take any action. (Testimony of Fred Koontz, Quinault Tribal Officer, Hearing of October 5, 1977, docket #3901)

23. On October 7, 1977 the Department of Fisheries announced an opening of eight fishing areas to non-treaty fishermen in response to a State Supreme Court ruling, although the areas had previously been closed because the non-treaty allocations had been achieved. The Department of Fisheries indicated that the expected additional non-treaty catch in those areas would come out of the treaty share. (Report of Fisheries Advisory Board, October 7, 1977 (attached to docket #3500); Mailgram of October 9, 1977, docket #3505)

24. On October 13, 1977, the Department of Fisheries concluded that illegal non-treaty fishing had occurred in Area 7B (Samish Bay) although some of the catches had been reported as having been caught in Areas 7 and 7A. (Statement of Duane Phinney in Fisheries Advisory Board report, docket #3589)

25. Guy McMinds, representing the Quinault Indian Nation before the Fisheries Advisory Board, described observations of five non-treaty gillnet fishing boats in Grays Harbor on November 13, 1977, and that the State had provided no enforcement. All parties at the board meeting agreed that illegal fishing activity in Grays Harbor warranted federal assistance with enforcement. (Report of Fisheries Advisory Board re: illegal non-treaty fishing in Grays Harbor, docket #3814)

26. The Washington Department of Fisheries indicated that a substantial number of the 80,000 non-treaty catch of Hood Canal origin chum were taken illegally, in spite of closures for conservation and allocation purposes. Mr. Austin reported that the State had been writing

citations but the track record in the State District Court was not good, and that fishermen tend to evaluate what the citation is going to cost relative to what they make from the fish. (Report of Fisheries Advisory Board Meeting of November 14, 1977 re: closure of chum fishery in Hood Canal, docket #3945)

27. Representatives of the tribes and the State discussed the amount of illegal non-treaty harvest of Hood Canal origin chum stocks prior to November 22. The State biologist estimated the illegal harvest at 9,000 fish, while the tribal representatives estimated the illegal harvest at 45,000 to 50,000 fish. (Report of Fisheries Advisory Board Meeting of November 22, 1977 re: closure of Hood Canal chum fishery, docket #3858)

28. Since Final Decision #I, certain non-treaty fishermen have engaged in a substantial number of violations of those State fishing regulations which were issued to comply with allocation orders of this court and protect treaty fishing rights. (Finding of Fact #4 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

29. A substantial number of the violations referred to [in #28] above, did not result in criminal citations from the State of Washington or any other sanction. (Finding of Fact #5 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

30. A substantial number of the citations which were issued in reponse to the violations described [in #28] above did not result in criminal prosecution by the State of Washington or any other type of enforcement action. (Finding of Fact #6 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

31. A substantial number of the State court criminal prosecutions which did take place as a result of violations referred to [in #28] above resulted in dismissals on the ground that the Department of Fisheries has no authority to issue regulations designed to comply with orders of this court and to protect treaty fishing rights. (Finding of Fact #7 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

32. As a result of certain decisions of the Washington Supreme Court, there have been widespread, open and intentional violations of this court's orders (and of State regulations enacted to comply with those orders) by certain non-treaty fishermen during the current fishing season. (Finding of Fact #9 re: Enforcement of 1977 Fisheries Orders, September 17, 1977, docket #3412 3/4)

33. Although the Washington Department of Fisheries indicated that it intended to enact regulations which comply with this court's allocation orders, it feels that such regulations will be ineffectual because of the refusal of certain county prosecutors to prosecute citations issued for violations of those regulations and the refusal of certain State courts to convict individuals who commit those violations (Finding of Fact #10 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

34. Despite the violations referred to [in #32] above, the Department of Fisheries has not issued a single citation for violation of those State regulations during the 1977 season. (Finding of Fact #11 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

35. The State of Washington and its Department of Fisheries is, and will be unable to enforce regulations it adopts to comply with orders of this Court. (Finding of Fact #12 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

36. Because of the public nature of this litigation, implementation of the judgment depends in part on cooperation by the State of Washington and its citizens, and is vulnerable to disruption by any of a large number of individuals, whose identities cannot practicably be specified in advance. (Finding of Fact #14 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

37. The non-treaty violations of this court's orders over the past three years have caused widespread disregard of the orderly process of law, have frustrated the exercise of plaintiffs' federally protected treaty rights and

implementation of this court's orders designed to protect those rights, and have interfered with defendants' ability to comply with those orders. (Finding of Fact #15 re: Enforcement of 1977 Fisheries Orders, September 27, 1977, docket #3412 3/4)

38. Alternatives to direct injunctions against non-treaty fishermen, which have been used by this court to seek compliance with its orders in this case in previous years (e.g., Preliminary Injunction, 1975 Chum Fishing, October 27, 1975; Order Re: 1976 Coho Fishery, September 6, 1976) have not succeeded in deterring violations of those orders. (Finding of Fact #18 re: Enforcement of 1977 Fisheries Orders, September 17, 1977, docket #3412 3/4)

39. During 1977 several Department of Fisheries patrol officers were advised by Mr. McEachran, Whatcom Co. Prosecutor, not to bring cases to him for prosecutions which are based on violations of State regulations which allow allocation of fish between non-treaty and treaty fishermen. Consequently if a regulation appears to the patrol officers to be an allocation regulation, no citations are issued to violators of it. (Testimony of Lyle L. Neslon, Patrol Sergeant, Washington Department of Fisheries, Hearing of March 28, 1978, docket #)

Respectively submitted this 4th day of April, 1978.

Evergreen Legal Services
Native American Division

/s/ _____

THOMAS P. SCHLOSSER
Attorney for: Duwamish, Lower Elwha, Muckleshoot, Nisqually, Nooksack, Port Gamble, Samish, Sauk-Suiattle, Snoqualmie, Skokomish, Snohomish, Squaxin Island, Steilacoom, Stillaguamish, Suquamish and Upper Skagit Indian Tribes

JOHN C. MERKEL
United States Attorney
J. RONALD SIM
Assistant United States Attorney

FISHERIES ADVISORY BOARD REPORT
Meeting No. 78-56

Re: Agreement on Joint Technical Report
Re: 1978 Chinook and Coho Fishery

July 19, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Data on 1978 Puget Sound chinook and coho salmon run sizes

'ISSUE: Receipt of joint technical report on run sizes, etc., for chinook and coho 1978.

RESULT: The Board agreed to accept and adopt the technical team's report.

On July 11, the Fisheries Advisory Board convened by separate telephone calls to Pete Berman and Dale Johnson. The board agreed to appoint a technical team to provide numerical data on the 1978 Puget Sound chinook and coho run sizes, escapement goals, ceremonial and subsistence, on-reservation, and "take-home" fish. Members appointed to the team were Duane Phinney, Lloyd Phinney, and Sam Wright for the state and Mike Grayum and Phil Roger for the tribes. The joint technical team met on July 17 and provided an agreed upon report, a copy of which is attached.

The Fisheries Advisory Board convened by telephone conference call at noon, July 19, 1978, to discuss the joint technical report. Designated representatives were Bernie Gobin for the tribes and Duane Phinney for the state. Also participating were Mike Grayum and Gary Graves for the tribe.

Mr. Gobin asked for a clarification with respect to the harvestable number, feeling it should include ceremonial

and subsistence and take-home fish. The team will provide a statement clarifying their agreed upon table.

Mr. Gobin asked what projected numbers for ceremonial and subsistence the state has from the tribes. Mr. Phinney replied that they have numbers from the following tribes: *Lower Elwha, Muckleshoot, Port Gamble, Skokomish, Squaxin I., Stillaguamish, Suquamish, Swinomish, Upper Skagit and Steilacoom.*

There was a discussion regarding methods and procedures to be used by the managers during the season. Mr. Grayum explained that the run size estimates for coho apply to the number of fish expected to reach the mouth of the Strait of Juan de Fuca. With regard to chinook, the estimate refers to the number expected at terminal areas. The total run size for chinook is therefore obtained by adding Puget Sound interception rates applied to those terminal area predictions. Prior troll and sport interception rates were applied to that number to obtain an estimate of their catch.

There was a difference of opinion on whether troll and sport interception rates should be adjusted during the season. Mr. Phinney felt there should not be a change in the coho catch after early August, as specified in the footnote to the table and in the Salmon Management Plan. Mr. Gobin felt the rate is so variable that it needs to be updated during the season along with the run-size estimates.

Mr. Gobin wanted some kind of an estimate from the state on the numbers of fish taken home by non-tribal fishermen. Mr. Phinney stated that no estimate was available. He did not feel it was possible to obtain a realistic estimate, and felt it would not affect the management anyway. A question was raised as to whether the Judge had ruled on whether non tribal take-home fish would count in the allocation.

Mr. Gobin moved and it was seconded by Mr. Phinney that the report of the technical team be adopted as corrected and clarified by saying that "ceremonial, subsistence, and take-home fish" are not included in the

harvestable number column shown in the table provided by the joint technical team.

/s/ _____
RICHARD R. WHITNEY
Chairman

July 17, 1978

JOINT TRIBAL-STATE TECHNICAL REPORT TO THE FISHERIES ADVISORY BOARD CONCERNING PUGET SOUND COHO AND CHINOOK SALMON RUN INFORMATION

The Fisheries Advisory Board asked that a Tribal-State Joint Techincial Team review data relative to 1978 Puget Sound chinook and coho salmon run sizes. The team met on July 17, 1978; attached are the joint technical reports concerning the above two subjects. Data for Puget Sound chum salmon and all Grays Harbor salmon runs will be reviewed similarly as soon as available.

/s/ _____
MICHAEL M. GRAYUM

/s/ _____
DUANE PHINNEY

1978 PUGET SOUND SUMMER FALL CHINOOK

Management Regions	Harvestable No. Available To Terminal Net Fisheries	Prior Net Interceptions[1] Treaty	Non-Treaty	Sport Interceptions[1]	Prior Troll & Harvestable Number[2]	Total Escapement Goal	Total Run Size
Straits	0	75	125	800	1,000	3,150	3,200
Nooksack-Samish	89,500	2,063	3,437	24,000	119,000	6,000	125,000
Skagit	5,350	712	1,188	4,800	12,050	14,850	26,950
Snohomish-Stilla-guamish	2,450	408	792	1,700	5,350	8,950	14,300
South Sound	24,250	3,332	6,468	27,100	61,150	31,500	91,000
Hood Canal	13,550	680	1,320	6,200	21,750	5,750	26,300

[1] Prior interceptions by the Treaty Indian troll fishery in its present nature is negligible.

[2] In some cases, this number will not equal the difference between the total run size and the escapement goal. this is due to some runs within a management region returning at levels below escapement goals while others are returning with harvestable surpluses.

These numbers do not include estimates of Tribal Ceremonial and Subsistence or non-Treaty take home catches.

Total catches are based on an annual average of the 1974-77 fisheries. The distribution between Treaty and non-Treaty fish is based on 1977 catches. More accurate estimates should be made by monitoring actual harvests during the 1978 fishery.

1978 PUGET SOUND COHO

Management Regions	Harvestable No. Available to Puget Sound Net Fisheries	Prior Troll & Sport Interceptions[1]	Total Harvestable Number[2]	Escapement Goal	Total Run Size
Straits	27,600	16,000	43,600	10,800	54,400
Nooksack-Samish	91,200	32,400	123,600	8,000	131,600
Skagit	22,300	8,000	30,300	48,000	78,300
Snohomish-Stillaguamish	101,700	40,700	142,400	75,200	217,600
South Sound	359,200	93,400	452,600	49,000	501,600
Hood Canal	56,100	33,100	89,200	22,500	111,700

[1] Subject to change depending on a review of troll effort in the fisheries during late July and early August. Prior interception by the Treaty Indian troll fishery in its present nature is negligable.

[2] These numbers do not include estimates of Tribal Ceremonial and Subsistence or non-Treaty take home catches.

FISHERIES ADVISORY BOARD REPORT
Meeting No. 78-77

Re: Puget Sound Non-Treaty Coho Fishery

September 21, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fishieries Advisory Board

SUBJECT: Puget Sound non-treaty coho fishery

ISSUE: Department of Fisheries proposed additional non-treaty fishing time in Puget Sound

RESULT: The Board agreed upon one day of fishing in Areas 6B, 9, 10, and 11, commencing Sunday night, September 24, for gillnets, and Monday during the day for purse seines. Area 7B opened for a total of four days, Sunday, Monday, Tuesday and Wednesday nights to gillnets; and to seines Monday, Tuesday, Wednesday and Thursday, during the day. Areas 7 and 7A for 3 days, Sunday through Tuesday night for gillnets; Monday through Wednesday, days for purse seines. The Board agreed to reconvene Thursday, Sept. 28, by telephone to consider future coho fisheries.

As agreed upon at the September 7 meeting, the Fisheries Advisory Board convened Thursday, September 21, at 2:00 p.m., at the Sea-Tac Hyatt House. Designated representatives were Mike Peters for the Tribes and Duane Phinney for the State. Also participating were Paul Sekulich for the State, Randy Hatch, Mike Grayum, Linda Jones, Cliff Bengston, Mike Turnipseed, Jack Rensel, Phil Mundy, and Terry Martin for the Tribes.

Mr. Phinney provided the following information. For Nooksack-Samish coho, the non-treaty fishery is expected to take about 950 total coho for the three days this week.

The remaining allocations are 49,100 for the treaty allocation; 19,500 for the non-treaty. For the Skagit there is no proposed non-treaty fishery. For the Stillaguamish-Snohomish the forecast was 176,900; the run size update indicates 173,300. The remaining catch allocations are 47,800 for treaty, 13,800 for non-treaty. In South Sound the forecast was 408,200; the update is 486,600. The remaining allocations are 244,100 for treaty, 67,900 for non-treaty. In Hood Canal the original forecast was 78,600; the update is 85,300. The remaining treaty allocation is 47,000; the non-treaty is 6,800. He estimated that the catch in 7B next week would be 1000 to 1200 coho per day, where this week the catch was about 300 per day. In Areas 6B and 9, the estimate is that they would take 25,000. In Areas 10 and 11, the non-treaty fishery would take 24,000. The estimated distribution of the stocks in the catch would be 6,000, Stillaguamish-Snohomish; 16,000 South Sound; and 3,000 Hood Canal in Areas 6B and 9 fisheries. In Areas 10 and 11, South Sound stocks would be affected, and the estimated catch would be 24,000 there. In Area 7B, Mr. Phinney stated he felt that 5 days might be justified, but would propose 4 at this time because the fourth day would be the only area open at that time, so the state would propose to see how much effort would develop on that fourth day this week and go to 5 next week if it appears the effort remains within a reasonable level. For the following week, according to the expected catches, there might be a few thousand fish remaining in the non-treaty allocation for Hood Canal, Stillaguamish-Snohomish, and South Sound, but he is not prepared to make a specific proposal and suggested that the board reconvene next Thursday to discuss the latest catch information and the proposed fishery for the following week.

Mr. Peters asked the tribal biologists if they saw any problems with the proposal. Mr. Bengston indicated he saw no problem; Mr. Mundy said he saw no problem. Mr. Bengston indicated he had talked to Paul Hage, Nooksack tribal biologist, who had no problem with a 3-day

non-treaty fishery in Bellingham Bay. He had not discussed 4 days, which was the state's proposal.

Mr. Phinney presented the state's proposal as a formal motion. It was seconded by Mr. Peters. Mr. Peters then raised the question of the appropriateness of a state conservation closure in 13B, which was affecting a proposed Squaxin tribal fishery at a time when stocks of fish are being taken in the Area 10 and 11 fisheries being carried forth by the state and other tribes. Jack Rensel, tribal biologist, was asked to report. He provided a specific proposal on a test fishery and on an evaluation fishery. The tribe has proposed a 3-day fishery commencing Saturday night. His projection is that it would take 60 fish per night for a total of 180 fish per week. He presented a schedule of test fisheries to evaluate timing of chum runs into specific areas in the Squaxin usual and accustomed area.

The Board, at the recommendation of the chairman, continued the subject and agreed to reconvene by telephone conference call at 8:00 a.m., September 23, and discuss the matter further. The state wished to apply their run size updates to stocks of fish in South Sound and determine whether the conservation closure could be removed. Mr. Peters and Mr. Phinney reported to me on September 22 that the issue had been resolved. The state was rescinding the conservation closure and the tribe was proceeding with strictly limited fishery.

/s/ _____
RICHARD R. WHITNEY
Chairman

FISHERIES ADVISORY BOARD REPORT
Meeting No. 78-83

Re: Makah Fisheries for Chum Salmon

October 9, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Makah Fisheries for chum salmon

ISSUE: The Makah Tribe requested that the Department of Fisheries rescind their conservation closure or otherwise permit tribal fisheries in Areas 4B and 5.

RESULT: The Fisheries Advisory Board was unable to reach agreement. The designated representatives asked me to report their positions to the court. The tribe invoked Paragraph 6 on page 13 of the Memorandum Order and preliminary injunction re salmon allocations for 1978 and subsequent seasons which says the Chairman of the Fisheries Advisory Board shall make a recommendation in such issues. I recommended that the conservation closure remain in effect for non-treaty fisheries, because no plan had been offered which showed a non-treaty fishery could be permitted without impacting stocks in need of protection. I recommended that the treaty fishery be permitted, because the effect on stocks needing protection is negligible, amounting to less than 1/10 of 1% of the total run of the stock needing protection.

The meeting convened at 2:30 p.m., Monday, October 9, at the office of the Northwest Indian Fisheries Commission in Olympia. Designated representatives were

Dale Johnson for the Makah Tribe and Paul Sekulich for the State. Also participating were Al Hartt and Jeff Halloway for the Makah Tribe, Mike Grayum, NWIFC, Loren Stern and Morris Barker for the State.

Mr. Sekulich commenced with an explanation of the conservation closures adopted last week by the state. The harvestable numbers of a number of natural stocks of coho in Puget Sound have been taken. The remaining harvestable are from hatchery stocks which will be harvested in terminal areas. All mixed stock areas are closed to protect natural coho. In the Strait we are approaching the chum management period. North Sound stocks of chum are predicted to have no harvestable numbers. Run size updates in season will probably not change those numbers, as they will South Sound and Hood Canal. Mr. Johnson asked what percentage of the total run of coho and chum are in need of protection. Mr. Sekulich stated that with coho less than 10% are viable natural stocks needing protection, and with chum about 15% (110,000 out of 820,000) need protection. Four out of six management regions in Puget Sound have runs of chum salmon that are not returning in harvestable numbers.

Mr. Johnson stated that in the Makah catch only 20% of the chums consist of Puget Sound stocks. The remainder are Canadian fish. If you take 15% of the 20%, then only 3% of the Makah catch would consist of stocks needing protection. He called on Al Hartt, who presented a written report and proposal for the Makahs (A copy is attached to the court's report, and is available on request from the Chairman). He stated that he believes the coho have pretty well passed the area, and that a tribal fishery would be a chum fishery. He estimated, based on past catch data and expected participation in the fishery, that the Makah catch would amount to 2,000 chum salmon, of which 3% or 60 fish would be from stocks in need of protection.

Mr. Sekulich responded that the State is concerned about their ability to enforce conservation closures in inside areas if tribal fisheries are permitted outside. The

state courts have, in the past, dismissed arrests based on conservation closures in Area 6C, for example, when Areas 4B and 5 were not closed for conservation. Despite the small percentages projected for the tribal catch, the State is managing for conservation to preserve certain stocks. Mr. Hartt inquired abut the fisheries proceeding in Areas 7 and 7A. Mr. Sekulich responded that it is true there are similar percentages of fish in 7 and 7A, as in 4B and 5, namely, stocks are principally Canadian, but in Areas 7 and 7A the distinction is that this is the last chance for U.S. fishermen to take those Canadian fish. If they waited until the fish separated out in the terminal areas, there would be no opportunity for U.S. fishermen.

Mr. Hartt stated that, in his view, the Makahs are in the same situation in Areas 4B and 5. Mr. Sekulich provided information on the breakdown of the expected catches in the Strait of Juan de Fuca, namely that 20% of the Strait chum would be of Puget Sound origin, as had been indicated; in Area 7, 15% would be chum of Puget Sound origin, and in 7A, 5% would be chum of Puget Sound origin. Mr. Johnson pointed out that this represents a lot more fish, even though the percentage is small. Mr. Sekulich said that to defer fishing in 7 and 7A would be giving up the harvest of a substantial number of Canadian fish in order to protect a small number of Puget Sound fish taken there.

Mr. Grayum provided information on 1976 catches in 7 and 7A. There were 245,000 chum taken in 7 and 7A by the non-treaty fishery in that area, and 30,000 by the treaty fishery. 11% 89%.

There was discussion of a number of alternatives that might be available to the Makahs. The state representative inquired whether the tribe would be able to participate in an invitational fishery in Puget Sound, after the fish had separated in the terminal areas. I inquired whether the tribe would be proposing as an alternative a closure of the chum fisheries in areas 7 and 7A. Mr. Johnson responded that invitational fisheries had not worked out in the past, for a number of reasons, and the

tribes had generally agreed and decided not to get involved in invitational fisheries in the future. The management is simplified without them, and the tribes are interested at this stage in developing their own local fisheries. He stated that the tribe would not be asking for a closure of 7 and 7A, because they felt the idea there was parallel to their own situation. I attempted to explore some alternatives that might provide some state as well as federal enforcement, but Mr. Sekulich was unable to agree because he felt that any tribal fishing in 4B and 5 would undermine their conservation closures, and undermine their enforcement in inside areas. He felt that the conservation closures and enforcement too important to jeopardize.

Mr. Johnson formally moved that Areas 4B and 5 be open to the treaty fishery 7 days a week. Mr. Sekulich was unable to second the motion, because there is a conservation closure in effect, and further he felt it inappropriate to lift a closure of this kind for a special group of treaty fishermen, when other treaty fishermen would be able to harvest available surpluses after the fish had got inside Puget Sound.

The parties were unable to reach agreement and asked me to report the differences to the court. The Makah Tribe called my attention to the wording in the Memorandum Order and Preliminary Injunction re salmon allocation in 1978 and subsequent seasons, para. 6, page 13, which says:

"In the event of disagreements in the Fisheries Advisory Board over whether the allocations have been reached, or whether fisheries will impact spawning escapements, the court's technical advisor shall recommend to the court whether harvest should be continued."

My recommendations are as follows.

First, I believe the issue can be identified as the problem of defining *negligible*. There is a question whether the tribal catch of stocks in need of protection is negligible. Apparently the Department of Fisheries is willing to open the fishery in areas where they feel the

impact on stocks needing protection is negligible. But at the moment there is no set of ground rules for "negligible." In this specific situation, for example, the tribes and the state have agreed that the catch of chum in the sport fishery is negligible, and therefore is counted as zero. In practice there are some chum taken by the sport fishery, but the number is negligible. I believe the state needs to provide some ground rules as a basis for decisions in such situations in order to avoid confusion, disputes, and avoid the need for the court's technical advisor to get involved in defining or reviewing conservation closures.

A fishery in a mixed stock area where there is one or more stocks needing protection must, in my view, meet three requirements:

1. The stocks needing protection must make up a small percentage of the catch.

2. The total numbers of fish caught from the stock needing protection must be small, and

3. That small number must represent a small percentage of the total number of fish in the run needing protection.

While the court waits for a definition of broader application, I think it appropriate under the present circumstances to make some recommendations and invite a response by the parties.

I think it is clear that the proposed Makah chum fishery in Areas 4B and 5 will satisfy the 3 requirements listed above in the following way:

1. The incidental catch of stocks needing protection will be 3% of the total Makah catch. I believe 5% or less would satisfy the requirement.

2. The total number of fish in the catch from stocks needing protection will be 60. I feel that anything less than 100 would certainly fall within the definition of small.

3. The catch of 60 fish will represent 0.055 percent of the total number of fish in the stocks needing protection. I feel that anything less than 0.1% would certainly be low enough.

The state was correct in instituting conservation

closures in all mixed stock areas where coho salmon are present and where chum salmon from North Puget Sound stocks (except Canadian) will be present. Based on the presentation made by the state representatives to the Board, it is clear that the state does not intend to open a limited entry fishery or other fishery that would otherwise limit the catch in a way to meet the three requirements. Any normal non-treaty fishery in Areas 4B and 5 and others listed by the state in FAB report 78-82 could not be permitted under the requirements for conservation because of the large size of the fleet, and the large catch that would be expected in those areas.

I, therefore, recommend that the conservation closures adopted by the State of Washington Department of Fisheries remain in effect, as to the non-treaty fishery. The hotline should continue to announce these conservation closures.

Because the Makah Tribe proposes a fishery which will meet all three requirements, I believe there is not a justification for a conservation closure of the tribal fishery in areas 4B and 5, and I therefore recommend that the treaty tribes chum fishery be permitted to proceed to take no more than 2,000 chum salmon in total form Areas 4B and 5. I recommend the conservation closure not be applied to the tribal fishery, because their proposal has demonstrated that conservation needs will be met. Similarly, the conservation closures do not apply to the non-treaty sport fisheries whose catch of chums is negligible, as the parties have agreed.

FISHERIES ADVISORY BOARD REPORT

Meeting No. 78-89

Re: Determination of the Appropriate Starting Date of Chum Fishery

October 17, 1978

TO: Hon. George H. Boldt
Sr. U.S. District Judge

FROM: Richard R. Whitney, Chairman
Fisheries Advisory Board

SUBJECT: Opening date for chum salmon fishery in Puget Sound

ISSUE: Determination of the appropriate starting date for the chum fishery.

RESULT: The board agreed that the first fishery for chum salmon would be in Areas 10, 11, and 12, on Thursday, commencing during the day for seines and during the night for gill nets. In addition, the board agreed to a gillnet only fishery in Area 8 for Thursday night.

The Fisheries Advisory Board convened Tuesday, October 17, 1:30 p.m., at the office of the Northwest Indian Fisheries Commission in Olympia. Designated representatives were Sam Wright for the state and Mike Turnipseed for the tribes. Also participating were: George Kalama, Randy Hatch, Nick Lampsakis, Terry Martin, Paul Svoboda, Robert Pillar, Dave Gibler, Duane Phinney, Paul Sekulich, and Gary Graves.

The meeting was requested by the state to propose the schedule for chum salmon fishing. Mr. Wright commenced by saying that according to the proposed chum management plan, which had been provided by the state and commented on by the tribes, there needs to be a fishery in the third and fourth weeks to provide an update on the run size for chum salmon. Mr. Wright proposed

that there be the first of two 1-day evaluation fisheries in Areas 10 and 11, to take place on Thursday, October 19. According to the best estimates provided in the past, one fishing day should be somewhere around the 20th and the other around the 25th. In Area 12 there are surplus fish returning to Hood Canal, and it is somewhat difficult to predict the total effort, but in the past it has not been much. The state has also worked out an agreement with the Skagit River Cooperative for an evaluation fishery in Area 8, which ought to take place at the same time.

Mr. Turnipseed asked how many coho would be taken in the chum fishery. Mr. Sekulich estimated 1,000 to 2,000. Mr. Turnipseed asked what percentage of the total catch would be represented, and Mr. Sekulich said probably 10% of the catch would be coho. I asked if there are coho remaining in the non-treaty allocation that have been reserved as incidental catch in the chum fishery. Mr. Wright responded that the state's original plan had reserved coho to be taken as incidental catch in the chum fishery, but that downward revisions of the coho run size in the updates had eliminated that buffer, the effect of which would be that the non-treaty catch would be eating into tribal allocation to some small extent. On the other hand, in other areas of Puget Sound the balance of catches had gone the other way. The state feels they have done the best they could under the circumstances, faced with the run size estimates that declined through the season beyond their expectations and ability to plan fisheries. Mr. Turnipseed expressed concern about coho stocks that are in need of protection, and related the situation to the protection of chinook at times when the coho were abundant and the conservation closures that were put into effect for chinook. Mr. Wright responded that the state is using the same standards in both situations. The management plans establish management periods for the runs of chinook, coho, and chum, and it is inevitable that there will be some overlap. The tribes in south Sound did open for coho when some chinook would be taken. The conservation closures were removed, although some

chinook would be taken incidentally in the coho fisheries. Mr. Sekulich provided the following numbers as the latest update for the coho run size: total run to the terminal area, 368,900; escapement goal, 49,000, leaving 319,000 harvestable. The catch to date is roughly 250,000, of which 113,000 are non-treaty (75,000 taken in South Sound) and 116,000 treaty catch in the Sound. The harvestable surpluses remaining are at the hatcheries.

Mr. Turnipseed called on Gary Graves, who inquired whether information from the Canadians suggests anything with respect to relative strength of the chum runs. Mr. Wright responded that Canadian catches are a little above predictions, and it looks good at this time, although the run may be early which affects the prediction. Mr. Graves inquired whether a threshold number would be employed, as was done last year; i.e., the catch on day one would have to be above a certain number before any additional fishery would be proposed. Mr. Wright said yes, they would use the same number as last year, as it would make no sense to proceed with the second day of fishing if the number on the first day makes it clear that the run is in trouble, and escapement goals would not be met.

In two days of fishing, the non-treaty fishery would probably take about ⅓ of their share. Mr. Graves asked if the state would be requesting their share of the late Nisqually run chums sometime after the second day. Mr. Wright said that they would prefer to take the non-treaty share during the normal run, although it would be possible to patch together a limited entry purse seine fishery in the Nisqually later on. This would be a subject that would be discussed at future Advisory Board meetings. He realizes that some agreement among the tribes would have to be reached if the non-treaty share is taken early.

Mr. Turnipseed called on Nick Lampsakis, who inquired what catch is expected in Area 12. Mr. Sekulich said that 1977 data are the only basis, and the catch there was 7,600 fish on a given day. The hatchery run this year is predicted to be high, so it could be slightly higher. At this time they are planning 7,600 fish in a 1-day fishery. Mr.

Lampsakis asked that if the chums are early, as indicated by results of the first fishery, would the state be willing to fish two days in the second week in order to take equal portions from different segments of the run. Mr. Wright responded that, yes, the state would be willing to look at that. They want to keep the non-treaty fishery up at the end of the Canal, in Area 12, and stay away from the river in the south end.

There was a brief recess while tribal representatives caucused. Mr. Turnipseed then called on Gary Graves who stated that the tribal representatives have no problem in Areas 10 or 12, but have certain concerns in Area 11. He wondered if the fishery in Area 11 could be postponed because of concern about high incidental catches of coho. Mr. Wright responded that the management plans have gone according to schedule, and Area 13 is designated now as a primary chum management area, and we couldn't very well backtrack to encompass Area 11 where the chums went through earlier and designate it as a coho area. There was a question about the timing of the coho runs. Mr. Sekulich said in Area 10 they were about 5 days early, and in Area 12 approximately 10 days early. Mr. Turnipseed proposed that no purse seines be permitted in Area 11. Mr. Wright responded that it would concentrate purse seines too much in other areas. They are already keeping purse seines out of the Skagit.

Mr. Graves asked if there were not some coho stocks in 10 and 11 that are no longer in harvestable numbers. Mr. Wright said yes, but the state and tribes have agreed on the management periods for chum and can't worry at this time about small incidental catches. If that were so, we would never fish. Mr. Turnipseed again asked for a proposal. Mr. Wright requested in the form of a motion that Areas 10, 11, and 12 be open Thursday, October 19, during the day for purse seines, 5 a.m. to 9 p.m., and at night for gill nets, 5 p.m. to 9 a.m.; and opening Thursday night for gillnets only in Area 8, with the understanding that the board would convene again Monday afternoon, October 23, 1:30 p.m., at the Sea-Tac Hyatt House to

discuss the results and any further fisheries. Mr. Turnipseed seconded the motion. The board instructed me as chairman to report that agreement had been reached.

The board was reconvened at 2:30, at the request of George Kalama, who asked for a discussion of the situation at the Minter Creek Hatchery. He feels that jack salmon taken there should not count in the shares. The tribes have talked to Ralph Rideout. Mr. Wright agreed that certain jacks taken in the fishery should not count in the allocation, and that the Department is only looking for a clean break in the size of fish in order to distinguish between jacks and adults. He is considering a 14-inch break-off point at this time, but wishes to have additional time to discuss this with the hatchery managers to see if this standard could be applied generally. He will get back to the tribes in the near future; next Monday at the latest. In the meantime, the tribes should keep track of the lengths of their fish so they can account for the jacks which appropriately should not be counted in the allocation.

The meeting adjourned at 2:45.

/s/ _____
RICHARD R. WHITNEY
Chairman

REPORT ON THE SNOQUALMIE TRIBE
by
Dr. Barbara Lane
(Exhibit USA-104)

(8) It is clear that the Snoqualmie regarded themselves as a continuing tribal organization. The Snoqualmie treaty signers and their followers who did not receive the land they had asked to have reserved in their own territory and who did not receive allotments on the reservations continued to press for the lands that they understood were due them under the terms of the treaty.

Pat Kanim, John Taylor (who had acted as the interpreter at the Point Elliott treaty) and other leaders met with representatives of the federal government in order to press their claims. They were unsuccessful and their decendants continued to assert tribal claims.

Eventually, the Snoqualmie Tribe along with many other tribes in western Washington joined in a suit against the government, *Duwamish et al v. the United States.* In connection with that case a large number of depositions were taken from Indian people. The depositions from Snoqualmie people were taken at Carnation, Washington, February 27, 1927. The Indian deponents were questioned by claimant's counsel, Arthur E. Griffin, and defendant's counsel, George T. Stormont.

Among the Snoqualimie deponents were Watson Martin, a grandson of old chief Sonowa, and Jerry Kanim, a nephew of chief Pat Kanim. Jerry Kanim testified as chief of the Snoqualmie Tribe.

The following excerpts are taken from Jerry Kanim's testimony.

Question. *Are you the chief of the tribe, Jerry?*
Answer. *Yes.*
Question. *What relation are you to Pat Kanim, the chief at the time the treaty was made?*
Answer. *He was my uncle.*
Question. *Do you know whether or not many of the Snoqualmie Indians got allotments of land?*
Answer. *No. Very few.*
Question. *Did you ever get an allotment?*
Answer. *No.*
Question. *Did Pat Kanim or your father get allotments?*
Answer. *No.*
Question. *Any of your children get allotments?*
Answer. *No.*

* * * *

Jerry Kanim was cross-examined by the government attorney with respect to the nature of Snoqualmie tribal government.

Question. *How did you become chief of the Snoqualmies?*
Answer. *I inherited the right.*
Question. *Do the Snoqualmies still maintain tribal relations and tribal life?*
Answer. *Yes.*
Question. *As chief, have you any authority over the other members of your tribe?*
Answer. *Yes.*
Question. *Isn't it a fact that the title of chief is more or less honorary now than actual?*
Answer. *The former chiefs were the head of the tribe, and of course at the present it is a little different than it used to be in the early days.*

Question. *In what manner did you receive recognition from the President of the United States as chief?*

Answer. *He says the certificate that I received from the President I was recognized as a member of this tribe, and the tribe suggested that I should have the right to hold that certificate that was issued of greetings from the President.*

Mr. Stormont. *That is all.*

Redirect examination by Mr. Griffin:

Question. *Did the President recognize the Snoqualmie Tribe of Indians as a tribe?*

Answer. *Yes.*

Question. *How long as the Snoqualmie Tribe of Indians been a member of the Northwest Federation of American Indians?*

Answer. *It is all of between 10 and 11 years ago since they became a member.*

Question. *Counsel asked you if your title is honorary. I will ask you if you have performed duties such as calling the tribe together and signing contracts with attorneys and appointing one of your members to take the enrollment, and such things as that?*

Answer. *Ever since I became recognized as the leader of the Snoqualmie Tribe, I always had the right and privilege to gather them so often, the same as I have them to-day.*

Question. *Have you called them together many times for council?*

Answer. *Yes.*

Question. *Do they come when you call them together?*

Answer. *Yes.*

Question. *What committees have the tribe now?*

Answer. *Wilfred Steve is one of the vice presidents of this council of this tribe; Jack Anderson, secretary; Johnny Johnson, treasurer; Bill Bagley is one of the committee; Ed Percival, committee; Joseph Charles, committee. That is all I can remember—Aleck Young, committee. That is all.*

Question. *Have you and your committee met with the chief or president of other tribes, with their committee, from time to time during the last 10 or 11 years, since you belonged to the federation?*

Answer. *Yes.*

* * * *

By the Commissioner:

Question. *Do you know of any other matter relative to the claim in question? If you do, state it.*

Answer. *The reason why I hear making these statements was because I was told direct from my uncle and others, the ones that was there when the treaty was made, and during my time, in the later days, that my uncles and all the other older people that gathered together and held a regular council and talked about this treaty, and I would be present and listen. Now, my uncle says to me, he says that "we want you to understand and know the fact that the Government has not fulfilled the promises that he made; he still owes for everything that he has promised. We will soon be passed away." For that reason I am looking forward and asking that something should be done to the promises that*

was made to the older people. He says all this country was ceded by the old chiefs with an understanding that they were to be paid in money, and he says and also the Government had promised that this big reservation and all you younger generation, that even the small children was to have allotment, and have homes for themselves. And also it was told to me that it was promised to them that they were going to establish and furnish us a school, and big schools, so that our children will be educated and learn the blacksmithing and mechanics of all other manual trainings. Now, he says all those promises isn't carried out to this present day. For that reason I said awhile back that I am stilling looking forward, and that is why we are filing the claim against the Government, for the Government failed in its part, and that is all I wanted to say.

He wishes to extend thanks to the Government man for coming over here to look over the conditions of our people and are very glad to see him come over and understand for himself the conditions of our surrounding.

[16]

It seems clear from the above, and from similar statements made by other deponents, that the Snoqualmie considered themselves to be an ongoing tribal organization pursuing matters of tribal business which had concerned previous tribal leaders and councils.

(9) In addition to the Court of Claims case referred to above, Jerry Kanim was frequently in Washington State

courts attempting to protect treaty hunting and fishing rights of the off-reservation Snoqualmie Tribe.

In a letter dated April 21, 1927 addressed to Mr. F.A. Gross, who was then in charge of the Tulalip Agency, Mr. Kanim wrote in part as follows:

I received your letter yesterday and I was in Seattle yesterday to my trial, but as the Judge was sick our case was postponed until next Wednesday April 27th.

And now, I will explain my trouble to you. I was doing a little trapping all winter. It is what I do every winter for my living. That is why I am in trouble. that is, for trapping without a license. there is three of us in for the same thing. Also we get arrested for taking fish out of the river, for our own use. This is all of our trouble.

The white man says that I'm breaking his law, taking my game and my fish. This is what I want to say. When my old people signed to give away our country to the United States Government. We didn't give away our game, or fish, berries or roots. And Governor Stevens agreed to that. * * * *

Pat Kanim was my Uncle. I'm representing the Snoqualmie Tribe now to-day. I have a set of treaty books here at my home. They were sent out from Washington, D.C. here to me. In Article 5 Volume 2 on Laws an treaties is says

"The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots an berries to open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

And friend I'm going to try to take this up in the Supreme Court if I can get to do it. All my people is getting to-gether in this point. So I'll have you to help us out all you can on this.

* * * *

And that is why I think that I can take fish an game

without a license at any time, because that was the understanding at the time the treaty was made, between the Whites and the Indians. We were supposed to take game an fish an berries at all time as long as the Mountain stands as long as the river is running. Now I will ask you my dear friend.

When did the State beat me out of these rights for game an fish? or did the Government turn over my rights to the State? And now the State is passing laws over these laws made by the United States Government and our old people. So this is the very point I want to get from you, is how did I lose my game, an fish an hunting rights at this time. The State law says I can take fish only inside the reservasion. Now how about us Indians outside of a reservasion an we are under the same treaty * * * *

[17]

The present Snoqualmie Tribal Organization, some of whose members are descendants and relatives of Jerry Kanim, continues to assert the same treaty rights which the off-reservation Snoqualmie have asserted since treaty times.

* * * *

(PP. 16-21)

EXHIBIT PL-M-3

WASHINGTON SALMON HARVEST STATISTICS
1974-1977,
TABLES 1 through 7

Table 1. ACTUAL HARVEST IN 1000's of Fish: Chinook Salmon

FISHERY	1974			1975			1976			1977			1974-1977 Average		
	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL
OCEAN															
TROLL (ALL)	385	-	385	262	12	274	343	18	361	251	12	263	310	10	320
SPORT (AREAS 1-4)	214	-	214	262	-	262	171	-	171	135	-	135	196	-	196
SUBTOTAL	599	-	599	524	12	536	514	18	532	386	12	398	506	10	516
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	119	72	191	182	141	323	152	137	289	183	84	267	159	108	267
FRESHWATER SPORT	16	-	16	16	-	16	18	-	18	7	-	7	14	-	14
SUBTOTAL	135	72	207	198	141	339	170	137	307	190	84	274	173	108	281
WILLAPA BAY															
NETS	14	-	14	15	-	15	29	-	29	24	-	24	20	-	20
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	14	-	14	15	-	15	29	-	29	24	-	24	20	-	20
GRAYS HARBOR															
NETS	10	1	11	7	2	9	8	4	12	12	6	18	9	3	12
FRESHWATER SPORT	1	-	1	1	-	1	1	-	1	1	-	1	1	-	1
SUBTOTAL	11	1	12	8	2	10	9	4	13	13	6	19	10	3	13
NORTH WASH. COAST															
NETS	-	11	11	-	12	12	-	11	11	-	17	17	-	13	13
FRESHWATER SPORT	-	-	-	-	1	1	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	11	11	-	12	13	-	11	11	-	17	17	-	13	13
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	14	4	18	27	9	36	19	8	27	29	12	41	22	8	30
PURSE SEINE	38	-	38	62	1	63	43	2	45	47	3	50	48	2	50
REEF NET	1	-	1	2	-	2	-	-	-	1	-	1	1	-	1
SUBTOTAL	53	4	57	91	10	101	62	10	72	77	15	92	71	10	81
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	1	5	6	-	5	5	3	5	8	6	2	8	2	4	6
PURSE SEINE	1	-	1	-	-	-	1	4	5	2	-	2	1	1	2
SUBTOTAL	2	5	7	-	5	5	4	9	13	8	2	10	3	5	8
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	23	64	87	38	90	128	25	102	127	44	89	133	32	86	118
PURSE SEINE	2	-	2	1	1	2	-	3	3	-	5	5	1	2	3
OTHER	-	-	-	-	1	1	-	2	2	-	1	1	-	1	1
SUBTOTAL	25	64	89	39	92	131	25	107	132	44	95	139	33	89	122
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	255	-	255	334	-	334	307	-	307	205	-	205	276	-	276
FRESHWATER SPORT	3	-	3	3	-	3	5	-	5	5	-	5	4	-	4
SUBTOTAL	258	-	258	337	-	337	312	-	312	210	-	210	280	-	280
TOTAL	1,097	157	1,254	1,213	274	1,487	1,126	296	1,422	952	231	1,183	1,096	238	1,334

Table 2. ACTUAL HARVESTS IN 1,000's OF FISH: COHO SALMON

FISHERY	1974 NON-TREATY	1974 TREATY	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	1,038	-	1,038	767	7	774	1,377	8	1,385	676	4	680	964	5	969
SPORT (AREAS 1-4)	595	-	595	481	-	481	943	-	943	412	-	412	608	-	608
SUBTOTAL	1,633	-	1,633	1,248	7	1,255	2,320	8	2,328	1,088	4	1,092	1,572	5	1,577
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	267	41	308	157	6	163	165	4	169	38	-	38	157	13	170
FRESHWATER SPORT	16	-	16	12	-	12	15	-	15	1	-	1	11	-	11
SUBTOTAL	283	41	324	169	6	175	180	4	184	39	-	39	168	13	181
WILLAPA BAY															
NETS	16	-	16	7	-	7	9	-	9	2	-	2	8	-	8
FRESHWATER SPORT	1	-	1	-	-	-	1	-	1	-	-	-	-	-	-
SUBTOTAL	17	-	17	7	-	7	10	-	10	2	-	2	8	-	8
GRAYS HARBOR															
NETS	50	5	55	21	4	25	14	19	33	1	3	4	22	8	30
FRESHWATER SPORT	4	-	4	1	-	1	3	-	3	-	-	-	2	-	2
SUBTOTAL	54	5	59	22	4	26	17	19	36	1	3	4	24	8	32
NORTH WASH. COAST															
NETS	-	61	61	-	24	24	-	25	25	-	9	9	-	30	30
FRESHWATER SPORT	1	-	1	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	1	61	62	-	24	24	-	25	25	-	9	9	-	30	30
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	186	21	207	213	11	224	140	20	160	168	25	193	177	19	196
PURSE SEINE	195	-	195	158	1	159	199	16	215	114	7	121	166	6	172
REEF NET	16	-	16	7	-	7	3	-	7	4	-	4	8	-	8
SUBTOTAL	397	21	418	378	12	390	345	36	382	286	32	318	351	25	376
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	33	40	73	12	30	42	18	16	34	121	46	167	46	33	79
PURSE SEINE	39	-	39	-	6		6	9	15	77	17	94	30	-	30
SUBTOTAL	72	40	112	12	36	48	24	25	49	198	63	261	76	33	109
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	12	330	342	83	371	454	2	218	220	14	337	351	28	314	342
PURSE SEINE	14	-	14	77	5	82	1	3	4	19	-	19	28	2	30
OTHER															
SUBTOTAL	26	337	363	160	382	542	3	237	240	33	348	381	56	326	382
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	164	-	164	199	-	199	224	-	224	184	-	184	193	-	193
FRESHWATER SPORT	10	-	10	8	-	8	10	-	10	10	-	10	10	-	10
SUBTOTAL	174	-	174	207	-	207	234	-	234	194	-	194	203	-	203
TOTAL	2,657	505	3,162	2,203	471	2,674	3,134	354	3,488	1,841	459	2,300	2,458	440	2,898

Table 3. ACTUAL HARVEST IN 1000's OF FISH: SOCKEYE SALMON

FISHERY	1974 NON-TREATY	1974 TREATY	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	-	-	-	1	-	1	1	-	1	-	-	-	-	-	-
SPORT (AREAS 1-4)	-	-	-	-	-	-	1	-	1	-	-	-	-	-	-
SUBTOTAL	-	-	-	1	-	1	1	-	1	-	-	-	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
GRAYS HARBOR															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTH WASH. COAST															
NETS	-	29	29	-	82	82	-	16	16	-	34	34	-	40	40
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	29	29	-	82	82	-	16	16	-	34	34	-	40	40
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	852	30	882	615	39	654	547	77	624	613	228	841	657	94	751
PURSE SEINE	1,526	-	1,526	890	8	898	651	11	662	677	80	757	936	25	961
REEF NET	72	-	72	52	-	52	24	-	24	59	-	59	52	-	52
SUBTOTAL	2,450	30	2,480	1,557	47	1,604	1,222	88	1,310	1,349	308	1,657	1,645	119	1,764
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PURSE SEINE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	1	8	9	1	14	15	1	8	9	-	54	54	1	21	22
PURSE SEINE	1	-	1	-	-	-	-	2	2	-	1	1	-	-	-
OTHER	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	1	8	10	1	14	15	1	10	11	-	55	55	1	21	22
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	-	-	-	-	-	-	-	-	-	1	-	1	-	-	-
FRESHWATER SPORT	9	-	9	-	-	-	-	-	-	17	-	17	6	-	6
SUBTOTAL	9	-	9	-	-	-	-	-	-	18	-	18	6	-	6
TOTAL	2,460	67	2,527	1,558	143	1,701	1,223	114	1,337	1,367	397	1,764	1,652	180	1,832

Table 4. ACTUAL HARVEST IN 1000's OF FISH: PINK SALMON

FISHERY	1974 NON-TREATY	1974 TREATY[a]	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	1	-	1	77	1	78	2	-	2	269	4	273	87	1	88
SPORT (AREAS 1-4)	-	-	-	14	-	14	-	-	-	27	-	27	10	-	10
SUBTOTAL	1	-	1	91	1	92	2	-	2	296	4	300	97	1	98
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
GRAYS HARBOR															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NORTH WASH. COAST															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
PUGET SOUND AREAS 4B, 5, 5A, 6, 6A, 7, 7A															
GILL NET	-	-	-	189	8	197	-	-	-	175	13	188	91	5	96
PURSE SEINE	-	-	-	973	7	980	-	-	-	1,587	139	1,726	640	36	676
REEF NET	-	-	-	59	-	59	-	-	-	22	-	22	20	-	20
SUBTOTAL	-	-	-	1,221	15	1,236	-	-	-	1,784	152	1,936	751	41	792
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	-	-	-	-	1	1	-	-	-	1	-	1	-	-	-
PURSE SEINE	-	-	-	-	4	4	-	-	-	-	-	-	-	1	1
SUBTOTAL	-	-	-	-	5	5	-	-	-	1	-	1	-	1	1
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	-	-	-	4	74	78	-	-	-	1	17	18	1	23	24
PURSE SEINE	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
OTHER	-	-	-	-	-	-	-	-	-	-	6	6	-	2	2
SUBTOTAL	-	-	-	4	74	78	-	-	-	1	23	24	1	25	26
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	-	-	-	7	-	7	-	-	-	22	-	22	7	-	7
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	7	-	7	-	-	-	22	-	22	7	-	7
TOTAL	1	-	1	1,323	95	1,418	2	-	-	2,104	179	2,283	856	68	924

Table 5. ACTUAL HARVEST IN 1000's OF FISH: CHUM SALMON

FISHERY	1974 NON-TREATY	1974 TREATY	1974 TOTAL	1975 NON-TREATY	1975 TREATY	1975 TOTAL	1976 NON-TREATY	1976 TREATY	1976 TOTAL	1977 NON-TREATY	1977 TREATY	1977 TOTAL	1974-1977 Average NON-TREATY	1974-1977 Average TREATY	1974-1977 Average TOTAL
OCEAN															
TROLL (ALL)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SPORT (AREAS 1-4)	-	-	-	-	-	-	1	-	1	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	1	-	1	-	-	-	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	1	1	1	-	-	-	1	-	1	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	1	1	1	-	-	-	1	-	1	-	-	-	-	-	-
WILLAPA BAY															
NETS	36	-	36	23	-	23	33	-	33	7	-	7	25	-	25
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	36	-	36	23	-	23	33	-	33	7	-	7	25	-	25
GRAYS HARBOR															
NETS	29	-	29	10	3	13	13	11	24	1	1	2	13	4	17
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	29	-	29	10	3	13	13	11	24	1	1	2	13	4	17
NORTH WASH. COAST															
NETS	-	9	9	-	3	3	-	8	8	-	3	3	-	6	6
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	9	9	-	3	3	-	8	8	-	3	3	-	6	6
PUGET SOUND AREAS 4B, 5, 5A, 6, 6A, 7, 7A															
GILL NET	129	6	135	56	1	57	105	22	127	24	3	27	78	8	86
PURSE SEINE	68	-	68	36	-	36	138	14	152	28	2	30	68	4	72
REEF NET	3	-	3	1	-	1	3	-	3	2	-	2	2	-	2
SUBTOTAL	200	6	206	93	1	94	246	36	282	54	5	59	148	12	160
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	6	42	48	3	11	14	160	24	184	140	23	163	77	25	102
PURSE SEINE	21	-	21	1	2	3	36	22	58	45	2	47	26	6	32
SUBTOTAL	27	42	69	4	13	17	196	46	242	185	25	210	103	31	134
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	3	109	112	3	47	50	11	218	229	12	97	109	7	118	125
PURSE SEINE	-	-	-	3	1	4	25	3	28	1	1	2	7	1	8
OTHER	-	-	-	-	-	-	-	3	3	-	-	-	-	-	-
SUBTOTAL	3	109	112	6	48	54	36	224	260	13	98	111	14	119	133
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	3	-	3	-	-	-	2	-	2	1	-	1	2	-	2
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	3	-	3	-	-	-	2	-	2	1	-	1	2	-	2
TOTAL	299	166	465	136	68	204	526	325	851	261	123	384	305	172	477

Table 6. ACTUAL HARVESTS IN 1,000's OF FISH: 1974-77 AVERAGES FOR ALL SPECIES

FISHERY	CHINOOK			COHO			SOCKEYE			PINK			CHUM		
	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL
OCEAN															
TROLL (ALL)	310	10	320	964	5	969	-	-	-	87	1	88	-	-	-
SPORT (AREAS 1-4)	196	-	196	608	-	608	-	-	-	10	-	10	-	-	-
SUBTOTAL	506	10	516	1,572	5	1,577	-	-	-	97	1	98	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	159	108	267	157	13	170	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	14	-	14	11	-	11	-	-	-	-	-	-	-	-	-
SUBTOTAL	173	108	281	168	13	181	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	20	-	20	8	-	8	-	-	-	-	-	-	25	-	25
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	20	-	20	8	-	8	-	-	-	-	-	-	25	-	25
GRAYS HARBOR															
NETS	9	3	12	22	8	30	-	-	-	-	-	-	13	4	17
FRESHWATER SPORT	1	-	1	2	-	2	-	-	-	-	-	-	-	-	-
SUBTOTAL	10	3	13	24	8	32	-	-	-	-	-	-	13	4	17
NORTH WASH. COAST															
NETS	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	22	8	30	177	19	196	657	94	751	91	5	96	78	8	86
PURSE SEINE	48	2	50	166	6	172	936	25	961	640	36	676	68	4	72
REEF NET	1	-	1	8	-	8	52	-	52	20	-	20	2	-	2
SUBTOTAL	71	10	81	351	25	376	1,645	119	1,764	751	41	792	148	12	160
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	2	4	6	46	33	79	-	-	-	-	-	-	77	25	102
PURSE SEINE	1	1	2	30	-	30	-	-	-	-	1	1	26	6	32
SUBTOTAL	3	5	8	76	33	109	-	-	-	-	1	1	103	31	134
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	32	86	118	28	314	342	1	21	22	1	23	24	7	118	125
PURSE SEINE	1	2	3	28	2	30	-	-	-	-	-	-	7	1	8
OTHER	-	1	1	-	10	10	-	-	-	-	2	2	-	-	-
SUBTOTAL	33	89	122	56	326	382	1	21	22	1	25	26	14	119	133
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	276	-	276	193	-	193	-	-	-	7	-	7	2	-	2
FRESHWATER SPORT	4	-	4	10	-	10	6	-	6	-	-	-	-	-	-
SUBTOTAL	280	-	280	203	-	203	6	-	6	7	-	7	2	-	2
TOTAL	1,096	238	1,334	2,458	440	2,898	1,652	180	1,832	856	68	924	305	172	477

Table 7. HARVESTS IN 1,000's OF FISH ADJUSTED TO ADULT EQUIVALENTS ON STOCKS WITH TREATY FISHING RIGHTS: 1974-77 AVERAGES FOR ALL SPECIES

FISHERY	CHINOOK			COHO			SOCKEYE			PINK			PINK		
	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL	NON-TREATY	TREATY	TOTAL
OCEAN															
TROLL (ALL)	121	4	125	280	1	281	-	-	-	61	-	61	-	-	-
SPORT (AREAS 1-4)	76	-	76	128	-	128	-	-	-	7	-	7	-	-	-
SUBTOTAL	197	4	201	408	1	409	-	-	-	68	-	68	-	-	-
COLUMBIA RIVER (OREGON & WASHINGTON COMBINED)															
NETS	67	108	175	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	67	108	175	-	-	-	-	-	-	-	-	-	-	-	-
WILLAPA BAY															
NETS	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
GRAYS HARBOR															
NETS	9	3	12	22	8	30	-	-	-	-	-	-	13	4	17
FRESHWATER SPORT	1	-	1	2	-	2	-	-	-	-	-	-	-	-	-
SUBTOTAL	10	3	13	24	8	32	-	-	-	-	-	-	13	4	17
NORTH WASH. COAST															
NETS	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
FRESHWATER SPORT	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
SUBTOTAL	-	13	13	-	30	30	-	40	40	-	-	-	-	6	6
PUGET SOUND AREAS 4B, 5, 6C, 6A, 7, 7A															
GILL NET	22	8	30	177	19	196	657	94	751	91	5	96	78	8	86
PURSE SEINE	48	2	50	166	6	172	936	25	961	640	36	676	68	4	72
REEF NET	1	-	1	8	-	8	52	-	52	20	-	20	2	-	2
SUBTOTAL	71	10	81	351	25	376	1,645	119	1,764	751	41	792	148	12	160
PUGET SOUND AREAS 6B, 9, 10, 11, 12															
GILL NET	2	4	6	46	33	79	-	-	-	-	-	-	77	25	102
PURSE SEINE	1	1	2	30	-	30	-	-	-	-	1	1	26	6	32
SUBTOTAL	3	5	8	76	33	109	-	-	-	-	1	1	103	31	134
PUGET SOUND ALL TERMINAL AREAS															
GILL NET	32	86	118	28	314	342	1	21	22	1	23	24	7	108	115
PURSE SEINE	1	2	3	28	2	30	-	-	-	-	-	-	7	1	8
OTHER	-	1	1	-	10	10	-	-	-	-	2	2	-	-	-
SUBTOTAL	33	89	122	56	326	382	1	21	22	1	25	26	14	109	123
PUGET SOUND SPORT															
MARINE (AREAS 5-13)	83	-	83	135	-	135	-	-	-	6	-	6	2	-	2
FRESHWATER SPORT	4	-	4	10	-	10	6	-	6	-	-	-	-	-	-
SUBTOTAL	87	-	87	145	-	145	6	-	6	6	-	6	2	-	2
TOTAL	468	232	700	1,060	423	1,483	1,652	180	1,832	826	67	893	280	162	442

Supreme Court, U. S.
FILED
FEB 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977
NO. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

v.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

Office & P.O.Address:
3920 Bank of California Center
Seattle, WA 98164
(206) 624-6993

JOSEPH T. MIJICH/JOHN P. WORLD
Attorneys for Purse Seine Vessel owners association & Frank Marinkovich

3300 Seattle-First Natl Bank Bldg.
Seattle, WA 98154
(206) 623-5890

CHARLES E. YATES/DOUGLAS M. FRYER
MORIARTY, LONG, MIKKELBORG & BROZ
Attorneys for Puget Sound Gillnetters Association & Philip Sutherland

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CRAFTSMAN PRESS, INC. SEATTLE

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IN THE
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STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,

v.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE SUPREME COURT

Respondents Puget Sound Gillnetters Association, Philip Sutherland, Purse Seine Vessel Owners Association and Frank Marinkovich, respectfully

join petitioners in praying that a Writ of Certiorari issue to review the opinions and judgments of the Washington State Supreme Court entered in Puget Sound Gillnetters Association v. Moos and Washington Commercial Passenger Fishing Vessels Association v. Tollefson.

OPINIONS BELOW

See the Petition of the State of Washington, et al., and Appendixes B, D and F thereof.

JURISDICTIONAL GROUNDS

See the Petition of the State of Washington, et al.

QUESTIONS PRESENTED

1. Did the Washington State Supreme Court correctly interpret the language of the treaties that the right to fish at usual and accustomed grounds and stations in common with all citizens means that individual Treaty Indians have "an equal opportunity to fish" as opposed to the federal court construction of the same treaties

that Indian tribes are entitled to 50% of the fish?

2. Does an allocation of more than 50% of the harvestable fish to certain treaty tribes who represent .028% of the population of the State of Washington constitute a violation of the constitutional doctrines of equal protection and prohibition of granting of special privileges and immunities?

3. Assuming that the treaties guarantee more than an equal opportunity to fish, are hatchery-reared fish beyond the scope of the treaty?

STATEMENT OF THE CASE

For purpose of this response, we accept the statement of the case contained in the petition, pp. 6-12, with the following addition:

Five cases arising from the United States District Courts of Washington and Oregon (United States v. Washington, (384 F.Supp. 312 (W.D. Wash. 1974) and United States v. Oregon, 302 F.Supp. 899

(OR 1973)), were argued by these respondents before the Ninth Circuit on February 1, 1978.[1] Those cases include the following issues:

(1) Whether the district court in United States v. Washington may take over management of the state fishery to implement its decree, in recognition of the absence of authority in the state to effectuate such decree.

(2) Whether the treaty provisions are non-self executing and therefore beyond the power of a court to implement.

(3) Whether individual commercial fishermen are subject to being named in injunctions by the district courts though they have never been parties to the litigation.

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[1] Puget Sound Gillnetters Association, et al. v. U.S. District Court for The Western District of Washington, No. 77-3129; Columbia River Fishermen's Protective Union, Inc., et al. v. U.S. District Court for the District of Oregon, No. 77-3208; United States of America, et al. v. State of Oregon, et al., No. 77-3209; and United States of America, et al. v. State of Washington, et al., Nos. 77-3654 and 77-3655.

The issues in those pending appeals involve the enforcement of the underlying decisions in United States v. Washington and United States v. Oregon. The court of appeals has indicated it will render a decision prior to the expected commencement of the fishing season in April 1978.

REASONS FOR GRANTING THE WRIT

I. The Decisions of The Washington State Supreme Court Conflict with the Decision of The Ninth Circuit Court of Appeals

The decision of the Supreme Court of Washington in these cases are in direct conflict with the decisions in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), Aff'd 520 F.2d 677 (9th Cir. 1975). The difference between the state and federal courts can perhaps be best expressed in the language of the Washington State Supreme Court:

> The federal district court for the Western District of Washington in United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974) construed the Medicine Creek and other Indian treaties and held that treaty fishermen were entitled to fifty percent of the harvestable salmon in Puget Sound plus such

> salmon as are necessary for ceremonial and sustenance purposes.
>
> This Court, in Department of Game v. Puyallup Tribe, Inc., 86 Wn.2d 664, 548 P.2d 1058 (1976), on a direct remand from the United States Supreme Court, Department of Game v. Puyallup Tribe, 414 U.S. 44, 38 L.Ed.2d 254, 94 S.Ct. 330 (1973), interpreted the same treaty language to mean that the right accorded the Indians under the Medicine Creek Treaty to fish "in common with others" was a right, not to a certain number or percentage of fish, but to an equal opportunity to fish. We further held that if the treaties guarantee more than this to the Indian signatories, then hatchery-reared fish were beyong the scope of the treaty.

Puget Sound Gillnetters v. Moos, 88 Wn.2d at 679.

The Washington State Supreme Court incorporated the interpretation of the "in common with" language contained in Puyallup III, supra, in its opinion in Gillnetters:

> Being cited no authority for the proposition that federal district courts have exclusive jurisdiction to construe Indian treaties--treaties which affect important interests of the state--we adhere to our own interpretation of the treaty.

88 Wn.2d 691.

This Court has recognized many times that a conflict between decisions of the highest state court and the United States Court of Appeals upon questions of federal law is a valid ground for the

issuance of a writ of certiorari. Palmer Clay Products Co. v. Brown, 297 U.S. 227 (1936) where the highest state court refused to follow decisions of a court of appeals upon the construction of the Bankruptcy Act); Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935) (where the decision of the highest state court was in conflict with the decision of the United States court of appeals upon a question of admiralty jurisdiction).

The Washington State Supreme Court has on at least three separate occasions recognized the conflict between its interpretation of the treaty language and that of the federal courts. It has said that this court is the only court which can decide with finality this conflict.[2] Resolution of the conflict between the state and federal

---

[2] Washington State Commercial Passenger Fishing Vessels Ass'n v. Tollefson, 87 Wn.2d 417, 421, 553 P.2d 113 (1976); Department of Game v. Puyallup Tribe, Inc., 86 Wn.2d 664, 548 P.2d 1058 (1976); and Puget Sound Gillnetters Ass'n v. Moos, 88 Wn.2d 677, 698, 565 P.2d 1151 (1977).

courts in their interpretation of the treaty language is, in itself, sufficient reason for this court to grant the writ.

II. The Decisions of The Washington State Supreme Court in These Cases Involve the Construction of Treaties

Even in cases in which there was an absence of conflict between the decisions of the state and federal courts, this Court has granted certiorari to review decisions of the highest state courts involving the construction of treaties. This is especially true when the state court's decision involves unsettled questions respecting the construction of treaties or federal statutes of long standing. Santovincenzo v. Egan, 284 U.S. 30 (1931). This Court has never construed the treaty language "in common with." The proper construction of the treaty language cannot be settled until this Court addresses that issue.

III. The Decisions of the Washington State Supreme Court in These Cases Raise Unsettled Constitutional Questions

Supreme Court Rule 19(a) provides that unsettled questions arising under the federal constitution is a factor to consider in deciding whether to grant a writ of certiorari. The Washington Supreme Court specifically held in both cases below that the allocation required by the federal courts of fifty percent of the harvestable salmon to treaty Indians representing .028% of the state population required by the district court violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and constitutes the granting of special privileges and immunities. Gillnetters, 88 Wn.2d at 684, Fishing Vessel, 89 Wn.2d at 285. This Court has never specifically addressed this issue.

This Court has on many occasions granted petitions for a writ of certiorari when state courts have decided unsettled questions arising under the federal constitution. Powell v. State of Alabama, 287 U.S. 45 (1932), and Cumberland Coal

Co. v. Board of Revision of Tax Assessments in Greene County, 284 U.S. 23 (1931).

IV. Special and Important Reasons Mandate the Granting of a Writ of Certiorari in These Cases

The issues raised by the Gillnetters and Fishing Vessel cases are not isolated esoteric problems for review by this Court; nor do they involve issues of purely private import. Multiple litigation in both the state and federal courts has resulted in fragmented management and general disorder in the salmon fishery of Washington State. The state and federal courts have enjoined Fisheries and its director from enforcing regulations which they have adopted for the regulation of the fishery. The confusion and conflict is rooted in the differing interpretations of the treaty language "in common with." This Court must compare the conflicting interpretations of the treaty and select which is to be the law of the land. If this Court does not now resolve the questions presented

by the Gillnetters and Fishing Vessel cases, the conflict, controversy and uncertainty will continue.

The absence of an authoritative interpretation of the meaning of the treaty language and a ruling by this Court on the other issues raised by these cases is, perhaps, the single most important factor in the continuation of the fishing rights controversy in the State of Washington. Not only have the parties hereto and the Washington Supreme Court welcomed a ruling on these issues by the court, but so have elective and appointive federal officials.

On February 11, 1977, the Washington Congressional Delegation sent a letter to the Attorney General of the United States, urging him to place these issues before this court. The letter provided that:

> While we take no position on the merits of the issues, their authoritative resolution by the Supreme Court would benefit all parties.

Appendix A, A-1.

In addition, the President of the United States has appointed a Presidential Task Force

on Northwest Fisheries which was authorized to investigate the problem in the Washington salmon fishery. In an open letter to the Washington State Salmon and Steelhead Fishing Committees written in December 1977, by the chairman and two members of the regional team of the Presidential Task Force, the need for this Court to review the construction of the language of the treaty was also recognized. The letter said in part:

> From our perspective, a tragic omission occurred when the Departments of Justice and Interior failed to seek a Supreme Court review of the U.S. v. Washington decision which might have precluded the need for many of the recent court battles.

We respectfully submit that the significance of this statement cannot be overemphasized. It is the same statement which we have made to this Court in the past. The statement is significant because it was made by members of a federal task force after they had objectively investigated the fishing conflict in the State of Washington. Even the United States, which has appeared as amicus in the Gillnetters case, has recognized the need for review of these issues by this Court.

In open argument before a panel of justices in the Ninth Circuit Court of Appeals on February 1, 1978, an attorney for the Department of Justice stated that she felt the United States would not support the petition for a writ of certiorari, but might support such a petition in the cases which were before the court of appeals. Unfortunately, this is not the first time that an attorney for the United States has attempted to forestall a review or decision of these issues by a statement that they would support review of these issues by this Court in some other case.

In the argument of the Gillnetters case on November 9, 1976, Edmund B. Clark, Chief of Appellate Section, Land and Natural Resources Division of the Department of Justice, appearing on behalf of the United States amicus curiae, argued that the state court should not take jurisdiction, because he would probably urge this court to resolve the basic issues in Puyallup Tribe, Inc. v. Department of Game, U.S. Supreme Court No. 76-423. However, the Department of Justice in its amicus brief to this court, joined the Puyallup Tribe

in suggesting that the issues be restricted to the regulation of the reservation fishery rather than to the basic issues in that case.

It is submitted that this Court should grant the writ on the questions posed by this response. If the Court is not disposed to grant the writ at this time, it should defer ruling on the granting or denial of the writ until such time as the Court of Appeals for the Ninth Circuit decides the pending appeals so that all aspects of the controversy may be examined.

CONCLUSION

On the basis of the reasons set out below, this Court should issue Writs of Certiorari to

review the judgments and the opinions of the Supreme Court of the State of Washington.

Respectfully submitted,

JOSEPH T. MIJICH/JOHN P. WORLD
Attorneys for Respondents
Purse Seine Vessel Owners
Association and Frank
Marinkovich

CHARLES E. YATES/DOUGLAS M.
FRYER,
MORIARTY, LONG, MIKKELBORG &
BROZ
Attorneys for Respondents
Puget Sound Gillnetters
Association and Philip
Sutherland

DON L.
Third Congress
STATE OF WA

COMMITTEES:
MERCHANT MARINE AND FISHERIES
INTERNATIONAL RELATIONS
SELECT COMMITTEE ON AGING

A-1

Congress of the United States
House of Representatives
Washington, D.C. 20515

Washington, D.C. 20515
District Offices
Olympia, Washington 98501
U.S. Post Office
Longview, Washington 98632
Post Annexes, Washington 98368

February 11, 1977

RECEIVED
FEB 23 1977
Ass'd.....

Honorable Griffin Bell
United States Attorney General
Washington, D.C.

Dear Mr. Attorney General:

The Indian fishing rights controversy in the State of Washington remains in something of a legal fog. Opportunity is now at hand for the United States Supreme Court to finally resolve the legal uncertainty. While we take no position on the merits of the issues, their authoritative resolution by the Supreme Court would benefit all parties.

In several different cases, Federal District Courts and the Ninth Circuit Court of Appeals have rendered opinions at variance with opinions of the Supreme Court of Washington on these basic issues:

1. Limitations on the right of the state of Washington to manage the resource in the interest of conservation.

2. The exclusion of hatchery-propagated fish from the treaty fishery.

3. The interpretation of the treaty language "in common," which results in the allocation of fish to various user groups.

The United States Supreme Court recently granted certiorari in the case of Department of Game v. Puyallup Tribe, Inc. We feel this case is a vehicle for resolution by the United States Supreme Court of these basic issues. Without

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Honorable Griffin Bell
February 11, 1977
-2-

stating any opinion on the merits, and certainly without urging any posture upon the Department of Justice, we do urgently request the Department seek in its amicus brief to present the issues to the court.

Sincerely,

Warren G. Magnuson, U.S.S.

Henry M. Jackson, U.S.S.

Don Bonker, M.C.

Lloyd Meeds, M.C.

Norman D. Dicks, M.C.

Joel Pritchard, M.C.

Congress of the United States
House of Representatives
Washington, D.C. 20515

February 11, 1977

Honorable Cecil Andrus
United States Secretary of the Interior
Washington, D.C.

JAN 16 1977

Dear Secretary Andrus:

Attached is a copy of a letter which we have sent to Attorney General Griffin Bell.

We are asking the Attorney General for his help in ensuring that the Supreme Court decides three basic issues at the heart of the Indian fishing rights controversy in the State of Washington. The Court has the opportunity to do so in the pending case of Department of Game v. Puyallup Tribe Inc. We take no position on the merits of these issues but feel strongly that the resolution of these issues is in the best interests of all parties.

We hope you are able to agree and to ask the Department of Justice to seek in its brief (due for filing February 25) to have the Court hear the issues noted in our letter to the Attorney General.

Sincerely,

Warren G. Magnuson, U.S.S.

Henry M. Jackson, U.S.S.

Don Bonker, M.C.

Lloyd Meeds, M.C.

Norman D. Dicks, M.C.

Joel Pritchard, M.C.

Supreme Court, U. S.
FILED
FEB 27 1978
MICHAEL RODAK, JR., CLERK

No. 77-983

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

KATHRYN A. OBERLY,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The interest of the United States in these cases is premised on its special relationship with, and responsibility for, the Indian tribes within its borders. *United States* v. *Klamath Indians,* 304 U.S. 119, 123; *United States* v. *Kagama,* 118 U.S. 375, 382. In addition, the United States has a unique and direct interest in this proceeding because the state court decisions of which review is sought may

affect rights established in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash.), affirmed, 520 F. 2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. The United States brought that federal-court action on its own behalf and in its capacity as trustee for the Indians.

STATEMENT

The present petition raises issues arising out of the 1974 decision of the federal district court in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash.), affirmed, 520 F. 2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. In that case, the district court held that certain Indians of the Pacific Northwest, pursuant to treaties with the United States, are entitled to an opportunity to catch up to 50 percent of any run of fish that normally would pass through their off-reservation sites, with adjustments for fish caught beyond state jurisdiction and subsistence and ceremonial fishing (384 F. Supp. at 343-344). To implement its decree, the district court directed the State of Washington to reduce non-Indian fishing to the extent necessary to permit treaty Indians to exercise their fishing rights (*id.* at 420). After the court of appeals affirmed, the case was remanded to the continuing jurisdiction of the district court to ensure implementation by the State of Washington of the Indians' treaty rights (520 F. 2d at 693).

Implementation of the district court decree has remained a problem. The State of Washington has been unable to discharge its responsibilities under the decision, and non-treaty fishermen have continued to fish throughout the area in disregard of state regulations and the district court's mandates. In each fishing season since the decision, the United States and the plaintiff-intervenor tribes have been forced to return to the district court seeking further orders to require compliance with that

court's Final Decision No. 1.[1] At the same time, non-Indian fishermen have instituted numerous suits against the State of Washington in the state courts, seeking declaratory and injunctive relief against implementation of state regulations that limit non-treaty fishing to protect treaty rights in compliance with the federal court's mandate. The state courts have consistently granted such relief, holding not only that the regulations are in violation of state law, but that the federal district court's interpretation of the Indians' treaty rights was erroneous and unconstitutional.[2]

The present cases represent part of the state court litigation. In *Puget Sound Gillnetters Ass'n.* v. *Moos,* 88 Wash. 2d 677, 565 P. 2d 1151 (Pet. App. D), respondents, an individual and an association of commercial non-Indian fishermen, filed an original action for mandamus in the state supreme court, asking that the Washington Department of Fisheries be restrained from promulgating fishing regulations which, as required by the federal decision, would allocate the harvest between treaty and

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[1]As we discuss below, these facts are not contained in the record of this proceeding. However, the record in *United States* v. *Washington,* W.D. Wash., Civil No. 9213, contains evidence of illegal non-treaty fishing and the State's unsuccessful efforts to combat it, as well as the district court's orders attempting to rectify the situation. See, *e.g.*, the following docket entries in *United States* v. *Washington*: Docket Nos. 768, 964, 968, 970, 1148, 1177, 1381, 1494, 1555, 2436, 2511, 2618, 2636, 2787, 3405, 3406, 3420, 3439 and 3945.

[2]In addition to the decisions here sought to be reviewed, see, *e.g.*, *Purse Seine Vessel Owners Ass'n.* v. *Moos,* 88 Wash. 2d 799, 567 P. 2d 205; *Grays Harbor Gillnetters Ass'n.* v. *Sandison,* Wash. Sup. Ct., No. 45144 (argued October 31, 1977); *Puget Sound Gillnetters Ass'n.* v. *Sandison,* Thurston County Super. Ct., No. 58107 (decided August 24, 1977); *Columbia River Fishermen's Protective Union, Inc.* v. *Dixie Lee Ray,* Thurston County Super. Ct., No. 55339 (decided August 25, 1977).

non-treaty fishermen. Neither the United States nor the treaty tribes were parties to the action, although they participated as *amici curiae*.

On June 9, 1977, the state supreme court issued an opinion accepting respondents' arguments though declining to issue the requested writ of mandamus.[3] The court first determined that, under state law, the Director of Fisheries lacked statutory authority to restrict fishing for any purpose other than conservation (Pet. App. D-5 to D-7). Asserting that a state agency cannot be compelled to act beyond its statutory authority, the court concluded that the Director thus had no power to restrict non-treaty fishing in order to ensure the Indians their treaty opportunity and comply with federal law (Pet. App. D-8 to D-13).

While resolving these questions in respondents' favor, the court also observed that even if the necessary state authority had existed, any allocation of fishing opportunity between treaty Indians and non-treaty fishermen would violate the constitutional guarantee of equal protection (Pet. App. D-8). Declining to follow the federal court's decision in *United States* v. *Washington*, the court held that the treaties guaranteed to the Indians only the same rights as are enjoyed by all non-treaty fishermen and that the State's regulations thus must treat all fishermen alike (Pet. App. D-15 to D-17).

The State of Washington filed a petition for rehearing, which was denied on October 10, 1977 (Pet. App. C). Although the opinion of the state court normally would

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[3]The court stated (Pet. App. D-4):

> [W]e decline to issue a writ of mandate but will set forth our opinion upon the questions concerning the authority of the department. We have full confidence that the director will abide by our decision.

then have become final, the non-Indian fishing association in the meantime had filed an Emergency Motion for Issuance of Writ of Mandamus. In their motion, they contended that the Director of Fisheries apparently was still following the orders of the federal district court and that the writ of mandamus which the state court had previously declined to issue was thus required. The full court heard oral argument on the motion on October 31, 1977, and the matter is still under submission.

In *Washington State Commercial Passenger Fishing Vessel Ass'n.* v. *Tollefson,* 89 Wash. 2d 276, 571 P. 2d 1373 (Pet. App. B), the second case of which review is sought, the respondent associations initiated an action for declaratory and injunctive relief in the Superior Court for Thurston County, Washington. (Neither the United States nor the treaty tribes were named as parties, nor did they participate as *amici curiae*.) The superior court held that the challenged state regulations were invalid because they exceeded state statutory authority (Pet. App. G). On appeal, the state supreme court initially dismissed the case as moot, because the fishing season to which the regulations pertained had passed. 87 Wash. 2d 417, 553 P. 2d 113 (Pet. App. F). On petition for rehearing, however, the court agreed to reach the merits and, on November 23, 1977, it issued an opinion reaffirming the conclusions it had reached in *Puget Sound Gillnetters Ass'n.* v. *Moos.*

As the state court litigation gradually indicated that Washington would not be able to comply with the federal court's judgment, the United States and the tribes again invoked the continuing jurisdiction of the district court in *United States* v. *Washington.* That court issued a series of orders during August and September, 1977, designed to protect the Indians' treaty rights. By orders dated August 10 and 31, 1977, the federal court determined the treaty Indians' proper share of the 1977 harvest and expressly

removed that share from the jurisdiction and control of the State of Washington. The court then stated that "[j]urisdiction and harvest control over all allocations for treaty fisheries is hereby vested in this court. The defendants * * * are hereby enjoined from exercising jurisdiction or any form of harvest management authorization or control over, or in any manner regulating, restricting, prohibiting or interfering with the taking, fishing for, possessing or disposing of, the fish comprising that portion of any run allocated by this court to the treaty fisheries * * *" (Memorandum Order and Preliminary Injunction, dated August 31, 1977, p. 19).

This action of the federal court, undertaken "reluctantly, but necessarily" (*id.* at 17), was compelled by the state court rulings that the Department of Fisheries could not lawfully allocate the fish catch. Under the federal court order the Department of Fisheries no longer was required to allocate the catch between treaty and non-treaty fishermen, because it no longer had control over the treaty Indians' share; the Department's only obligation was to ensure that non-treaty fishermen did not harvest fish in excess of the numbers authorized by the federal court. Even this task, however, was frustrated by the state court decisions, which effectively prevented the State from enforcing any restrictions against non-treaty fishermen. At several hearings before the federal court, the State's Assistant Attorney General so admitted, acknowledging that restrictions on non-treaty fishing could be enforced only if the federal court entered an injunction running directly against non-treaty fishermen and punished violators through the contempt process. (See, *e.g.*, *United States* v. *Washington*, Transcript of

August 25, 1977, pp. 59-63; Transcript of August 26, 1977, pp. 31-33; Transcript of August 30, 1977, pp. 20-21.)[4]

Accordingly, on August 31, 1977, and September 27, 1977, the district court issued injunctions against the non-treaty fishermen,[5] prohibiting all net salmon fishing in certain specifically described geographic areas except during such times and in such specific waters as were open by regulations conforming to the court's prior orders.[6] The court directed the State of Washington and the United States to cite any fisherman who, having received notice of the injunction, thereafter fished illegally, and to require him to appear before the court to show cause why he should not be held in contempt. Preliminary Injunction Re: Enforcement of 1977 Fisheries (September 27, 1977), p. 3.

The non-treaty fishermen sought review of the injunctions against them by filing a petition for a writ of mandamus in the federal Court of Appeals for the Ninth

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[4]Respondents herein have also advised the state supreme court that state citations based on violations of state regulations promulgated to comply with the federal judgment are routinely dismissed by the state trial courts. Brief of Petitioners in Support of Application for Writ of Mandamus, filed in September 1976, in *Puget Sound Gillnetters Ass'n.* v. *Moos* (Pet. App. D).

[5]*United States* v. *Washington*, W.D. Wash., Civil No. 9213, Temporary Restraining Order Re: Enforcement of 1977 Fisheries (August 31, 1977); Preliminary Injunction Re: Enforcement of 1977 Fisheries (September 27, 1977); Findings of Fact and Conclusions of Law Re: Enforcement of 1977 Fisheries Orders (September 27, 1977).

[6]The procedures for determining open fishing times and areas, which are always subject to change during the season, are specified in the injunction of September 27, 1977.

Circuit. *Puget Sound Gillnetters Ass'n.* v. *United States District Court,* No. 77-3129. At approximately the same time, the State of Washington appealed from all of the district court's orders relating to the 1977 season. *United States* v. *Washington,* C.A. 9, Nos. 77-3654 and 77-3655. The court of appeals permitted the non-treaty fishermen to intervene in the State's appeals (*United States* v. *Washington,* C.A. 9, Nos. 77-3654 and 77-3655, Order dated November 25, 1977), and the appeals and mandamus proceeding were consolidated and ordered expedited. *Puget Sound Gillnetters Ass'n.* v. *United States District Court,* C.A. 9, No. 77-3129, and related cases, Order dated November 15, 1977. Oral argument in the consolidated cases was heard on February 1, 1978, and a decision is expected shortly.

DISCUSSION

The United States urges that the petition for a writ of certiorari be denied or that action on it be deferred. Although we believe that the decisions below are incorrect as a matter of federal law,[7] these cases do not provide an adequate or appropriate vehicle for resolution of the important conflict that exists between the federal and state courts. The cases awaiting decision by the federal court of appeals can be expected to provide a much more suitable vehicle, and review of the controversy by this Court should await their presentation.

1. The continuing and sensitive controversy over Indian treaty fishing rights in the Pacific Northwest involves not only the State of Washington and non-treaty

[7]In its petition, the State of Washington urges (Pet. 14) that review be granted because the decisions below are " 'probably not in accord with applicable decisions of this court,' " quoting Rule 19(1)(a) of the Rules of this Court.

fishermen, but also the United States and numerous Indian tribes. More than seven years ago the United States brought suit in federal district court to determine the extent of treaty fishing rights in Washington waters and to secure the protection and enforcement of those rights. See *United States* v. *Washington, supra.* The State of Washington had a full opportunity in that case to litigate these questions on behalf of all its citizens (including, of course, non-treaty fishermen), and the district court issued a thorough and considered decision, which the court of appeals affirmed. We believe it would be inadvisable for this Court now to make final determinations regarding those treaty rights, and the manner of their enforcement, in litigation to which neither the United States nor the Indians are parties.[8]

The absence of the United States and the Indian tribes as parties in these lawsuits is especially significant because the actual parties have not developed a full and balanced record. The record in *Puget Sound Gillnetters Ass'n.* v. *Moos,* for example, consists solely of stipulated statements of fact. Although the United States and the tribes advised the courts below that the stipulations were incomplete and inaccurate,[9] neither the parties nor the court made adequate changes in the stipulations and no proof was submitted to supplement them. See *Lord* v. *Veazie,* 8 How. 251, 254-255. By contrast, the federal

[8]As *amici curiae,* the United States and the tribes argued below that they were indispensable parties and that the doctrine of sovereign immunity prevented their joinder. See *Puyallup Tribe, Inc.* v. *Department of Game of Washington,* No. 76-423, decided June 23, 1977. These issues were never addressed by the state supreme court.

[9]See the following briefs filed in *Puget Sound Gillnetters Ass'n.* v. *Moos*: Brief for the United States as *Amicus Curiae* (October 1976), pp. 2-5; Brief for the United States as *Amicus Curiae* (October 1977), p. 3; Brief of *Amici Curiae* (Indian Tribes) (October 1976), pp. 1-4; and Brief of *Amici Curiae* (Indian Tribes) (October 1977), pp. 1-11.

district court in *United States* v. *Washington* had the benefit of a record resulting from three years of intensive discovery and a two-week trial, and produced a 112-page decision dealing with all aspects of off-reservation treaty fishing (384 F. Supp. 312).

Moreover, it cannot be said that the parties to these state court suits are adversaries in a real sense. Virtually all the arguments made below by the non-Indian fishermen were first made by the State of Washington in *United States* v. *Washington.* Although the State did advance arguments in these cases against the position of the non-Indian fishermen, it told the state court that it did not believe those arguments were correct.[10] The State of Washington did not raise as an affirmative defense the possibility that the federal court decision was *res judicata* on many issues in the state court actions. In short, it may be questioned whether the case presents the "honest and actual antagonistic assertion of rights" which, in our adversary system, is a safeguard essential to the integrity of the judicial process. *United States* v. *Johnson,* 319 U.S. 302, 305. See also, *Lord* v. *Veazie, supra.*

If these cases provided the only foreseeable opportunity for this Court to resolve the controversy presented by the opposing views of the state and federal courts, the record defects and lack of adversarial presentation might have to be disregarded. But as we next discuss, cases are now

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[10]See the following briefs filed by the State in *Puget Sound Gillnetters Ass'n.* v. *Moos:* Brief in Response to application for Writ of Mandamus (October 1976), p. 3; and Respondents' Supplemental Responsive Brief to Petitions for Mandamus (October 1977), p. 5. The State did not attempt in these briefs to make the appropriate arguments itself; it merely summarized the position of the United States as set forth in various federal court briefs and then provided the state court with random excerpts from those briefs.

awaiting decision in the Ninth Circuit that can be expected to provide far more satisfactory vehicles for review.

2. The Washington Supreme Court in the instant cases has decided that, whatever the scope of Indian treaty fishing rights, officials of the State of Washington cannot enforce those rights by regulation but may regulate for conservation purposes only. As noted earlier, related questions regarding implementation of the Indian treaty fishing rights are pending before the Court of Appeals for the Ninth Circuit in *Puget Sound Gillnetters Ass'n., et al.* v. *United States District Court,* No. 77-3129, and *United States* v. *State of Washington,* Nos. 77-3654 and 77-3655, argued (on an expedited basis) February 1, 1978. These cases, which involve challenges to nine separate orders of the federal district court issued pursuant to its continuing jurisdiction in *United States* v. *Washington,* will require the court of appeals to consider the proper allocation of enforcement power among the tribes, state officials, federal officials, and the federal judiciary itself.

Should this Court be inclined to review any aspect of the fishing rights controversy, we suggest that these pending federal cases will offer the most appropriate vehicle for such review. First, all interested parties would be before the Court, inasmuch as the non-Indian fishing associations were granted permission to intervene in the State's appeals. Second, the full record in *United States* v. *Washington* would be before the Court. Finally, the problems of implementation, which are not addressed in the state supreme court's decisions, would be squarely presented.

In its petition (Pet. 20-21), the State acknowledges the likelihood that this Court will be asked to review any decision in the pending federal cases. Similarly,

respondents have publicly stated their intent to use the Ninth Circuit cases as a vehicle to obtain review by this Court. Since these cases would be considerably more suitable for full and fair review of the issues than the state cases, we urge that the Court either deny the present petition or defer action on it until the pending federal cases are also before the Court.[11]

3. Finally, we question whether there is presently any final judgment in *Puget Sound Gillnetters Ass'n.* v. *Moos* from which the State of Washington can seek review. See 28 U.S.C. 1257(3). Despite its agreement with most of respondents' arguments, the Washington Supreme Court declined to issue a writ of mandamus against the State or its officials.[12] Moreover, the proceeding has been reopened by filing of the respondents' October 7, 1977, Emergency Motion (see pp. 4-5, *supra*). This Court, therefore, lacks jurisdiction over that case while it is still pending in the state court; although a further order of the state court might remedy the defect, for this Court to grant certiorari now would be at least premature.

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[11]If, before the Court acts on the present petition, the court of appeals decides the pending cases in a way that changes our appraisal of their suitability for review, we will promptly inform the Court in a supplemental memorandum.

[12]Respondents did not cross-petition for a writ of certiorari in this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, or action on the petition should be deferred until the related federal cases are brought before the Court.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

KATHRYN A. OBERLY,
Attorney.

FEBRUARY 1978.

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
FEB 27 1978
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1977
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STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
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v.
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STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,
Petitioners,
v.
PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,
Respondents.

REPLY OF RESPONDENTS PUGET SOUND GILLNETTERS ASSOCIATION, PHIL SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION, FRANK MARINKOVICH AND WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION TO MEMORANDUM OF UNITED STATES AS AMICUS CURIAE

Office & P.O. Address:
3920 Bank of Calif. Center
Seattle, WA 98164

JOSEPH T. MIJICH/JOHN P. WORLD
Attorneys for Purse Seine Vessel Owners Association & Frank Marinkovich

3300 Seattle-First Natl Bank Bldg.
Seattle, WA 98154

CHARLES E. YATES/DOUGLAS M. FRYER
Attorneys for Puget Sound Gillnetters Association & Philip Sutherland

3737 Bank of Calif. Center
Seattle, WA 98164

RICHARD W. PIERSON
Attorney for Washington State Commercial Passenger Fishing Vessel Association

IN THE
SUPREME COURT OF THE UNITED STATES

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PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,
Respondents.

REPLY OF RESPONDENTS PUGET SOUND GILLNETTERS ASSOCIATION, PHIL SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION, FRANK MARINKOVICH AND WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION TO MEMORANDUM OF UNITED STATES AS AMICUS CURIAE

ARGUMENT IN REPLY

1. The United States argues (Memo., p. 7) that the cases awaiting decisions by the Ninth Circuit Court of Appeals can be expected to

provide a much more suitable vehicle for resolution of the important conflict that exists between the federal and state courts than the state decisions below. The major issue to be resolved is the interpretation of the language "in common with" in the treaty provision authorizing Indians to fish off the reservation at their usual and accustomed fishing grounds "in common with" other citizens of the Territory. At the time of oral argument on the aforementioned cases pending before the Ninth Circuit Court of Appeals, the presiding Judge of the panel hearing that matter expressly stated that the court will not review the "in common with" issue. Therefore, the state cases before this Court appear to be the only vehicle through which that issue can be reviewed by this Court.

2. The United States further argues (Memo., p. 8) that the record is incomplete in the state cases. Although we feel that the interpretation of the "in common with" language is purely a

question of law which does not require a voluminous record, respondents and petitioner are willing to permit the United States to include with the record before this Court all or any part of the record in United States v. Washington.

3. The United States objects (Memo., p. 8) that it and the Indian Tribes are not parties to the state cases. The United States and the Tribes were expressly invited by the parties and the State Supreme Court to participate as intervenors in those cases, and they refused. On the other hand, two of the respondents in the state cases, the Purse Seine Vessel Owners Association and the Washington State Commercial Passenger Fishing Vessel Assn., petitioned to intervene in United States v. Washington; however, in support of the objection by the United States and the Tribes to such intervention, the Court denied the petitions.

4. The United States questions (Memo., p. 11) whether there is presently any final judgment in the Gillnetters case from which the State of

Washington can seek review. We submit that the decision became final on October 10, 1977, when the Washington Supreme Court denied a petition for rehearing in that case. Respondents' October 7, 1977 emergency motion to which the United States alludes (Memo., p. 11) was a motion for purely remedial relief. It in no way affects the finality of the decision of the Washington State Supreme Court in that case.

5. Although respondents feel that the state cases before this Court are an adequate vehicle to review the major issues in United States v. Washington, particularly since the record in that case can be brought before this Court, we are willing to have the cases presently pending before the Ninth Circuit Court of Appeals consolidated with the state cases before this Court for review of all the issues raised by all these cases. All interested parties would be before the Court and the record would be as complete as the United States desires.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted, or, in the alternative, action on the petition should be deferred until the related federal cases are brought before the Court, at which time certiorari should be granted in all the cases (federal and state) and all the issues raised therein should be reviewed by this Court.

Respectfully submitted,

JOSEPH T. MIJICH/JOHN P. WORLD
Attorneys for Respondents
Purse Seine Vessel Owners
Association and
Frank Marinkovich

CHARLES E. YATES/DOUGLAS M. FRYER
Attorneys for Respondents
Puget Sound Gillnetters
Association and
Philip Sutherland

RICHARD W. PIERSON
Attorney for Washington State
Commercial Passenger Fishing
Vessel Association

Supreme Court, U. S.
FILED
DEC 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, et al.,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, et al.,

Respondents.

No. 78-119

STATE OF WASHINGTON, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,

Respondents.

PETITIONER STATE OF WASHINGTON'S BRIEF

SLADE GORTON,
Attorney General
EDWARD B. MACKIE,
Deputy Attorney General
JAMES M. JOHNSON,
Sr. Assistant Attorney General
Counsel for Petitioner State

Office and Post Office Address:
Temple of Justice, Olympia, Washington 98504, (206) 753-6207

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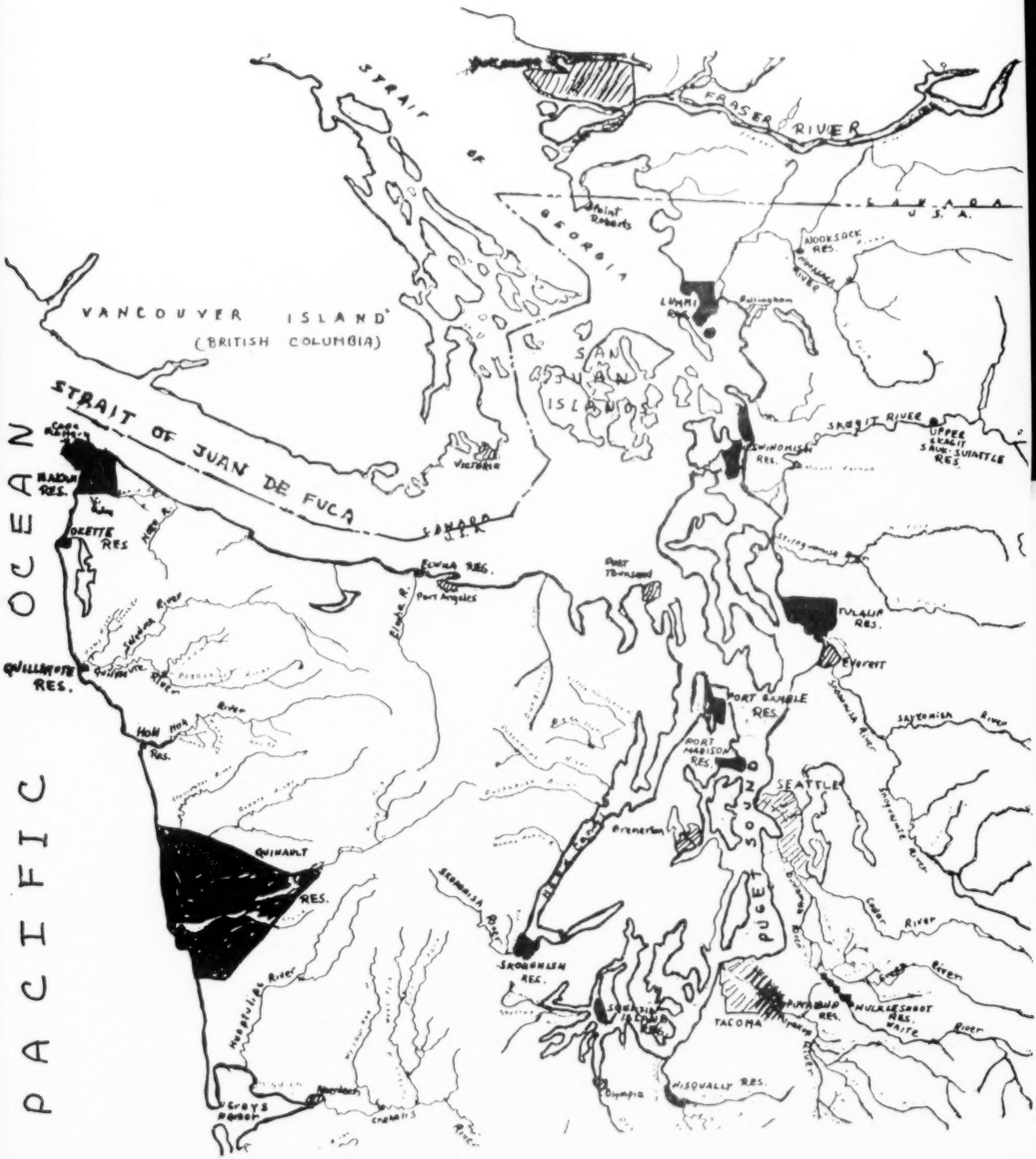

PACIFIC OCEAN
STRAIT OF GEORGIA
FRASER RIVER
CANADA
U.S.A.
Point Roberts
NOOKSACK RES.
LUMMI RES.
Bellingham
VANCOUVER ISLAND
(BRITISH COLUMBIA)
SAN JUAN ISLANDS
STRAIT OF JUAN DE FUCA
Victoria
SKAGIT RIVER
UPPER SKAGIT SAUK-SUIATTLE RES.
SWINOMISH RES.
Mount Vernon
OKETTE RES
ELWHA RES.
Port Angeles
Port Townsend
TULALIP RES.
Everett
QUILLAYUTE RES.
PORT GAMBLE RES.
PORT MADISON RES.
SEATTLE
Bremerton
QUINAULT RES.
SKOKOMISH RES.
PUGET SOUND
TACOMA
PUYALLUP RES.
MULKLESHOOT RES.
WHITE River
Olympia
NISQUALLY RES.
Grays Harbor
Aberdeen
Chehalis River

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,

Respondents.

AND

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,

Respondents.

No. 78-119

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES, and DONALD W. MOOS, Its Director,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

AND

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondents.

PETITIONER STATE OF WASHINGTON'S BRIEF

SLADE GORTON,
Attorney General
EDWARD B. MACKIE,
Deputy Attorney General
JAMES M. JOHNSON,
Sr. Assistant Attorney General
Counsel for Petitioner State

Office and Post Office Address:
Temple of Justice, Olympia, Washington 98504, (206) 753-6207

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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OPINION BELOW

On October 16, 1978, the Court granted certiorari on three petitions (Nos. 77-983, 78-119 and 78-139) and by order dated November 13, 1978, consolidated the three petitions for review.

Petition No. 77-983 is a request by the State of Washington for review of two decisions by the Washington State Supreme Court: *Puget Sound Gillnetters Association v. Moos* (hereinafter referred to as *"Gillnetters"*), 88 Wn.2d 677, 565 P.2d 1151 (1977) (App. D of the petition) and *Washington State Commercial Passenger Fishing Vessels Association v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977) (hereinafter referred to as *"Fishing Vessel 2"*) (App. B of the petition). This case is the decision upon reconsideration of 87 Wn.2d 417, 553 P.2d 113 (1977) (hereinafter referred to as *"Fishing Vessel 1"*) (App. F of the petition). In those decisions the Washington State Supreme Court found that United States treaties of 1854 and 1855 in Washington did not create a special Indian fishing right entitling treaty Indians to an allocation of the harvestable fishery resource. The court further concluded that the Washington Department of Fisheries is not authorized by state law to allocate fish for Indian fishermen.

The State of Washington in No. 78-119 and commercial fishing groups in No. 78-139 separately petitioned for review of *United States v. Washington*, 573 F.2d 1123 (9th Cir., April 24, 1978) (hereinafter referred to as *"Washington Fisheries case"*) (App. A-1, petition No. 78-119). In that decision the Ninth Circuit upheld a specific allocation of the fish resource and the direct control by the District Court of fishing activities in Western Washington as an exercise of continuing jurisdiction in *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) (Joint App. p. 63). 520 F.2d 676 (9th Cir. 1975) (Joint App. p. 39) (cert. den. 423 U.S. 1086 (1976)).

The second decision by the Ninth Circuit included in the same petitions is *U.S. v. Washington*, 573 F.2d 1118 (9th Cir., April 24, 1978) (hereinafter referred to as the

"International Fishery Case") (App. A-29 petition No. 78-119). The Ninth Circuit concluded that the District Court's determination that treaty Indians do not have to comply with certain regulations of the International Pacific Salmon Fisheries Commission and that they are entitled to 50% of the American harvest of those fish runs was moot.

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

The constitutional provisions, treaties and statutes involved which are hereinafter enumerated are reproduced in App. A-128-167 petition No. 78-119.

Constitutional Provisions of the United States

(a) Article II, Section 2, *Powers of the President* A-128
(Section 2 Clause 2) (Presidential powers with the Advice and Consent of the Senate to Make Treaties)
(b) Article VI, *Debts, Supremacy Oath*, #2, Supremacy A-129
(c) Amendment V, *Due Process* A-129
(d) Amendment X, *Powers Reserved to States or People* A-130
(e) Amendment XIV, *Citizenship rights not to be Abridged* A-130

TREATIES

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. Those six treaties each contain a similar fishing provisions and only those provisions are set forth in App. 131-134 Pet. No. 78-119.

(a) Treaty of Medicine Creek, 10 Stat. 1132 . A-131
(b) Treaty of Point Elliott, 12 Stat. 927..... A-131
(c) Treaty of Point No Point, 12 Stat. 933 .. A-132
(d) Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939 ..... A-132
(e) Treaty with the Quinaielts (Treaty of Olympia), 12 Stat. 971 ..... A-133
(f) Treaty with the Yakimas, 12 Stat. 951 ... A-133
Convention with Canada 1930 and 1956 Supplement. 50 Stat. 1355, 8 TIAS 3867, 8 UST 1057 . A-135-158

STATUTORY PROVISIONS

United States Code, Title 16:
Section 776 - 776f (Sockeye Salmon or Pink Salmon Fishing Act of 1947) A-159-61
Section 1801 - 1882 (Fishery Conservation and Management Act of 1976) A-162-67
Revised Code of Washington
RCW 75.40.060 Fraser River sockeye salmon fishery — Adoption, enforcement of convention authorized A-167

QUESTIONS PRESENTED

1. Do treaties executed by the United States with certain Indian tribes in 1854-55 in the Territory of Washington require an allocation of 50% of the harvestable fish to treaty Indian fishermen?
(78-119 # 1, 78-139 # 1)[1]

---

[1]If the question presented is a restatement consolidating questions presented in the three petitions for certiorari, those references are set forth within parentheses. When the reference is not within parentheses, the question is as phrased in the petition for certiorari.

2. Do the Indian treaties mandate an allocation of harvestable fish between treaty Indian and all other fishermen when both groups have an opportunity to participate in the fishery on a nondiscriminatory basis?
78-119 # 2 (77-983 # 1)

3. If the District Court has discretion to allocate a division of harvestable fish between treaty Indian and all other fishermen, did the court abuse its discretion in requiring that treaty Indian fishermen be entitled to all the fish they desire for subsistence and ceremonial uses, and all fish harvested on reservations, plus 50% of the remaining harvestable fish and including as part of the nontreaty 50% share of fish those fish harvested by treaty Indians outside of usual and accustomed fishing areas?
(78-119 # 3, 77-983 # 3, 78-139 # 1, # 5)

4. Does a special allocation of fish to treaty Indians who are citizens, and a reduction in the available fishery for other United States citizens, constitute a violation of the constitutional doctrines of equal protection and the prohibition against the granting of special privileges and immunities?
(78-119 # 4, 77-983 # 1, # 4)

5. Did the District Court, in assuming control of the management of the fishery resource in Washington state waters and ordering federal and state agencies to perform activities not authorized by statutory provisions exceed its authority?
(78-119 # 7, 77-983 # 2, 78-139 # 4)

6. If the Indian treaties mandate or authorize an allocation of harvestable fish to treaty Indians, does the United States/Canada Convention of 1937 supersede that requirement for the fish harvest which is subject to the jurisdiction of the International Pacific Salmon Fisheries Commission?
78-119 # 5

7. Do the Indian treaties, or can the District Court, grant Indians an immunity from enforcement of the

International Pacific Salmon Fisheries Commission regulations?
78-119 # 6

8. Are the Indian treaties' fishing provisions nonselfexecuting and nonjusticiable, thereby precluding judicial implementation?[2]
78-139 # 3

9. Is an individual who conducts business in the state, in such privity to that state, that a court may directly enjoin the citizen without his being a party to or participant in the cause of action in which the state is a party? Assuming privity, if an injunctive order is sought against an individual, is that individual entitled to notice of and participation in the injunctive hearing prior to its issuance?[2]
78-139 # 2

STATEMENT OF THE CASE

A. INTRODUCTION.

All of the actions which have been consolidated by this Court involve the interpretation and implementation of six treaties executed in 1854 and 1855 by the United States with Indians in the Washington Territory. The focal point of all of this litigation is the construction of the treaty provision;

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. * * *"

(Treaty of Medicine Creek, Art. III, 10 Stat. 1132, A-131 Petition No. 78-119)[3]

---

[2]Questions 8 and 9 are presented by the petition of the commercial fishing organizations (#78-139) not by the State of Washington which in this brief will not present argument on these questions.

[3]The language of the other five treaties is substantially the same. See A-131-34, Petition No. 78-119.

The District Court for the Western District of Washington has construed this treaty provision to require an allocation of the fishery resource between treaty Indians and all other citizens and has further, in implementing that decision, restricted and substantially displaced the state of Washington as the manager of the fishery resource. (*U.S. v. Washington*, 384 F. Supp. 312, *supra*, (Joint App., p. 63), and subsequent orders, (Joint App. pp. 202 et seq. 423 et seq.).

The principal impact of this decision has been upon salmon and steelhead trout, both of which are anadromous[4] fish which constitute a major natural resource of the Pacific coastal states and British Columbia.

There is an annual harvest of approximately 8,000,000 fish. The commercial fish harvest by Indians and non-Indians represents a major industry in the State of Washington. For many of the small towns and communities of Western Washington the fishery industry on salmon is the economic mainstay. The economic viability of these communities is dependent upon the success or failure of the season's fishing harvest. Salmon and steelhead also provide a major recreational activity for citizens of Washington and many other states.

The fishery resource now is largely managed by the District Court to achieve its mandated division of the resource between certain Indian fishermen and all other citizens, including both Indians and non-Indians.[5] The court-ordered division of fish operates in this fashion:

[4]Anadromous fish spawn in fresh water streams or hatcheries. They migrate to salt water where they mature, returning to fresh water to spawn. Pacific salmon die after spawning. Steelhead trout (like Atlantic salmon) may live to spawn again.

The District Court has also applied its division of the resource to some fish which are not anadromous, such as herring.

[5]Many Indian citizens in Washington do not share the special fishing rights. Some tribes have no treaties. Although one group of intervenor tribes is not recognized by the United States government, the District Court has permitted its fishermen to fish without licenses if they establish to the court's satisfaction their "blood quantum." They are also permitted to enjoy the same rights as the recognized treaty tribes when invited to fish by one of those tribes.

First, the treaty tribes designate a reservation catch. Second, the tribes specify the number of salmon and steelhead which they will take for ceremonial, and subsistence purposes. Third, and finally, after the reservation, ceremonial, and subsistence harvests by Indians are subtracted from the total fish available for harvest, the remainder is then divided: half to the treaty Indian fishermen and the other half to all other citizens, both Indian and non-Indian. In addition, under the court's allocation formula, any harvest made by treaty Indian fishermen outside of their usual and accustomed fishing grounds are computed as part of the all-citizen fishery, not as part of the treaty Indian fishery.[6] We will hereinafter refer to this formula as "50% plus."

The District Court's decision precipitated an economic upheaval for commercial fishermen in the State of Washington. According to a report by the United States National Marine Fisheries Service, March 3, 1975, which summarized the results of its first year:

> The sharply reduced landings experienced by Puget Sound net fisheries during 1974 were due in large part to court decisions that apparently transferred about $2,000,000 in landings from the nontreaty commercial gear to treaty Indian gear. (Page 1)

This report further indicated a drop in net earnings from 1973 (pre-judgment) to 1974 (post-judgment) for nontreaty gillnetters from $9,379 to $1,527; for purse seiners in the same period from $30,568 to $13,026; for reefnetters from $9,287 to an average loss of $68. The report also observed, with reference to the nontreaty fishermen, that:

> * * * because of their age, years spent in

[6]In addition to all of these factors which increase the treaty Indian allocation over the 50% level, the court also invokes what it designates as an "equitable adjustment." By this "adjustment," the court increases the fish allocated to the treaty Indians to reflect fish caught by Washington citizens in areas beyond the state's jurisdiction, such as the ocean fishery regulated by the United States (16 USC 1801, et seq. A-162-167 Pet. No. 78-119), that might return to Washington waters if not harvested in those areas.

> commercial fishing and attachment to this industry, [they] are likely to be somewhat immobile in moving to other types of employment. * * *

The commercial fishermen impacted by the District Court order have generally been involved in the fishery for many years. The National Marine Fisheries Service report reflects the average number of years spent in commercial fishing by individual gillnetters to be 16; purse seiners, 28; and reefnetters, 18.2. Most of these fishermen are individual entrepreneurs, not large corporate employers. These fishermen, who have been impacted by the creation of an allocation system 120 years after the treaties, have individually and through their organizations filed a number of actions in various courts, including those which are now here on certiorari from the state supreme court. Some of these commercial fishermen, who historically have been law-abiding citizens of the state, have engaged in fisheries in violation of federal court orders and regulations adopted by the state. It should be noted that such violations (by both treaty Indian fishermen and by nontreaty fishermen) have continued to occur as recently as October and November, 1978.

B. HISTORY OF COURT PROCEEDINGS.

In 1970, the United States, on behalf of seven Indian tribes, sued the state of Washington in the United States District Court for the Western District of Washington. The prayer was for declaratory and injunctive relief predicated upon five treaties[7] executed by the United States and Indians in 1854 and 1855. Subsequently, in 1971, seven additional plaintiff tribes and two defendant state agencies (Fisheries and Game) were permitted to intervene. Intervention by sport and commercial fishing organizations were denied.[8]

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[7]When the Yakima tribe was permitted to intervene, a sixth treaty was interjected.

[8]One commercial group, the Washington Reef Net Owners Association, was permitted to intervene during a period when the case was assigned to another District Court Judge.

On February 12, 1974, the District Court rendered its Final Decision, Findings of Fact, Conclusions of Law, Judgment and Decree. On March 22, 1974, the court entered orders amending the Final Decision and implementing an Interim Plan. (Joint App. 202 et seq., 437)

The District Court retained continuing jurisdiction to implement its decision. The Ninth Circuit Court essentially affirmed. *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1976). (Joint App. 39)

The District Court appointed a Master, a "fishery expert" and a "fisheries advisory board" to apply the decision.

Nearly 200 subsequent orders have been entered and there have been over 5,000 docket entries. More than 20 subsequent appeals to the Ninth Circuit have been taken by the state, nontreaty fishermen and tribes. Actions in state courts, in which the state and its officers have been defendants, have proliferated (on several occasions, despite injunctions against those courts by the District Court) and have resulted in a number of Washington Supreme Court decisions.

1. The Washington State Court Actions: No. 77-983

After the District Court decree in 1974 that Indians were entitled to "50%-plus" of the fish harvest, the Washington Department of Fisheries adopted regulations designed to increase the fish available for harvest by the tribes at their usual and accustomed grounds and stations. Those regulations restricted the catch in the ocean by sport and commercial fishermen. The reduction was to be accomplished by lowering the maximum number of fish sport fishermen were allowed to catch each day and closing some ocean areas to commercial troll fishing. Those regulations were invalidated by a Washington state superior court in a consolidated action brought by the Washington State Commercial Passenger Fishing Vessel Association, an organization of charter boat operators and service industries supporting ocean sports fishermen, such

as motel owners, and by the Washington Kelpers Association, an organization of ocean commercial troll fishermen.

An appeal by the Washington Department of Fisheries to the state supreme court was decided after the fishing season was over. The court ordered it dismissed as moot. *Fishir Vessel* 1, *supra*. The department's petition for reconsideration was granted by the court, but in *Fishing Vessel* 2, *supra*, the decision of the trial court invalidating the state regulations was affirmed.

The other state court decision included in Petition No. 77-983 challenging the efforts of the state to implement the 50%-plus allocation was filed directly in the Washington State Supreme Court by an individual and an organization of commercial fishermen who fish in the interior salt water areas in Washington. The court's decision in that case is *Gillnetters, supra*. The court held that state Department of Fisheries regulations restricting or prohibiting non-treaty fishing in order to allocate fish to treaty fishermen were unconstitutional violations of the equal protection and privileges and immunities clause of the Fourteenth Amendment and that such regulations were beyond the statutory authority of the department.

2. **Washington Fishery Case.**

The determinations by the Washington state courts that state regulations to effectuate the 50%-plus allocation were invalid rendered it impossible to enforce those regulations in state courts.

In August of 1977 the District Court entered a series of orders largely preempting state authority over fisheries management, taking over all aspects of the treaty Indian allocation and setting out an allocation in detail by specific percentages and numbers of fish rather than by the "opportunity" to harvest fish which was the language of its original 1974 decision. Pursuant to these orders, the state Department of Fisheries was to manage only the non-treaty allocation of the fish. State courts promptly enjoined the department's attempted compliance, concluding that the department's regulations constituted an impermissible allocation.

On August 31, 1977, the District Court entered eight new orders creating an entire system for the management of the Washington fisheries and extending the system to an area of Washington not originally included in the case (Grays Harbor). A similar system has been adopted for 1978 and subsequent years. Court preemption of the management of the fishery is now complete.

Under the system, treaty Indian allocations are set forth by percentages and numbers of fish by species and area. Nontreaty commercial fishermen (except those in the ocean) may fish only with the consent of the court communicated by a recorded telephone message controlled by the National Marine Fisheries Service. In some interior waters no nontreaty commercial harvest was allowed in 1978; in others, treaty shares by species and region varied from 52% to over 90%. Catches by Washington ocean commercial troll fisheries and all sport fisheries are counted in the nontreaty allocation but these fisheries are exempted from specific court management and thus do not share directly in the burden imposed by the allocation.

These orders are, of course, based on the district court's 1974 interpretation of the treaties.

This court decided *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (hereinafter referred to as *Puyallup III*) construing the same treaties in June of 1977. In light of that decision, the state moved for reconsideration of the District Court's basic 1974 decision, prior to the August, 1977, District Court orders and in light of the passage of the Fishery Conservation and Management Act of 1976 (16 USC § 1801, et seq. A162-167, Pet. No. 78-119) by which regulation of the ocean fishery occurring more than three miles off-shore was preempted by the federal government. The District Court has never acted on that motion.

3. **International Fishery Case.**

There was an apparent recognition by the District Court and the Ninth Circuit Court of Appeals in the first

United States v. Washington, supra, (Joint App. 39) decision that treaty Indians were subject to regulations of the International Pacific Salmon Fisheries Commission[9] (hereinafter referred to as "IPSFC" or "Commission") on the same basis as other citizens. In the first year following the 1974 decision, treaty Indians complied with IPSFC regulations. Enforcement was by the historical pattern of adoption of those regulations by the Washington Department of Fisheries as state regulations and enforcement in state courts in case of violation.[10]

In February, 1975, when the proposed IPSFC regulations were approved by the United States and Canada, those regulations were transmitted by the United States State Department to the Washington Department of Fisheries for adoption as state regulations. The state did so. (Ex. USA-77)

In June of 1975, several tribes, supported by the United States government, moved for a determination that their members were entitled to 50% of the American share of the IPSFC Fraser River stocks. An injunction was granted directing that the State Fisheries Department allow no non-Indians to fish in IPSFC waters until special fisheries for treaty Indians were established for those waters.

At the request of the state, the District Court delayed the effect of its order until July 10, 1975 (Record in 9CCA No. 75-2835 p. 69). This provided Fisheries with the opportunity, which the department exercised, to ask the IPSFC to allow a special Indian fishery. During that period the IPSFC met and declined to change its regulations so as to provide for any special Indian fishery. (Ex. Jx-7)

On July 11, 1975, after an evidentiary hearing, the District Court again delayed the preliminary injunction to

[9]This international commission was created pursuant to a convention with Canada, 50 Stat. 1355, to manage the Canadian Fraser River fish runs which travel through the waters of British Columbia and the state of Washington.

[10]Revised Code of Washington 75.40.060.

July 16, 1975. The Court directed that the state Fisheries director "* * * promptly take action, whenever seems appropriate in the occasion, to press the matter before the Commission." (Tr. July 11, 1975, p. 144)

Then, on July 16, 1975, the District Court ordered the state Fisheries Department to establish by regulation two special treaty Indian fisheries in IPSFC waters. (A-105, Pet. No. 78-119)

The same day, July 16, the District Court stayed its order (1) "pending conclusions of discussions between representatives of the United States and Canada now scheduled for Friday, July 18, 1975; and (2) determination by the court of any promptly proposed modifications or amendments resulting from said discussions." (Tr. July 16, 1975, p. 99).

At the meeting of July 18, 1975 the United States and Canada did not agree to any revision of the IPSFC regulations so as to allow the special Indian fisheries ordered by the District Court (Ex. USA 94).

On July 21, 1975, Fisheries promulgated the regulations ordered by the District Court, and the following day appealed that order to the Ninth Circuit. The District Court granted a stay order pending appeal. (Tr. July 22, 1975, p. 120).

A commercial fishing organization then sued the Department of Fisheries in state court on July 23, 1975. The state court ruled that the special IPSFC regulations which had been adopted by Fisheries to comply with the order of the District Court were beyond the department's statutory authority. The court ordered those regulations suspended. (Ex. F-81).

The following week, July 30, 1975, the District Court modified its injunction, dissolved the stay, and made its permanent injunction respecting the IPSFC fishery immediately effective. (Docket No. 1211).

In response, the Department of Fisheries on the next day adopted the regulations required by the District Court injunction.

On the following day, August 1, 1975, the state superior court ordered the suspension of the new regulations promulgated by Fisheries to comply with the most recent District Court order. (Ex. F-86).

Fisheries complied with that order and repealed the regulation. (Ex. F-84).

The District Court then made effective the order enjoining Fisheries from allowing any IPSFC fishing by nontreaty fishermen until Fisheries had in effect special treaty Indian regulations for that fishery. (Record, CCA No. 75-2835 pp. 109-110).

Fisheries then suspended all regulations implementing the IPSFC regulations, thus withdrawing from permitting, prohibiting or regulating that fishery. (Ex. F-87).

On August 6, 1975, the United States attorney made an oral motion in District Court for a stay of the proceedings in the state court. No notice was given to the state court but counsel from the Attorney General's Office representing Fisheries was present. (Tr. August 6, 1975, p. 14) The District Court granted the request and issued an order ordering the stay of state court proceedings. The court then directed Fisheries to repromulgate the regulations enjoined by the state court and denied Fisheries' motion to stay the District Court's injunction. (Docket No. 1240).

The District Court order of August 6 made additional "Modifications and Additions" to the Findings and Conclusions re Fraser River Sockeye and Pink Salmon Harvest. The conclusions included the following:

> 63. The Stevens treaties between the United States and the various Indian tribes, as interpreted by the Court and the Ninth Circuit Court of Appeals, preempted State control of fishing within Washington territorial waters in Puget Sound, including Fraser River sockeye and pink salmon, and made it the supreme law of the land that the Indians must be allowed the opportunity to take up to fifty per cent of the fish that may be legally harvested in Washington territorial waters. (A-123 Pet. No. 78-119).

This conclusion has formed the basis for the court's (and the United State's) subsequent actions in connection with the IPSFC: Indians are now entitled to 50% of the United States' share.[11]

The department sought a stay from the Ninth Circuit on August 18, 1975, which was denied on August 20, 1975. (CCA No. 75-2835). The state court then found the regulations adopted at the direction of the District Court to be invalid on September 19, 1975. The State Supreme Court refused to grant a stay on September 23, 1975. The state trial court was affirmed in *Purse Seine Vessel Owners Assoc. v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977).

On October 2, 1975, a second notice of appeal to the Ninth Circuit Court of Appeals was filed by Fisheries specifically appealing the modification of the IPSFC decrees. The two appeals were consolidated by the Ninth Circuit Court of Appeals in January, 1976. The appeal was argued in February, 1978, and the decision in April of 1978 held that the appeal was moot. (A-29, Pet. No. 78-119).

C. CHARACTERISTICS OF SALMON AND STEELHEAD FISH.

Salmon and steelhead are anadromous fish; that is, they spend successive portions of their life cycles in fresh, then salt, and finally fresh water. These fish hatch from eggs in fresh water streams or hatcheries. At this stage of their development, they are known as fry. Depending upon the species, the juvenile fish spend varying periods of time (from less than a month to as long as two years),[12] in fresh water before migrating to the ocean. Again, depending

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[11]The actions by the United States for the 1978 IPSFC fishery appear to be based upon a 20% Indian share of the American Fishery. See, *Purse Seine Vessel Owners Association v. United States*, (9th Cir., October 26, 1978, No. 77-2968).

[12]For pink and chum normally only a month or less; for steelhead and sockeye up to two years; for coho and spring run chinook approximately 14 months; and for fall run chinook three to six months, with variations by all.

upon the species, the fish will spend varying periods of time (from less than one to more than four years) in the ocean while they mature. The fish then return to the same fresh water stream or lake in which they hatched in order to spawn. It is during the "run" to the spawning grounds that the major portion of the commercial net fishery harvest occurs in Washington waters.

There are five major species of salmon: chinook, chum, coho, sockeye and pink.[13] Steelhead[14] is a species of trout. Within the portion of western Washington encompassed by the District Court's orders, one or more of these species is produced in each of fifteen major river systems and their tributaries, and also in 239 small independent streams emptying into the marine waters of Puget Sound, the Strait of Juan de Fuca, and the Pacific Ocean north of Grays Harbor, Washington. There are also fish from Idaho, Oregon, California and British Columbia which feed in and migrate through Washington waters. Many are also produced "artificially" in hatcheries or man-made spawning channels.[15]

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[13]The species have been listed in terms of average size at maturity. While the weights vary considerably, the averages are: chinook - 20 pounds, chum - 10 pounds, coho - 7-8 pounds, sockeye - 6 pounds, and pink - 4-5 pounds.

[14]The average mature steelhead is 7-8 pounds with substantial variations anong individual fish.

[15]The Department of Game has developed a substantial steelhead planting program supporting sixteen state hatcheries and nine major rearing ponds. (Ex. G-14, p. 7) Hatchery steelhead smolts are planted in approximately 60 rivers in Washington; and in 1973, these hatcheries produced 3,000,000 winter steelhead smolts and 1,500,000 to 2,000,000 summer steelhead smolts. (FF 240, Joint App. 188) These programs are relatively expensive enterprises, for only an average of 5% of the smolts planted will ever return as adults to the site of their planting for spawning.

The Department of Fisheries conducts rearing programs at 32 major and 26 satellite fish cultural stations. These programs include a combination of egg-taking, hatching, feeding in standard facilities, lakes and pens, "egg box" programs, and natural spawning in prepared channels.

A "run" of fish (for practical management purposes) normally refers to groups of fish of the same species from the same geographic area or streams of origin which are together enroute to their spawning grounds. (Ex. JX-2, p. xx).

In marine waters (i.e., salt water areas), runs of the same species to the various rivers and streams are usually mixed. As the runs proceed easterly through the Strait of Juan de Fuca (or southerly through Georgia Strait) and into Puget Sound, each run breaks off and enters its natal stream.[16] In addition to the mixing of different runs of the same species in marine waters, runs of different species (e.g., Puyallup River fall chinook run and coho runs, and Nisqually River chum run and steelhead run) are often mixed in both marine and fresh waters. (Ex. JX-2a, Tables 2-17). The mixing of runs of the same and different species complicates conservation regulation of the fishery harvest because fishing activities affecting a particular run

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Salmon expected to be liberated in waters of the state by the Department from July, 1978, through June 1979, are as follows:

Species	Numbers of Fish
Chinook	98,900,000
Chum	85,100,000
Coho	63,900,000
Sockeye	13,000,000
TOTAL	260,900,000

The state is engaged in experimental programs to determine the feasibility of hatchery production of pink salmon.

[16]For example, chinook salmon destined for the Nooksack River (in northern Puget Sound), the Puyallup and Nisqually Rivers (in southern Puget Sound), and numerous other streams and hatcheries all enter the Strait of Juan de Fuca together. As the chinook runs proceed, the run to the Nooksack River and Samish hatchery branches off and the runs to the southern Puget Sound rivers remain mixed. As the runs proceed further south, the Puyallup River (including the Puyallup hatchery), Minter Creek hatchery, Nisqually River and Deschutes hatchery runs successively split off. (This listing is for illustration purposes only since the successive split offs will occur for virtually every watershed.)

frequently have an incidental effect on other runs present in the fishing area.[17]

These fish migrate and feed over very broad and overlapping areas. Some remain as "residents" within a few miles of their natal streams while others migrate as far as the Gulf of Alaska. In any given area of the coastal waters and Puget Sound, not only are steelhead and salmon of varying species likely to be found together, but also fish at varying stages of maturity are found within each species.

Sockeye, chum and steelhead tend to feed in Washington waters ony as juveniles, migrating northward sometimes as far as the Gulf of Alaska and beyond the continental shelf before commencing their spawning migrations. Pinks have a similar life cycle but often spend a month or more as feeding adults in near-shore Washington waters before completing their spawning journey.

Chinook and coho usually feed on the continental shelf where they are available to ocean sport and troll fisheries for a major portion of their post-juvenile lives. Both species may remain close to their native streams or may migrate a thousand or more miles along the coast while feeding. Chinook have a consistently northward migration, with some members of most stocks reaching southeastern Alaska. Washington coho are found from nothern California to northern British Columbia.

Stocks of each species in Washington have distinct and overlapping timings of spawning migration and ages of maturity. Pinks mature exclusively at two years and enter streams in late summer and early fall.[18] Coho females mature at three years as do most males, but many males ("jacks") mature at two years of age. Coho enter the streams from late summer through winter. Chinook mature as two, three, four, five and sometimes six-year old

[17]Net mesh size regulations are used when it is desired to allow one species to escape while another is harvested. However, this is only effective when the species of salmon present are of a sufficiently different size. (Ex. JX-2a, p. 55).

fish, with major spawning migrations occurring from early spring to late fall. Chum salmon mature at from 3 through 5 years of age and enter spawning streams from September through March. Sockeye mature at ages 3 through 6 but are normally "4's". In isolated instances they return to streams in the spring. Usually Sockeye runs take place from June through September.

Male salmon of all species except chum and pink tend to mature at earlier ages than females. Steelhead usually spawn at ages 4 through 7 but differ from Pacific salmon in that some survive after spawning while all Pacific salmon die after spawning. Steelhead migrations to the streams occur primarily from November through April, but in some streams there is a summer run.

Among all these species and stocks there are great differences in the proportion of the runs required for spawning. In some situations runs can barely maintain themselves so that there is no harvestable supply.

The survival of wild fish from egg deposit to stream out-migration is usually between 5 and 30%. Hatchery produced fish have substantially lower mortality with 70-95% surviving from egg to out-migration. The higher rate of survival in a hatchery environment allows a harvest of a higher percentage of a hatchery fish run than a natural fish run because fewer spawning fish are needed to perpetuate the run. For example, one study of Coho indicated a survival of hatchery fish seven times that of the wild stocks in the same area. In light of the higher survival rate, the harvestable portion of a healthy hatchery stock can be 1½ to 15 times that of a healthy wild stock.

D. MANAGEMENT OF THE FISHERY RESOURCE.

To provide for the protection and optimum utilization of anadromous fish, which are a public resource, it is necessary to exercise comprehensive management control.

[18]Pinks occur only in odd-numbered years in Washington waters and are the only salmonide species with this characteristic.

As the prior discussion of the salmon resource clearly indicates, a management program to preserve salmon stocks, to obtain optimum yields, and to provide for an orderly fishery is an exceedingly complex enterprise. In contrast the management of the steelhead resource has been relatively simple.

There are substantially fewer steelhead than salmon in Washington waters. The respective harvests in 1971 were 264,599 steelhead to 7,777,093 salmon. Steelhead, unlike mature salmon, feed in fresh water when returning to spawn. That characteristic makes steelhead more susceptible to being caught by a hook and line fishery. Nevertheless, steelhead are difficult to hook and even more difficult to land, and thus fishing for them is considered a challenging sport. The recreational importance of the steelhead fishery is reflected by the fact that sports fishermen are willing to spend an average of nearly 23 hours per fish caught in the Puyallup River.

To protect steelhead and to maximize the recreational value of that resource, Washington in 1925 declared steelhead to be a game fish in fresh waters (FF 168, Joint App. 161). The effect of the state's designation was to bring the steelhead under the protection of game statutes which prohibit the net fishing or commercialization of game fish. RCW 77.16.040. In 1933 steelhead was made a game fish for all purposes, including both fresh and salt water fishing. (FF 168, Joint App. 161) Since that time off-reservation fishing for steelhead has been confined to a hook and line sport fishery, with the exception of Indian net fisheries (FF 219, Joint App. 180) authorized pursuant to this Court's decision in *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973), (hereinafter referred to as *Puyallup* II.

The steelhead fishery occurs almost exclusively in fresh water. (Ex. JX-2a, p. 49). The relative inefficiency of a hook and line sport fishery, that is, the substantial time expended per fish caught, is such that it does not require the day-to-day management control necessary for a commercial net fishery in order to allow sufficient

escapement for spawning. To some extent a sports fishery is "self-controlling." When there is a small fish run the catch by sport fishermen declines and as the catch declines so too does the interest of some fishermen, thus reducing the number of people trying to catch fish.

For conservation purposes, the state limits the sport fishermen to a total annual catch of steelhead of thirty fish and a maximum of two per day. However, the average catch per sport fishermen is only two steelhead per year. (FF 241, Joint App. 189). Time and area closures are also common in steelhead management. Thus, the management system for steelhead is relatively simple if there is no commercial harvest.

As noted earlier, in on-reservation and off-reservation waters, pursuant to *Puyallup II, supra*, Indians engage in a net fishery for steelhead at usual and accustomed grounds and stations generally at the mouths and lower reaches of rivers. This fishery is easier to manage than a marine salmon fishery because the steelhead run is usually separated from other species at the time of the fishery although there are overlaps with later run chum in some rivers. While fish managers have fewer variables to contend with, an intensive Indian net fishery can and has resulted in a substantial disparity[19] in the relative Indian and sport harvests of steelhead due to the difficulty in regulating such net fisheries.

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[19]An example of the disparity is reflected by the steelhead fisheries on the Green, Skagit and Nisqually Rivers reflecting the respective harvests by treaty Indians and vis-a-vis all other citizens:

	74/75	75/76	76/77	77/78
Green:				
Indian	7419	6190	3258	4340
Non-Indian	4291	1591	2400	6690
Skagit:				
Indian	15973	6332	2416	4250
Non-Indian	5743	1647	1241	3672
Nisqually:				
Indian	4944	3695	2691	2331
Non-Indian	843	238	860	1157

Under Washington law, the Department of Fisheries has the responsibility and authority to manage and regulate salmon fishing (FF 167, Joint App. 161). In performing that task the department must take into consideration both the salmon resource and the objectives and needs of the society seeking to utilize it (FF 169, Joint App. 162). The complexity of that task and the need for professional expertise flows from the very nature of the salmon resource.

As previously indicated, the five species of salmon originate and migrate from streams and tributaries throughout western Washington. During their migratory pattern ranging from northern California to the Gulf of Alaska, they encounter salmon and other fish from other areas. Each species and run of that species has its own particular set of characteristics and varying percentages of return are needed for the hatchery and natural spawning of future generations.

Conservation management of this resource is complicated by the fact that in any given area in the ocean or interior waters of the state many fish from different species and from different rivers and streams of origin are present at the same time. Thus, the managing agency must carefully draft regulations to permit an appropriate harvest of those which are in surplus without jeopardizing the other species or stocks present for which it is not appropriate to permit a harvest. Management of the harvest requires daily monitoring during the fishing season so that on the basis of the changing information so obtained, restrictions can be imposed or modified so as to protect the fish needed for replenishing the run and at the same time to maximize the effective harvest of the fishery. That harvest of the salmon occurs by both sport and commercial fishing, with Indians participating in both. In managing the fishery for both groups, the object is an optimum sustained yield. (FF 169, Joint App. 162).

We have earlier made reference to the sport fishery for steelhead. There are also sport fisheries for salmon. In sport fisheries each fisherman uses a rod with one fishing

line with the hope that a fish will strike the bait or lure and be caught. These fisheries occur primarily on the ocean and inside marine waters, although small, but important, salmon sport fisheries take place on about one hundred rivers, lakes and creeks. Marine sport fisheries in Puget Sound primarily harvest immature feeding salmon and do not significantly impact most mature brood stocks, which are fish migrating to spawning grounds. (Ex. JX-2a, p. 49). As previously noted, with the exception of steelhead, mature fish generally cease feeding during the course of spawning migration (FF 173, Joint App. 163) The majority of the salmon caught by hook and line in fresh water are small mature males or immature "jacks." (Ex. JX-2a, p. 125)

Generally, the objectives of Indian fishermen are closer to those of the commercial net fishermen than to those of ocean trollers or sport fishermen. Until recently, however, few tribes were active in marine fisheries. Historically much of the Indian fishing took place at the mouths and the upstream courses of coastal and Puget Sound rivers. (FF 176, Joint App. 164). When fishing occurs in the confined areas of the rivers where the fish are heavily concentrated, careful day-to-day regulation to protect the run or harvest is an absolute necessity. (FF 176, Joint App. 164). If spawning escapements are to be achieved particularly stringent controls of the harvest near or in the natal stream are vital. In addition, salmon deteriorate in condition as they approach spawning, and major Puget Sound harvests in fresh water commonly diminish potential economic values that might be derived from salmon resources.

Commercial fishing involves a variety of techniques which vary both in efficiency and from area to area. In the ocean fishery of the Pacific Northwest, anadromous fish are taken by "trolling," a technique similar to the hook and line method of the sport angler, but multiple lines and hooks are utilized. Net fishing in the ocean has been prohibited by agreement between the United States and Canada. On the Washington coast the ocean salmon catch

consists primarily of chinook and coho. A significant number of pinks are also caught but only small percentages of the other salmon species, and virtually no steelhead.

Commercial fishing in inland marine waters of the state of Washington is by means of various kinds of net gear: Gillnets, purse seines, and reefnets. Commercial harvests are targeted on mature fish with net fisheries mainly occurring during the brief periods when fish are migrating to their spawning grounds. (FF 172, Joint App. 163). Net fishing seasons permit the efficient taking of mature fish but require careful day-to-day monitoring and constant emergency adjustments in regulations.

A drift gillnet is suspended in subsurface waters, supported by floats at the surface and held vertical by a weighted line at the bottom called the "lead line." The mesh of the gillnets come in various sizes, as some sizes of nets will selectively capture certain types of salmon surplus to spawning objectives which are of a larger or smaller size than other fish which should be protected. Fish attempting to swim through the mesh are usually caught behind their gills. (Ex. JX-2a, p. 117).

Purse seine nets have smaller, heavier mesh than gillnets. They capture fish by enclosing them; that is, the net is pulled into a circle and a long rope threaded on rings suspended on the bottom rim of the net is pulled tight. The net is then pulled into the boat, steadily diminishing the circle in which the fish are confined until the fish may be lifted into the boat (Ex. JX-2a, p. 120).

A reefnet utilizes nets to make a funnel, channeling the fish into a net which is then raised thereby catching the fish (Ex. JX-2a, p. 122).

Treaty Indians employ all of these techniques, and in addition, set fish traps and set nets, the use of which (i.e., fixed gear) is otherwise prohibited to all other citizens by state law.

The fisheries are managed to provide for a harvest of the surplus fish from each run after natural spawning and artificial production requirements are assured.

Great numbers of salmon which originate in the area covered by this case are harvested in ocean waters beyond the state's jurisdiction. (FF 185 Joint App. 167) Canadian fishermen harvest 65% of the Puget Sound origin Chinook and over 50% of Puget Sound origin Coho salmon. Seventy-five percent of the ocean catch of Olympic Peninsula origin Chinook and 50% of like origin Coho salmon take place off the coast of British Columbia and southeastern Alaska. Ninety percent of the ocean catch of Puget Sound origin Chinook salmon occurs off the coast of British Columbia. In the 1960's, the average harvest occurring in ocean waters outside the territorial jurisdiction of the state, from stocks originating in rivers on which there are Indian fisheries in the case area, except for the Quinault and Queets rivers, has been: Chinook, 58.9%; Coho, 55.3%; Pink, 29.4%; Chum, 2.6%. (FF 186 Joint App. 168) Other than control over fish landings, there are no fish management regulations or practices which the state of Washington can employ effectively to control fishing beyond its territorial waters. Nothing prevents United States fishermen from landing their catches in neighboring states.

E. IPSFC WATERS (Fraser River Fish Runs).

The most valuable commercial fishery in the state occurs on the Pink and Sockeye salmon runs headed for British Columbia's Fraser River (JX-2a, pp. 13-14, 135). This fishery takes place in the Strait of Juan de Fuca and in the waters surrounding the San Juan Islands, and is regulated by the International Pacific Salmon Fisheries Commission (hereinafter IPSFC or "Commission") pursuant to a 1937 convention between the United States and Canada. 50 Stat. 1355. The Commission is international in composition. Three commissioners are appointed by the President of the United States and three are appointed by the government of Canada.

By this convention the United States has obligated itself to enforce IPSFC Commission regulations. Pursuant to authority conferred by Congress, Washington's Depart-

ment of Fisheries adopts and promulgates the Commission's regulations, and until recently, enforced those regulations against all Indian and non-Indian citizens. While the IPSFC Commission's jurisdiction is specifically over Fraser River pink[20] and sockeye salmon, its regulations do have incidental to major effects on the taking of chinook, coho, and chum salmon and also affect the harvest of sockeye and pink salmon originating in Washington's rivers and streams, including those encompassed by the treaty tribes' "usual and accustomed" fishing grounds.

The IPSFC Commissioners' jurisdiction lasts for the period of time in which the Fraser River runs are present in the marine waters of Washington and British Columbia, and in the fresh waters of the Fraser River. The waters over which the Commission has direct jurisdiction also include some of the usual and accustomed fishing places of a small number of the Indian tribes.

The fishery in IPSFC waters by United States citizens is by gillnet, purse seine, and reefnet. The Commission's regulations separately set different fishing seasons for each type of gear. The fixed gear common to other Indian fisheries is not allowed.

The Fraser River runs of pink and sockeye salmon afford Canadian and United States citizens, including treaty Indians, a vast resource for commercial exploitation. It was the recognition of this fact by both the Canadian and United States governments, and of the need for effective management, that originally gave rise to the convention creating the international IPSFC body.

In the early part of this century, the Fraser River generated a prodigious number of fish; in 1913, for example, the Sockeye returning to spawn were estimated to number 37,000,000 fish. Later a landslide blocked large portions of the Fraser River through which the salmon needed to pass on their way to the spawning grounds, and the runs declined to slightly over 1,000,000 sockeye in

[20]The treaty was subsequently extended to include pink salmon (The Pink Salmon Protocol of 1956, TIAS 3867, 8 UST 1058).

1928. A United States commitment to expend a substantial amount of monetary resources in unblocking the Fraser River was the cornerstone of the 1937 convention. The United States received in return the protection of its interest in this fishery by the agency of an international regulatory body. As a result of Commission regulatory efforts, the Fraser River runs have been restored to an average level of approximately 6,000,000 harvestable salmon annually.

The conservation management of the Fraser River runs is as complex as the regulation of the Puget Sound runs. Fraser River pink and sockeye runs are composed of individual runs of fish spawning at varying times and available to the fisheries at different times. Sockeye stocks returning to spawn in any year are generally the product of those which spawned four years earlier but may also include in the run fish having a 3, 5 or 6 year cycle. The effect of coinciding cycles in some years and minimal runs in other years is reflected by the Adams River contribution to the Fraser River sockeye run. Its dominant year reflects up to 10 million fish; the next year, one million; the following year, 50,000; and the lowest of a four year cycle, only 10,000. (Tr. July 11, 1975, pp. 69-70) This and the large number of separate stocks results in the necessity for extremely complex harvest regulation.

Most of the United States' catch occurs after the fish have left the Strait of Juan de Fuca. Five percent is caught in the Strait. Fifty-four percent of the catch is in the San Juan Island area; forty-one percent of the total United States' catch occurs in the last of the United States fishing areas, Point Roberts. A few Indian tribes have "usual and accustomed grounds and stations" in areas under the jurisdiction of the IPSFC. When the Fraser River fish return from the ocean into Washington territorial waters, they are first available for harvest in the usual and accustomed grounds of the Makah Indian Tribe, in the western portion of the Strait of Juan de Fuca.

In general, however, only a small number of treaty Indians, relative to the total number of Indian fishermen,

participate in the harvest of Fraser River stocks. During the time that IPSFC fisheries occur, many treaty fishermen choose to fish for the larger and more valuable Chinook salmon in areas outside of the IPSFC waters, such as Bellingham and Skagit Bays. (Tr. June 26, pp. 69-71. et seq.)

F. HISTORICAL FISHERY.

In 1854-55, Western Washington was sparsely populated with widely dispersed Indian settlements, the estimated population being 7,500 Indians and 2,000 non-Indians. (FF 9, Joint App. 103) While fish had been a major food supply for Indians (FF 4, Joint App. 100), there were considerable fluctuations in the availability and abundance of the fishery resource (FF 3, Joint App. 100). At times the number of returning fish were so low that the Indians' food supply was imperiled. (FF 5, Joint App. 101)

The Indian fishery at the time of the treaties utilized a wide variety of methods to harvest fish, including traps, weirs, dip nets, spearing, hook and line, etc. Although there was some trading of fish between Indians and non-Indians (FF 5, Joint App. 101), it was inconsequential compared to the volume of the present day commercial salmon harvests. (FF 7 and 8, Joint App. 102) The limited commercialization of the fishery resource at that time was due to the small population in the area and inadequate preservation techniques to permit the shipment of fish to markets in larger population areas. (FF 8, Joint App. 102) With the abundance of fish, the small population and limited trade in fish, there was no need to regulate or limit the taking of fish by either Indians or non-Indians. (FF 9, Joint App. 103)

This changed with the invention and perfection of the canning process for fish in the latter portion of the Nineteenth Century. (FF 8, Joint App. 102) Although the first cannery in Puget Sound was constructed in 1877, it was not until about the 1890's that the major impact was felt in Washington. The canning process made it possible to ship the product to distant markets and therefore gave

rise to the development of a large-scale commercial fishery, participation in which has been open to all citizens, both Indians and non-Indians. The volume of fish commercially harvested in Washington reached a peak in about 1914. In recent years, with the implementation of massive hatchery programs by the State of Washington, there has been a substantial replenishment of the fishery stocks in the area.

During this period there was a drastic decline in the number of Indians whose principal occupation was fishing. (FF 33, Joint App. 114) The major cause for this decline was the employment acculturation of the Indians. (FF 33, Joint App. 114)

Acculturation of the western Washington Indians into western culture began prior to treaty times and has continued to the present day. Today, with reference to clothing, language, economic pursuits and general interests, most Indians in Washington are indistinguishable from other citizens. Traditional religious rites and ceremonies are no longer widely observed by most tribes. (FF 33, Joint App. 114)

As a part of that acculturation, Indian fishermen use modern gear, (FF 30, Joint App. 113), and share the same economic motivation to maximize harvests and fishing opportunities as non-Indian commercial fishermen. (FF 31, Joint App. 113) In addition to treaty Indian-only commercial net fisheries, Indian fishermen fish in the regular all-citizen commercial fisheries of Washington and the Pacific Coast. (FF 32, Joint App. 114) They fish with the same gear as non-Indian fishermen, but are not required to purchase licenses or pay landing taxes. (FF 32, Joint App. 114) In the case area at the time of the District Court decision there were 792 Indian fishermen, 6,600 commercial, 283,650 salmon sport fishermen, and 145,000 licensed sport steelhead fishermen. (FF 18, 251, Joint App. 168 and 190). With the exception of the full-time Indian commercial fishermen, who fish in the all-citizen commercial fisheries, Indian fishermen frequently have other occupations, fishing for food and to supplement

their incomes. (FF 32, Joint App. 114) Part-time fishermen of some tribes average $5,000 per year income from fishing. (FF 30 and 110, Joint App. 113 and 142) Indian tribes also run sport fishing businesses on their reservations for which they charge license fees and tribal members serve as guides. (FF 31, Joint App. 113)

While historically the Indians' catch was controlled by the needs of a relatively small human population, gear inefficiencies and tribal custom and religious commandments, (FF 190, Joint App. 169) today it is necessary that the fisheries of Indians, like those of non-Indians, be regulated in order to assure conservation.

Subsequent to the decision of the District Court in *U.S. v. Washington* and its implementation guaranteeing treaty Indians a given number of fish from each of the runs, there has been a change in the composition of the commercial fishery. There has been an increase in the Indian fleet both in quantity and quality; i.e., the number of Indian fishermen has increased; so, too, has the amount and efficiency of the gear which is utilized by the treaty Indian fleet. The nontreaty commercial fleet has declined, in part due to the impact of the decision reducing the fishing opportunity for nontreaty citizens, in part due to a state moratorium on the issuance of licenses, and in part because there has been available since 1975 a state buy-back program, federally financed, whereby vessels and licenses are bought and removed from the fishery.

There also have been regulatory changes. The United States enacted the Fishery Management and Conservation Act of 1976 (16 USC § 1801, et seq.) which asserted preemptive jurisdiction over fishing in a zone from 3 to 200 miles off the coast of the State of Washington. Thus, even higher percentages of harvests of stocks from the case area occur outside the jurisdiction of the State of Washington than at the time of trial, which were: Chinook — 58.0%; Coho — 55.3%; Pink — 29.4%; Chum — 2.6%. As previously noted, chum salmon are not commonly harvested in the ocean.

Another source of the increase in the treaty Indian fleet has been the District Court's permitting the post-trial intervention of twelve additional tribes. Generally, for those tribes which are not recognized by the United States government, the court has found conditional rights which permit those Indians with an appropriate blood quantum to fish as treaty Indians if one of the recognized tribes invites their participation.

G. TREATY BACKGROUND.

The United States claimed the area which is now the state of Washington by discovery, settlement and treaty extinguishment of conflicting claims of Spain, Russia and Great Britain. (FF 15, Joint App. 106) In 1848, the Oregon Territory, which included Washington, was created, but Indian claims were not extinguished. (FF 15, Joint App. 106) Thereafter, in 1850, Congress authorized the negotiation of treaties with Indian tribes in Oregon Territory to extinguish their claims to lands lying west of the Cascade Mountains. (9 Stat. 437) In 1853, the act creating the Washington Territory continued the authority to make treaties with the Indians, and appropriations were made for that purpose. (FF 15, Joint App. 106)

Isaac Stevens was appointed Governor and Superintendent of Indian Affairs of the Washington Territory. (FF 17, Joint App. 107)

At that time the Indians in western Washingon did not have a formal political structure. (FF 15, Joint App. 106) They were organized loosely, if at all. Governor Stevens therefore created tribes and bands with leaders or chiefs in order to have political entities with which to negotiate. (FF 17 and 18, Joint App. 107, 108)

The purpose of the treaties was to extinguish Indian claims to the land in Washington Territory. (FF 19, Joint App. 108) Governor Stevens and the treaty commissioners were not authorized to grant to the Indians or treat away on behalf of the United States any governmental authority of the United States. (FF 19, Joint App. 108)

At the treaty negotiations the Indians' primary concern was that they have freedom to move about to gather food, particularly fish, at their usual and accustomed fishing places. (FF 20, Joint App. 109) The words of One-lun-teh-tat, a Skokomish Indian spokesman, addressed to Governor Stevens, expresses the Indian concerns about relinquishing their claims to lands and being left with small reservation areas (Ex. PL-15, Joint App. 330):

> I wish to speak my mind as to selling the land—Great Chief. What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food.

In response the Indians were assured that while they would have the freedom to move about to secure food and fish, the white man also would be allowed to fish. (FF 20, Joint App. 109)

Governor Stevens, in discussing the policy that he intended to pursue during negotiations with the tribes, in a letter dated September 16, 1854 to the commissioner of Indian Affairs, said:

> The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, *the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing.* It is therefore desirable that this question should be set at rest by law.

(Emphasis supplied) (Ex PL 47 p. 456 Joint App. 327)

Governor Stevens' concern with protecting Indians from an exclusion from the fishery was reflected by his specifically recognizing the Indians' ability to go outside of reservation areas for the purpose of harvesting fish. His statement at the Treaty of Point Elliott on Monday, January 22, 1855, was:

> We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and *where you will be able to pass in canoes over the waters of the Sound and catch fish* and back to the mountains to get roots and berries.

(PL Ex 14, Joint App. 329-30) (Emphasis supplied)

Subsequently, in the negotiation of the Treaty of January 31, 1855, with the Makah Indians, Governor Stevens reassured the Indians that he did not intend to stop their fisheries but he made clear that the whites would also fish. (Ex. PL-16(b), Joint App. 331)

The concern with permitting the Indians to have the opportunity for access to the fishery was also reflected in the report by George Gibbs, frequently referred to as the author of the treaties, to Captain McClellan on March 4, 1854:

> * * * *They (Indians) require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found.*
>
> The subject of the right of *fishery,* in its present position, is believed to be one concerning which difficulties may arise. *It is certain that the intention of Congress never was that the Indians should be excluded from them*; but as no condition to this effect was inserted in the donation act, the question has been started whether persons taking claims, including such fisheries, do not possess the right of *monopolizing them.* It is, therefore, proper that this also should be set at rest by law.

(Ex PL-9, Joint App. 326) (Emphasis supplied)

Subsequently, in the course of the negotiations on the Treaty of Point-No-Point, the Indians were advised, that they would have the privilege of going where they pleased to fish, if they relinquish land claims.

> Mr. Simmons, the agent, explained that if they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. That where a small tract alone was left, *the privilege was given of going wherever else they pleased to fish* and work for the whites. If you can cultivate more land than this, you can have it.

(PL Ex 15, Joint App. 330) (Emphasis supplied)

Although there was no intent to exclude the Indians from using fisheries for economic gain, it was intended that they become agriculturists, diversify their economy, learn western skills and trades in order to accomplish their transition into western culture. (FF 21, Joint App. 109) The treaty provisions contemplate that the reservations would become productive farms and obligated the United States to provide schooling and tradesmen to train the Indians.[21] The annual reports of the Indian agents in the years immediately following the signing of the treaties show that the government was attempting to carry out those treaty provisions. (Exs. PL-6, PL-40, PL-41, PL-42) It was contemplated that the Indians would become less dependent on fish as they became increasingly westernized and successful in their agricultural pursuits. (Ex. D-1, p. 27)

The treaty negotiations were carried on in Chinook jargon, a trade medium used by the tribes. (FF 22, Joint App. 110) Colonel Shaw, the government interpreter, translated the treaty language into Chinook jargon, which was in turn translated by Indian interpreters into native languages (FF 22, Joint App. 110) It is probable that there were Indians at each council who would have spoken or understood some English. (FF 22, Joint App. 110) Although the vocabulary of Chinook jargon was not adequate to express precise legal language, the general meaning of the treaty language could be explained. (FF 22, Joint App. 110) The treaty commissioners probably used the phrase "usual and accustomed" and "in common with" in their common parlance. (FF 24, Joint App. 111)

The phrase "usual and accustomed fishing grounds" was all inclusive and intended by all parties to the treaty to include reservation and off-reservation areas. (FF 24, Joint App. 111) It was probably used in a restrictive sense, not intended to include areas where use was occasional or incidental. (FF 24, Joint App. 111)

George Gibbs, a lawyer, surveyor, ethnologist and probably the most informed member of the treaty

commissioners, observed that the Indians' "fisheries were held in common, and no tribe pretends to claims from another, or from individuals, seignorage for the right of taking." (FF 25, Joint App. 112) At treaty times Indians and settlers shared common fishing grounds (FF 13, Joint App. 104), so the concept of common user interests was familiar to them, and the concept was capable of expression in the Chinook jargon. (FF 24, Joint App. 111)

SUMMARY OF ARGUMENT

This litigation, which has been increasing in complexity at an ever-accelerating rate, can be made quite simple, for the key to this litigation is found in the answer to a single question. What is the meaning of the phrase:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens* of the Territory, * * * (Emphasis supplied)

Treaty of Medicine Creek, Article III, 10 Stat. 1132 (1854).

All of the complexities in this litigation have arisen because the District Court and the Ninth Circuit gave the wrong answer to this question. Those complexities will disappear if the right answer be given.

In view of the lower federal courts, this treaty language confers upon the Indian treaty fishermen a virtual guarantee that they will harvest more than half of the harvestable fish. In our view, this language means that each individual fisherman, Indian and non-Indian alike, has the right to participate in the fishery on a nondiscriminatory basis and that the individual Indian treaty fisherman cannot be denied access to the fishery needed to exercise that right. This language neither requires nor even permits the allocation decreed by the lower federal courts.

We first take up this basic interpretive question as part one of this brief and then address the subordinate issues as the second part of the brief. Those are issues

[21] See, e.g., Treaty of Medicine Creek, art. 10, 10 Stat. 1132; Treaty of Point-no-Point, art. 11, 12 Stat. 933.

which become essentially irrelevant if the meaning of the treaty language which we urge is correct; if it is incorrect, and if the meaning adopted by the lower federal courts is upheld, these issues become unavoidable. These issues are: The conflict between the directives of the District Court and the requirements of a treaty with Canada, as implemented by the regulations of the International Commission created by that treaty pp. 63-81 *infra*; the abuse of discretion, if allocation is discretionary, in allocating in excess of 50% of the fishery to a relatively small number of tribal fishermen pp. 81-94 *infra*; the excessive interference by the District Court in the state's management and conservation of the fishery resource pp. 99-114*infra*; and the ability of the state to comply with a judicial mandate to allocate the resource between treaty and nontreaty fishermen pp. 94-98 *infra*.

The treaty language, probably drafted by a lawyer who was one of the treaty commissioners, was intended to secure to the Indians access to the fishing grounds (*U.S. v. Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) and an opportunity to participate in the fishery along with all other citizens. Neither Indian nor non-Indian was to be allowed to exclude the other from the fishery. (*Winans*, *supra*; *Puyallup III*, *supra*). Nor was there contemplated any quantified allocation of fish between the two groups of fishermen.

The common law of fisheries, as developed in England and adopted in this country, is fully compatible with treaty language. The treaties incorporated the common law concept of a "common fishery;" i.e., a public domain in navigable waters in which all citizens have an equal opportunity to fish. (*Infra*, 48)

A review of the historical evidence surrounding the actual treaty negotiations, reflecting the view of the treaty commissioners and the Indians, is completely consistent with the common law concept of the common fishery, and inconsistent with any notion of a right to a quantitative allocation or a specific percentage of the fish *infra*. This

examination of the common law of fisheries and the historical background of the treaty negotiations is made because of the rule of construction enunciated by this Court in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 206 (1978): Treaty provisions are to be construed in the light of the "common notions of the day and the assumptions of those who drafted them."

We also examine, as did the District Court, contemporaneous dictionary definitions of the word "common." Far from supporting the conclusion of the lower federal courts that the fishery resource must be divided between the two groups of fishermen, treaty Indians and all other citizens, the definitions support instead our conclusion that the resource is truly *public; i.e.*, equally open to all on an individual basis. (pp. 48-56, *infra*) This same conclusion as to the meaning of the word "common" is bolstered by the specific language of one of the Stevens treaties, which grants to the Indians a "right in common with citizens * * * to travel upon all public highways," i.e., a right of access to and equal enjoyment of a public resource. (*Infra*, p. 55)

Finally, but most importantly, we examine recent interpretations and applications of the treaty language in the *Puyallup* series of cases, focusing on the "issue of equal protection implicit in the phrase 'in common with' " as used in the treaties. *Puyallup I*, *supra*; at 403; cf., *Puyallup II*, *supra*. (*Infra*, pp. 86-90) The 50%-plus allocation required by the lower federal courts is, as we demonstrate, completely incompatible with the equal protection requirements implicit in the treaty language. Our reading of the treaty language, in contrast, is completely consistent with, and indeed is demanded by, equal protection principles. (*Infra*, pp. 89-90)

ARGUMENT

A. THE STEVENS TREATIES NEITHER REQUIRE NOR PERMIT A FIFTY PERCENT-PLUS ALLOCATION OF THE WASHINGTON FISHERY TO THE TREATY INDIANS.

1. Introduction.

This litigation is founded upon six separate treaties which include a reference to fishing in the Washington Territory. The following is a typical treaty provision although there are minor differences of language in the six treaties:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens* of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided, however, that they shall not take shellfish *from any* beds staked or cultivated by citizens.

Treaty of Point Elliott, Art. 5, 12 Stat. 927 (A-131, Pet. No. 78-119). (Emphasis supplied.)[42]

The heart of the controversy that brings the parties to this Court is the determination by the District Court in 1974 that:

> By dictionary definition and as intended and used in the Indian treaties (and in this decision) 'in common with' means *sharing equally* the opportunity to take fish at usual and accustomed grounds and stations; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations * * *

[42]Two treaties, the Treaty of Point No Point, 12 Stat. 933, and the Treaty with the Makahs, 12 Stat. 939, refer to citizens of the "United States." The proviso concerning shellfish was omitted from the comparable provision of the Treaty with the Yakima, 12 Stat. 951, for the obvious reason that the Yakima Nation, occupied territory to the east of the Cascade Mountains, where shellfish were not found.

384 F.Supp. at 343.[43] Joint App. 88-89.

This quantitive allocation is the cornerstone of every major subsequent enforcement order of the District Court, and provides the basis for the 1977 injunctive orders which are the immediate subject of this appeal. (See App. A35-127 Pet. No. 78-119).

Although the Ninth Circuit in its first decision, 520 F.2d 676 (1975), (Joint App. 39), upheld the District Court's 50%-plus allocation, it did not follow the lower court's rationale that the allocation was required by the dictionary definition of the term "common." The Ninth Circuit Court for good reason ignored the historical-semantic approach of the District Court. Even if " 'in common with' means sharing equally the opportunity to take fish * * *," (384 F. Supp at 343, Joint App. 89) the 50%-plus allocation does not inevitably follow, as the Ninth Circuit apparently realized. The critical question is: how is equality of opportunity to be measured? Is it to be equality of opportunity among all *individual* fishermen, Indian and non-Indian alike? Or is it to be equality between two *groups* of fishermen, one treaty Indians and the other all other citizens, both Indian and non-Indian?

This initial question of how equality is to be measured is pivotal. It must be answered before considering the question as to what, if any, limits the treaties place upon the state's power to regulate the fishing resource. The answer to this initial question ultimately requires a resolution of the conflicting claims of private individuals, i.e., the individual fishermen, treaty and nontreaty; the dispute between the governmental entities involved is secondary. After all, the treaty language is cast in terms of "said Indians" and "all citizens of the Territory"; the present day individual fishermen are simply their legal successors.[44]

[43]Actually, the court's allocation formula allots over 50% of the fish resource to the various Indian tribes. See discussion at pp. 6-7, *infra*.

[44]This Court noted in *United States v. Winans*, 198 U.S. 371 (1905) that:

In addressing this initial question, the Ninth Circuit correctly understood that the District Court's allocation could be justified only if the equality is measured between two groups, and not among individuals. To remedy the defect in the District Court's rationale, it unearthed the common law concept of a cotenancy in property. In the view of the Ninth Circuit, the effect of the "in common with" treaty provision was mutually to endow the United States and the newly constructed Indian tribes with an interest in the fish resource "analogous to a contenancy." 520 F 2d *supra*, at 685, Joint App. 50.[15] This conceptual maneuver enabled the court to characterize the District Court's allocation as an equitable remedy for a breach of a cotenant's fiduciary duty by the state, as successor to the cotenancy interest of the United States. Apparently, the state's breach of duty consisted of allowing its nontreaty citizens as a group to harvest a share of the salmon and steeelhead in quantities substantially greater than those garnered by its treaty Indian citizens as a group, even though each individual of both groups had an equal opportunity to fish. Id., at 687.

The Ninth Circuit utilized the cotenancy analogy in affirming the respective percentages of the fish resource allocated to non-treaty and Indian treaty fishermen. Referring to the "formal equality" of the bargaining positions of the United States and each Indian tribe, the court concluded that both parties had an equal equity in their jointly-held property that was properly reflected by a 50-50 partition of the fishery. *Id.*, at 688, Joint App. 52.

When the Ninth Circuit subsequently reconsidered its cotenancy theory as the foundation for 50%-plus allocation, fissures in that foundation began to appear to

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The reservations were in large areas of territory and the negotiations were with the tribe. *They reserved rights, however, to every individual Indian, as though named therein.* Id., at 381. (Emphasis supplied)

[15] In a later opinion which is the subject of this appeal, the Ninth Circuit also described the Indians' interest as a "quasi cotenancy." 573 F.2d 1123, 1130 (1978). (App. A-12 Pet. No. 78-119)

members of the court. In the panel decision which is immediate subject of this appeal, 573 F.2d 1123 (1978), Judges Kennedy and Wallace, two members of the panel, expressed their misgivings about the correctness of the 50%-plus allocation; and Judge Kennedy's misgiving was expressed in terms of the doubtful applicability of the cotenancy analogy. To quote Judge Kennedy:

> * * * [I]t has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of those treaty rights.
>
> I recognize that the opinion of the court does not advocate strict adherence to the technical rules of common law cotenancy as a means of resolving this case. The defects of the analogy, however, should be noted specifically, since alternative justifications for the apportionment rule have not yet been fully discussed. This panel is bound by *United States v. Washington, supra,* and thus I concur in today's judgment. However, I would not attempt to restate or explain that decision by means of an inappropriate analogy. We do not sustain the dignity of the treaties in question by deriving an apportionment rule from a hesitant reference to property concepts that are unrelated to the rights asserted by the parties.

Id. at 1136 (App. A-28 Pet. No. 78-119).

To quote Judge Wallace:

> While I sympathetically agree with Judge Kennedy's statement that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights," I am compelled to join with Judge Goodwin based upon our prior decision in *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. den.*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976).

Id. at 1136 (App. A-28 Pet. No. 78-119.)

The Ninth Circuit in its original decision and its latest decision, which is the subject of this appeal, was correct in searching for a common law analogy for construing the treaty. The draftsmen of the treaty were no doubt aware of the common law, for the District Court found that "[t]he treaty language 'in common with' was

probably introduced by George Gibbs, who was a lawyer and advisor to Governor Stevens." FF 23, Joint App. 110.

The court unfortunately selected the wrong analogy. Instead of utilizing the concept of the cotenancy, it should have utilized the common law concept of a "common fishery." This is the common law concept which Gibbs intended to incorporate in his drafting of the treaty, as is shown by the history of the treaty negotiations. It is also the concept which the Solicitor General successfully urged upon this Court in *United States v. Winans*, 198 U.S. 371 (1905), the first major decision of the Court construing the "in common with" language.

As we shall also show, this concept of a common fishery also fits best with contemporaneous dictionary definitions of the word "common." Like the Ninth Circuit, the District Court, in searching the dictionaries of the day, was looking in the right place, but did not look far enough.

2. The Fishery Contemplated by the "In Common With" Provision of the Stevens Treaties is Inconsistent with an Allocation of a 50 Percent-Plus Portion of the Fishery to the Treaty Tribes.

The finding by the District Court that the "in common with" language of the Stevens treaties was intended to mean a "sharing equally" of the fishery between treaty Indians and nontreaty fishermen as groups, not individuals, and the Ninth Circuit's determination that the same phrase created a quasi-contenancy interest for the Indians in the fish resource, both purport to be definitive interpretations of the treaties, and were rendered as a matter of law. Both interpretations are inconsistent with the opinions of this Court. Moreover, both represent attempts to inject into the treaty language notions which the historical background of the treaties and the legal milieu in which their terms were conceived do not support. As recently as March of 1978, this Court reversed the Ninth Circuit for engaging in a similar non-historical reconstruction of these treaties:

> These instruments (treaties, statutes, and resolutions), which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

The failure of both the District Court and the Ninth Circuit to abide by this canon of treaty interpretation has produced, in addition to a great injustice, an historical anomoly. Indian tribes situated within the state of Washington now enjoy an entitlement, the very claim to which the Stevens treaties were intended to withdraw from them: The right to exclude nontreaty fishermen from fishing grounds.

(a) Historical Background.

In the aftermath of the passage of the Land Donation Act of 1850, 9 Stat. 437, substantial numbers of settlers began to pour into the Oregon Territory west of the Cascade Mountains, spreading out over an area that encompasses what today is the western portion of the state of Washington. Whether by oversight or deliberate neglect, Congress in enacting the Donation Act broke with its previous policy of prohibiting the entry of claims by settlers to lands on which the Indian title had not been extinguished. In order to render the Indians of the area amenable to white settlement, and to defuse the potential for hostilities erupting over conflicting claims of Indians and non-Indians, Isaac Stevens, then Governor of the Washington Territory, was commissioned to treat with the various Indian residents of the Washington Territory.

One of Governor Stevens objects in negotiating the treaties with the various bands of Indians was to minimize contacts between the settlers and the Indians. The Governor therefore sought and obtained the agreement of the various bands to confine their homes to reservations to be set aside for their use. It was recognized, however, that confinement to the reservation was impossible if the

Indians were to sustain themselves. As George Gibbs, the probable draftsman of the Stevens treaties, observed:

> They [the Indians] require the liberty of motion for the purpose of seeking, in their proper season, roots, berries and fish, where those articles can be found.

(Ex. PL-9, Joint App. 326)

Accordingly, the treaty commissioners proposed and ultimately secured for the Indians the right to leave their reservations for the limited purpose of seeking food for their subsistence, of which fish constituted a principal part.

The treaty commissioners foresaw, however, that a treaty-secured right of leaving the reservation might not in itself be sufficient to assure the Indians an access to the fishery. Several months before the execution of the first of the treaties, Governor Stevens expressed concern that settlers entering upon land claims might assert their common law right (see discussion, *infra* 32) to monopolize the fishery in waters adjoining their lands, and thereby entirely exclude Indians from fishing at such locations:

> The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing. It is therefore desirable that this question should be set at rest by law.

Ex. PL-47, Joint App. 327. The identical sentiment was expressed by George Gibbs several months before, in March of 1854. Ex. PL-9, Joint App. 327)

Gibbs' and Stevens' concerns over the settlers' exclusion of the Indians from their usual fishery grounds was the genesis of the fishing provision included in each of the Stevens treaties at issue. By providing that Indians were to have "the right of taking fish at all usual and accustomed grounds and stations," the treaty secured for them access to the usual fishing grounds, and the right to

fish in those places, which might otherwise have been foreclosed by the claims of private property owners.

From the record of the negotiations, and the correspondence surrounding the proposal and execution of the Stevens treaties, three notions emerge which illustrate the meaning of the off-reservation fishing provision. First, the right of fishing secured to the Indian signatories consisted of a right of access; that is, a right to seek out and pursue the fish in the customary areas where the fish might be located. The right did not consist of an entitlement to have fish shepherded into whatever locations at which the Indians wished to set up their fishing gear. The treaty right was designed to insure for Indians, in the words of Commissioner George Gibbs, a "*liberty of motion* for the purpose of *seeking* * * * *fish*," Ex. PL-9, Joint App. 327 (Emphasis supplied). In explaining the treaties to the Indians present at the treaty signings, Governor Stevens and his fellow commissioners enunciated the same understanding of the fishery provision:

> We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, *and where you will be able to pass in canoes over the waters of the Sound and catch fish* and back to the mountains to get roots and berries.

Ex. PL-14, Joint App. 330, (emphasis supplied).

> They would have the right of *travelling throughout the country for lawful business; fishing* at accustomed places *in common with the whites.*

Ex. PL-22, Joint App. 331, (emphasis supplied).

> Mr. Simmons, the agent, explained that if they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. *That where a small tract alone was left, the privilege was given of going wherever else they pleased to fish* and work for the whites. If you can cultivate more land than this, you can have it.

Ex. PL-15, Joint App. 330 (emphasis supplied).

Second, the right of fishery secured to the Indians was not of such a nature as to entitle them to exclude

non-Indians from fishing at the same or any other locations. As between Indians and the "citizens of the Territory," the right of fishery was to be public, a "common" right, one from which no one could be excluded. On at least two occasions during the negotiations, Governor Stevens made reference to this aspect of the treaty:

> They would have the right of travelling throughout the country for lawful business; fishing at accustomed places in common with the whites. And going to the mountains for berries, always provided that they were to remain upon their reservation when required, and *were in no manner to interfere with the whites when off of it.*

Ex. PL-22, Joint App. 331-32, (emphasis supplied).

> Kalchote Neah Bay * * * He thought — he ought to have the right to fish and to take whales and get food where he liked. He was afraid that — if he could not take halibut — where he wanted, he would become poor.
> * * *
> Gov. Stevens informed them that so far from wishing to stop their fisheries, he wished to send them oil kettles, and fishing apparatus.
> * * *
> *Gov. Stevens replied that 'he wanted them to fish but that the whites should fish also.'*

Ex. PL-16(b), Joint App. 331, (emphasis supplied).

In fact, Governor Stevens' understanding that the fishery rights secured were non-exclusive in nature harmonized with the Indians' own view of the right of the fishery. As Commissioner George Gibbs later observed:

> * * * as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking, in fact, such claim would be inconvenient to all parties, as the Indians move about on the sound particular, from one to another locality, according to the season.

Ex. G-4, Joint App. 333.

Third and finally, the object which the special and general rights of access to the fishery secured to the

Indians were designed to serve was the provision of a food resource for personal consumption. The treaty provisions were not intended to insure a special commercial fishery for the Indians, especially one that would interfere with the fishing industry of the incoming settlers. This sentiment was expressed by the treaty commissioners in the minutes reflecting the commission's consideration of the provisions of the Treaty of Medicine Creek in late December of 1854:

> It was also thought necessary to allow them [the Indians] to fish at all accustomed places, since this would not in any way interfere with the rights of citizens and was necessary for the Indians to obtain a subsistence.

Ex. PL-10, Joint App. 327.

And on two separate occasions, one before and the other after the execution of the treaties, Governor Stevens referred to the same limited objects of the Indian treaty fishing right:

> The provisions as to reserves and as to taking fish, pasturing animals, and gathering roots and berries had strict references to their condition as above, to their actual wants and to the part they play and ought hereafter to play in the labor and prosperity of the territory. *It may be here observed that their mode of taking fish differs so essentially from that of the whites that it will not interfere with the latter. They catch the salmon with spears in deep water and not with seines or weirs.* (Lt. of Governor Stevens to the Commissioner of Indian Affairs in Washington, D.C., Dec. 30, 1854.)

Ex. PL-11, Joint App. 329, (emphasis supplied).

> Office Supt. Ind. Affairs
> Olympia W.T. Dec. 6, 1856
>
> Capt. E.S. Fowler,
> Special Indian Agent
> Port Townsend, W.T.
>
> Sir,
>
> I have to request that you will furnish me at the earliest practicable moment with all the information

you can collect in regard to the Fisheries of the Sound, Straits and Coast — *to what extent they might enter into our commercial operations and made an article of export* — the market — the craft best adapted to the business the best point for a depot on the Sound. The extent the whole business might be developed. The extent to which the labor of the Indians could be availed of. *Is there any likelihood* that, for some years, *the quantity of fish will be diminished as to ~~straighten the Indians~~ interfere with the subsistence of the Indians.*

Truly & respectfully
Isaac I. Stevens
Gov. & Supt.

Ex. PL-7, Joint App. 332 (Emphasis supplied).

In summary, by their insertion of the off-reservation fishing provisions into the Stevens treaties, the treaty commissioners intended to provide a means of subsistence[26] for the individual Indians by affording them a right to pursue the fishery outside their reservations. The right of access secured was a participation in public fishery, exclusive to none but open to all.

(b) **Legal Milieu.**

In drafting the language of the Stevens treaties, Commissioner George Gibbs, a lawyer by trade, (FF 23, Joint App. 110) did not choose his terms without recourse to a body of law on the subject of fisheries. By the nineteenth century, there had developed an extensive common law of fishery, christened by Sir Matthew Hale in his opus, *De Jure Maris* (circa 1667), and consuming a number of pages of scholarly treatment by Chancellor James Kent in his famous *Commentaries on American*

[26]See, also the finding of the Indian Claims Commission in *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477, 508 (1959):

> (3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, *and in no sense was this treaty provision a guarantee of future commercial fishing rights.* (Emphasis supplied)

Law (5th Ed., 1844).[27] An understanding of this law of fishery is of paramount importance for the interpretation of the treaty provisions, in view of this Court's injunction in *Oliphant v. Suquamish Indian Tribe, supra* at 206, that treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumption of those who drafted them." See discussion at pp. 31-35, *infra*.

At the time the Stevens treaties were negotiated, Anglo-American jurisprudence conceived of the right of fishing as an interest in real property. The right attached to the fee ownership of the soil underlying and adjoining the waters where the right could be exercised. In short, the right of fishing was an easement over real property, detachable from the fee and capable of being freely transferred. See 3 Kent, *Commentaries, supra* at pp. 408-418.

The rights of fishery affixed to real property varied with the identity of the fee title holder, public or private. The public domain, for example, was presumed to support a public right of fishing for all citizens, as the brief of the Solicitor General to this Court in the case of *United States v. Winans*, 198 U.S. 371 (1905) (hereinafter cited as Solicitor's *Winans* Brief) explains:

> Under English law there were three kinds of fisheries. A free fishery, or exclusive right of fishing in a public river, which was a royal franchise; such right to be valid must be very old, because Magna Charta and the later charters directed that rivers fenced should be laid open and forests be disafforested. A several fishery was one vested in or derived from the owner of the soil. *Both a free fishery and a several fishery were exclusive rights, in which they differed from a common of piscary.* (2 Bl. Com., 39, 40; id., 417 *et seq.*) But it was a general and settled principle of English law that *there was a public domain in navigable waters and their beds extending to the*

[27]In a recent decision on the subject of the fishery, this Court had occasion to describe Chancellor Kent as "the country's foremost legal scholar." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278, n. 13 (1977).

> *usual high-water mark, and that within that limit the right of fishery is common to all, and this principle has been generally recognized in the United States, excepting so far as it has been restrained by positive law or by grant from the State. In this country the presumption is against the existence of an exclusive fishery.* (*Weston* v. *Sampson*, 8 Cush., 346, 352; *Carson* v. *Blazer*, 2 Binn., 475; *Yard* v. *Carman*, 2 Pen. (N.J.), 681, 686; *Melvin* v. *Whiting*, 7 Pick., 79; 1 Pingrey on Real Property, 107, 108; Washburn on Easements and Servitudes, 533.)
>
> The riparian owners on principal rivers of a State have not an exclusive right to fish, *but the right is vested in the State and open to all.* (*Carson* v. *Blazer*, *ut sup.*; *Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R., 71).

Solicitor's *Winans* Brief, *supra*, at 43-44 (emphasis supplied).[28]

As the Solicitor noted in his discussion, the right of fishery attaching to the public domain — the ocean, bays, estuaries, and navigable portions of rivers[29] — was vested in the state, as an incident to its fee ownership of the soil underlying these bodies of water. See *Shively v. Bowlby*, 152 U.S. 1, 11-12, 57-58 (1894). But the state's holding of this title and the appurtenant fishing right was not like that of a proprietor, but rather of a fiduciary, as the Court observed in *Smith v. Maryland*, 59 U.S. 71, 74 (1855):

[28]In the common law, there had developed a considerable confusion of terminology used to describe the exclusive and non-exclusive rights of fishery. According to Chancellor Kent, the exclusive right of fishery in certain waters was alternatively denominated a "several fishery," "free fishery," or "common of fishery." Kent, *Commentaries*, supra, at 409-410, and the terms "common fishery," and "common right of fishery" denoted a right "for all mankind." *Id.*, at 411, 413, 414, 418.

The above quotation illustrates the problem of terminology. Solicitor General Hoyt, in using the term "common of piscary" is obviously referring to the non-exclusive right which Chancellor Kent (and ourselves as well) would term "a common fishery."

[29]By extending the concept of navigability, from the narrow English concept of waters in which the tide ebbs and flows, to the present day concept of navigability, the territorial extent of the common fishery has been greatly expanded in the United States. See *Shively v. Bowlby*, *supra*, at 43.

> But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well as shellfish and floating fish.

See also, *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

Thus, under the system of fishing rights prevailing through the nineteenth century, citizens enjoyed the privilege of a free and public fishery on all of the waters of the state except those portions of non-navigable waters adjoining privately-owned land. For present purposes, two aspects of this right must be emphasized.

First, the right of common fishery on the public waters of the state was a non-exclusive one. No one person or group of persons was entitled to exclude others or monopolize the fishery or any portion of it in those water subject to a common right of fishing. As Chancellor Kent noted:

> This private right of fishery is confined to fresh water rivers, unless a special grant or prescription be shown; *and the right of fishing in the sea, and in the bays and arms of the sea, and in navigable or tide waters, under the free and masculine genius of the English common law, is a right public and common to every person.*

3 Kent, *Commentaries*, *supra*, at 412. (Emphasis supplied).

Second, all rights of fishery, private and public, were by nature *terra firma*, affixed to and defined by the metes and bounds of real property. Rights did not attach to a particular run, school, or species of fish. The notion that an individual or group could have a form of exclusive interest in a run of fish destined for a particular river was simply unknown to the law. See *Geer v. Connecticut*, *supra*, at 538-40; *Missouri v. Holland*, 252 U.S. 416, 434 (1920). A person who enjoyed a public or right of fishing at a particular location therefore had no right to restrain the lawful exercise of fishing rights by another at some other location.

The meaning of the fishing provisions incorporated by draftsman George Gibbs into the Stevens treaties must be understood against this background of the common law. In allowing a reservation of fishing rights at certain fishing sites located in the territory which the Indians were ceding, Gibbs and his fellow treaty commissioners recognized and created for the benefit of the Indians what was in essence an easement right upon real property. The right reserved in the land is no different than that which any title holder may reserve in the real estate that he sells.

Secondly, by defining the nature of the right reserved as one to be exercised "in common with the citizens of the Territory", it is evident that Commissioner Gibbs intended to secure for the Indians, in the location of their off-reservation customary fishing grounds, the same rights that citizens might enjoy in a common fishery.[30]

For Indians, the provision of the common right of fishing would entail no essential change in their prior entitlement. As Commissioner Gibbs observed, the Indians of Washington Territory had always regarded the right of fishery to be what the common law termed the "common right":

> as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking, in fact, such claim would be inconvenient to all parties, as the Indians move about on the sound particular, from one to another locality, according to the season.

[30]Of course, as between the "citizens of the Territory" and the United States, the treaty did not guarantee to the citizens that all such locations would remain common fisheries for their benefit. By allowing the entry of claims upon the riparian lands of the public domain, the United States, and later the state, allowed such landholders to exclude other nontreaty citizens from their property and, in the case of nonnavigable waters, from the fishery itself. But, as the Solicitor noted in his *Winans* Brief, *supra*, at 49, the claims of private landowners were subject to the easement right created by the treaties for the benefit of the Indians. Though the riparian lands might cease to be public domain, as to the Indians, the right of fishery at their customary sites would always be the right attaching to the public domain — the "common right of fishing." Solicitor's *Winans* Brief, *supra*, at 16.

Ex. G-4, Joint App. 333. But by securing the "common right" to Indians by treaty, the treaty commissioners guaranteed to them an access to the fishery even after the public domain upon which they formerly roamed had passed to private property owners.

Measured by these "common notions of the day and the assumptions of those who drafted them", *Oliphant v. Suquamish Indian Tribe*, *supra* at 206, the boundaries of the Indian treaty right become apparent. The Indians' right of fishery at their customary fishing sites is a non-exclusive one, as the Solicitor General noted in his *Winans Brief*, *supra:* it is the right *"public and common to each person,"* 3 Kent, *Commentaries*, *supra*, at 412, and not a right of preference for any one person or group. Both the nature of the easement reserved and the guarantee of the rights of common fishery protect the Indians from exclusion from the fishery at such locations by those who would monopolize it, as this Court recognized in *United States v. Winans*, supra. By the same token, the nature of the right prevents the Indians themselves from monopolizing the fishery at such locations. Cf., *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165, 176, n. 16 (1977).

More importantly, the Indians' reserved right, like all rights of fishery recognized in the common law, is defined by and attached to real property — their "usual and accustomed grounds and stations." By its nature, the right does not consist of an interest in the fish themselves that would entitle the Indians to restrain the lawful exercise of fishing rights by nontreaty citizens at the same locations. A fortiori the right reserved does not establish any cognizable interest in the fish or lawful fishing activities outside the boundaries of the "usual and accustomed grounds."

This common-law understanding of the "in common with" language of the treaty fishing provision corresponds with the "common parlance" use of the term 'common' "as found in a contemporaneous dictionary definition." 384 F. Supp., at 356, Joint App. 111. In enunciating its

interpretation of the treaty language, the District Court abstracted only a portion of the definition of 'common' set forth in the 1828 and 1862 editions of Webster's *American Dictionary of the English Language*. The full definition is set forth below; portions quoted in the District Court's opinion are italicized:

> Common. 1. *Belonging equally to more than one, or to many indefinitely;* as, life and sense are common to man and beast; the common privileges of citizens; the common wants of men.
>
> 2. *Belonging to the public; having no separate owner.* The right to a highway is common.
>
> 3. *General; serving for the use of all;* as, the common prayer.
>
> 4. Universal; belonging to all as, the earth is said to be the common mother of mankind.
>
> 5. Public; general; frequent; as, common rapport.

Ex. PL-86, Joint App. 325.

Considered in its entirety, Webster's definition of the term "common," as applied to property, connotes the type of property interest in which no one person or group can have preferred rights. Only a strained reading of the definition would support the District Court's understanding of the term "common" as describing a *divisible* property interest.

In view of the grave consequences that have attended the District Court's allocation scheme, the significance of the court's misconstruction of the dictionary definition of "common" cannot be overemphasized. The District Court rested the legitimacy of its 50%-plus allocation of the fishery squarely upon its reading of the dictionary definition. The error in that reading having been exposed, the legal basis for the court's allocation collapses on its own terms.

Additionally, our reading of the "in common with" language of the Stevens treaties as guaranteeing to the Indians a public right of access to the fishery consistent with its use in another portion of the same article contained in one of the Stevens treaties, the Treaty with

the Yakimas (12 Stat. 951, A-133 Pet. No. 78-119). The paragraph preceedng the reference to fishing rights in Article III of that treaty reads as follows:

> Article III. And provided, That if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; *as also the right, in common with citizens of the United States, to travel upon all public highways.*

A-133, Pet. No. 78-119. (Emphasis supplied.)

If the phrase "in common with," as applied to "the right * * * to travel upon all public highways" means what the District Court says it means in connection with fishing, the Yakima Nation may at this day possess by virtue of its treaty rights the prerogative to exclude the nontreaty citizens of Washington from using one-half of the public highways in the state. Such an interpretation would be absurd as well as erroneous; it is not the less erroneous when applied to the right to fish.

Finally, it should not be supposed that, in securing to the Indians both the public right of common fishery and the easement right to locate at customary places while fishing, the treaty commissioners were affording "no rights (to the Indians) but such as they would have without the treaty." *United States v. Winans, supra,* at 380. At the time of the execution and negotiation of the Stevens treaties, there was no Fourteenth Amendment to the Constitution, and many persons residing in the United States did not enjoy the rights and privileges of citizenship. *Cf., Scott v. Sandford,* 19 Howard 393 (1857). The Indians of Washington Territory, not then being citizens of the Territory or the United States, would have been subject to discriminatory legislation completely excluding them from the off-reservation fishery, even where that fishery was a "common fishery," were it not for the protections of the treaties.[11]

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[11]Certain states had attempted to confine their common fisheries to their own citizens. The New Jersey law involved in *Corfield v. Coryell,*

At least in the matter of the fishery, the treaty provision elevated the Indians to the rights and privileges of citizenship. This Court recognized as much in *Puyallup Tribe v. Department of Game, (Puyallup I)*, 391 U.S. 392, 402 (1968), when it noted "the issue of equal protection implicit in the phrase 'in common with' "; and this notion was implicit in the Court's sustaining of state jurisdiction over individual Indian fishermen in *Puyallup Tribe v. Department of Game, (Puyallup III)*, 433 U.S. 165, 171 (1977).

The Indians' easement rights at their usual and accustomed fishing grounds, unique to them and deriving from their historical use of these locations prior to the time of the treaties which secured them, are therefore no greater than the easement rights that any landowner may reserve in land which he sells. The Indians' common right to engage in fishing at these locations is likewise no greater than the rights of each individual citizen in a fishery for the benefit of all.

(c) Subsequent Interpretations of the Treaty Provisions.

The understanding of the Indian treaty right as the guarantee of the right of equal access to the public fishery and the provision of an easement over private property to secure that access, accords with the pronouncements of this Court through a line of decisions extending back to the beginning of this century. In its more recent decisions, however, this Court has usually focused upon the Indian treaty right in the context of state regulations for conservation. See, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game (Puyallup*

Fed. Cases No. 3,320 (1825), is an example; and the Maryland law involved in *Smith v. Maryland*, 59 U.S. 71 (1855), appears to be another example. Indeed, such attempts persist, as shown by the Virginia statute involved in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). Such exclusionary laws were under vigorous attack prior to the time of the treaty negotiations, but the attacks were not successful. See *Smith v. Maryland, supra* at 75, and *Corfield v. Coryell, supra*.

I), 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165 (1977); cf., *Antoine v. Washington*, 420 U.S. 194 (1975).

Of necessity, the Court's attention in these more recent cases has been drawn to the limitations upon the state police power to regulate the fishery, as opposed to the nature and extent of the Indian treaty right. As a result, the Court's later descriptions of the right have been couched more in negative than in positive items: the exercise of the federal right cannot be conditioned on the payment of a state general revenue tax, *Tulee v. Washington, supra;* and it cannot be regulated unnecessarily or in a manner that discriminates against the Indians, *Puyallup I, supra; Puyallup II, supra; Puyallup III, supra.* But in the earlier part of this century, when private rights, as opposed to state regulatory authority, were interposed against the fishing activities of the Indians, this Court had two occasions on which to discuss the nature and scope of the Indian treaty right.

In the first, and principal, of these, *United States v. Winans, supra*, this Court indicated that the Indian off-reservation fishing right was by nature an interest in real property that protected against the forced exclusion of treaty Indians from the fishery. In its opinion, the Court resolved the treaty fishing right into two components: a "mere right" of taking fish, "not exclusive to the Indians," *id.*, at 381, later described as "the common right," *id.*, at 382; and a "special provision of means for [the] exercise" of the common right, *id.*, at 382. That this "special provision" is defined by nature and extent as a right in land, not a right in fish, is evident from the Court's further elaboration. This Court alternatively characterized the "special provision" as "a right in the land — the right of crossing it to the river — the right to occupy it to the extent and for the purpose mentioned," *id.*, at 381; as a "servitude upon every piece of land as though described therein," *id.*, and as a right that does not preempt reasonable state regulation, but "only fixes in the land

such easements as enable the [common] right to be exercised." *Id.*, at 384. The real property nature of the "special" Indian right is also evidenced by its relation to the claims of the respondent in that case: the right prevailed over an assertion by riparian property owners of "the power to exclude the Indians from the river by reason of ownership" of the adjoining land and shoreline, *id.* at 379; and also over a claim of entitlement to use "a device which gives * * * exclusive possession of the fishing places * * *." *Id.*, at 382.

Particularly worthy of note in the case of *Winans* is the Solicitor General's characterization of the Indian off-reservation fishing right. In his brief to this Court, the Solicitor expressly disclaimed that the Indian treaty right authorized the shutting down of non-Indian fishing activities at such customary locations:

> It will not be forgotten that the Indians are not claiming exclusive rights; but only rights in common with others; it is the defendants who are claiming exclusive rights. There is a *common right of fishing*, but no right in anyone to monopolize.

(Solicitor's Brief *Winans supra* at 16) (Emphasis supplied)

In the same brief, the Solicitor argued to this Court:

> "by the treaty the United States * * * reserved or granted to the Indians, under the guarantee of the national responsibility and honor * * * an exclusive right of fishery in the reservation streams, [and] a *common right of fishery* at all usual and accustomed places * * *

Id. at 27. (Emphasis supplied.)[32]

[32]In the same paragraph, the Solicitor General refers to the treaty fishing right as "the common of fishery," but from his subsequent definition of this term as a non-exclusive right, it is evident that the Solicitor General used the terms "common right of fishing" and "common of fishery" interchangeably in referring to the public right. See n. 28, *infra*.

The Solicitor's characterization of the off-reservation Indian fishing right as the "common right of fishery" is fraught with significance. Viewed in the context of the common law of fishery (see discussion *infra*, pp. 49-53), the right which the Solicitor General effectively vindicated on behalf of the Indians in *Winans* was the right public and common to every person," 3 Kent, *Commentaries, supra*, at 413, the right to be free from exclusion from the fishery at the location of their customary fishing sites.

On the other occasion in which this Court had the opportunity to discuss the nature of the Indian treaty right, *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), the Court's description of the off-reservation right also makes clear that it consisted of a right in land, an easement, and not a property interest in the fish themselves. In contrasting the claims indicated in *Winans*, with those before it in *Seufert*, the Court observed:

> The right claimed by the Indians in that case was to fishing privileges *on the north part and bank of the Columbia river*,---in this case similar rights are claimed *on the south part and bank of the river.* * * * [and] that their understanding of the treaty was that they had the right to resort to *these fishing grounds* and make use of them in common with other citizens of the United States.

Id., at 198-199 (Emphasis supplied.)

Finally, in delineating the nature of similarly-phrased treaty rights enjoyed by certain New York Indians in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916), this Court again reaffirmed the essentially territorial character of reserved common fishing rights. The non-exclusive right to hunt and fish in ceded lands was there described as "an easement, or profit á *prendre*;" a "privilege", "reserved" "as against their [the Indians] grantees and all who might become owners of "the ceded lands."; and a "right of private property" that could ground a claim of "injurious discrimination." *Id.*, at 562. That right did not contemplate any restriction on its common exercise by non-Indians, save for the good of all for conservation purposes; the Court noting that:

> Those to whom the lands were ceded, *and their grantees, and all persons to whom the privilege might be given,* would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe.

(*Id.*, at 562, emphasis supplied)

While this Court has defined the Indian off-reservation fishing right in terms that do not allow for an allocation of the fishery between treaty and non-treaty fishermen, it has recognized that the proper exercise of the state's conservation power, a matter not envisioned by the treatymakers, may in certain unique circumstances require an allocation of the fishery. In *Puyallup II, supra,* this Court invalidated a state regulatory regime that discriminated against Indian fishing by entirely pre-empting their commercial net fishery on steelhead. In *Puyallup III, supra,* the Court approved the state court's selection of an allocation formula to effectuate the "accommodat(ion)" required by the Court in *Puyallup II, supra,* at 49.

It is important to recognize, however, that the allocation solution approved by the Court in *Puyallup III* was necessary and appropriate only because the state could not effectively conserve the steelhead resource in a non-discriminatory fashion without such an allocation.

The steelhead fishery involved in the *Puyallup* cases consisted of a highly "efficient"[33] commercial net fishery by Puyallup Indians in the same "usual and accustomed" areas that had traditionally supported a relatively "inefficient" hook-and-line sport fishery. If left unregulated, the Indian commercial fishery would have entirely pre-empted the sport fishery by non-Indians on the Puyallup River, and perhaps have destroyed the entire run of steelhead. See, *Puyallup III, supra,* at 176-77. The state's prohibition of the Indian net fishery, however, would have likewise allowed a preemption of the steelhead fishery by non-Indians. See *Puyallup II, supra* at 48-49.

[33]"Efficient" is here used in the sense of number of fish caught per unit fishing time per person.

An allocation between the two fisheries was therefore necessary to avert a preemption by either one.[34]

The salmon fishery by treaty Indians and nontreaty fishermen at issue in this case, however, is in marked contrast to the steelhead fisheries involved in the *Puyallup* cases. As between treaty Indians and all other citizens, the use of the salmon resource is the same: members of both groups engage in a commercial net fishery of the salmon and take advantage of an equal opportunity to participate in the commercial and sport fisheries occurring at all locations — ocean, inland marine waters, and rivers. In light of that equal opportunity, there is no danger that one group will preempt another in the salmon fishery harvest. Thus, since state conservation regulations applied to all fishermen are inherently nondiscriminatory, there is no necessity for an allocation between different fisheries.

(d) **Summary.**

Against the background of the treaty negotiations, the historical and legal milieu in which the treaties were conceived, and the undeviating opinions of this Court, the radical and unjust restructuring of rights effected by the District Court becomes all too evident.

The District Court's orders have transmitted the Indians treaty-guaranteed servitude upon a real property, *United States v. Winans, supra,* into a servitude upon fish. Fifty percent-plus of the number of salmon and steelhead annually returning to spawn in Washington's rivers and streams are now impressed with an encumbrance in favor of treaty fishermen. As to such fish, treaty tribes are given the right to restrain the "trespass" of non-treaty fishermen upon them, even though that "trespass" may occur tens or hundreds of miles beyond the usual and accustomed fishing grounds of a particular tribe.

[34]The language "entirely preempted by non-Indians" is that used by Justice Douglas in his opinion for the court in *Puyallup II, supra,* at 48. Actually, non-Indians did not entirely preempt the sport fishery on steelhead; Indians as well engaged in such a sport fishery.

It is difficult to imagine a more thorough reversal of the territorially-confined right of fishing originally incorporated into the Stevens treaties, or one more inconsistent with Governor Stevens' exhortation to the Indians "but that the whites should fish also." Joint App. at 331.

Moreover, by allocating the fishery between treaty Indians and other citizens, the District Court has destroyed the common fishery envisioned by the treaty provisions, thereby denying to non-treaty citizens the right of fishing that is "public and common to every person." 3 Kent, *Commentaries, supra* at 412. If there were a common fishery in Washington waters, as there was prior to the decision of the District Court in this case, both treaty and non-treaty fishermen would have the opportunity to fish for 100% of the harvestable resource, although the activities of each and the vagaries of nature would preclude either group from taking more than a fractional share of the harvestable fish. The actual apportionment of the harvest would be determined by the amount of time, effort and resources invested by each individual fisherman, and of course, that ever present factor, luck. Under the current court-ordered system, however, nontreaty fishermen are prohibited from fishing upon more than 50% of the available resource. There is now only a true common fishery for treaty Indians and all other citizens as to one-half of the salmon and steelhead fishery.[35] The other half is an exclusive franchise for the benefit of the 800 or so treaty fishermen. These fishermen have been insulated from the laws of the marketplace: each can expend only a fraction of the effort that the non-treaty fisherman invests and yet reap a harvest that is many times over that of the average non-treaty fisherman.

The injustice of such a franchise has long been recognized by the legal tradition which we share. As Chancellor Kent observed in his famous *Commentaries*, Volume III, *supra*, an exclusive right of fishing in the

[35]Under the District Court orders, treaty Indian catches occurring outside of the "usual and accustomed" areas are included within the nontreaty citizens' 50% share. See discussion at pp. 7, 78-82, *infra*.

public waterways "was so unreasonable, as to be prohibited in future by the Magna Carta." *Id.*, at 409, 410, n. *c*. It is no less unreasonable or unjust to the non-treaty fisherman who has been ordered by the District Court to refrain from fishing while his treaty Indian neighbor continues to fish.

B. INTERNATIONAL PACIFIC SALMON FISHERIES COMMISSION

1. Introduction.

At issue is the propriety of the District Court's extension of the 50% allocation to fisheries which are subject to the jurisdiction of the International Pacific Salmon Fisheries Commission. The extension was implemented in 1975 through orders requiring Fisheries to allow special Indian fisheries in violation of then-existing IPSFC regulations. Fisheries by Indians on IPSFC stocks are now permitted at times and in manner prohibited by IPSFC regulations. Indian fisheries in IPSFC waters are also permitted in the face of total closures if large mesh nets are used.

These orders are in direct opposition to the District Court's original holding in 1974 that:

> * * * This court believes that treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the commission.

United States v. Washington, supra, 384 F.Supp. at 411. (Joint App. 214).

These orders also directly contradict the affirmance of that original decision by the Ninth Circuit, which declared:

> Congress sufficiently indicated its intent that all persons, including Indians, be subject to commission regulations.

United States v. Washington, supra, 520 F.2d at 690. (Joint App. 54).

The advent of these orders, adopted in response to motions of the United States and various tribes, also

marks a direct reversal of the position that the United States has taken before this Court. In opposing the state's petition for certiorari in Pet. No. 75-588, the United States gave the following assurances to this court:

> The decision below presents no issue regarding that [IPFSC] Convention requiring further review. Both the district court (384 F.Supp. at 411) and the court of appeals (Pet. App. 49-50) specifically held that all persons, including treaty-protected Indians, are subject to the regulations of the IPSFC. Thus there is no question of the decree impinging upon the authority of the IPSFC.
>
> * * * As we have demonstrated, both courts below specifically recognize the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the commission, they are not sanctioned by the decision under review.

Brief of United States in Opposition Pet. No. 75-588, pp. 21-22.

Immediately after the District Court's entry of the orders extending the 50% treaty Indian allocation of the fishery to IPSFC waters in 1975, the state filed its notice of appeal to the Ninth Circuit. The case was not heard until 1978.

2. **This Case Is Not Moot.**

The Court of Appeals refused to review the merits of the District Court's orders respecting the IPSFC. At the behest of the United States, the Ninth Circuit dismissed the IPSFC case as moot, holding:

> The 1975 season has now passed and neither the order of the United States District Court nor that of the state court has current force.

United States v. Washington, 583 F.2d, at 1121. (1978) (A-32, Pet. No. 78-119).

However, the actions of the District Court and the United States government, commencing with the court's orders in 1975 and continuing up to the present day, belie the contentions of the United States and the holding of the Ninth Circuit that the issue is moot.

The District Court's orders of 1975 are still in effect and have been implemented for every fishing season since their entry. The injunction allowing Indians to use large mesh nets in IPSFC waters when waters are closed by Commission regulation (A-125, Pet. No. 78-119) has been implemented in each subsequent season. More importantly, the court's Conclusions of Law (CL 56-59, A-114-15 Pet. No. 78-119) that the 50%-plus allocation applies to the IPSFC fisheries also remains in effect though it has been inplemented in varying ways in subsequent seasons. In 1976 the court ordered the United States and the state Fisheries Department to provide special fisheries for Indians in IPSFC waters. This was specifically based upon the 1975 orders and its Conclusions of Law that Indians are entitled to 50% of the United States' catch in IPSFC waters. (Joint App. 461 et seq.)

In its dealings with the Canadian government and the IPSFC in particular, the United States continues to take the position that it is bound by the District Court's orders to provide for an allocation of the United States fishery in IPSFC waters to the treaty Indians. The government provided directives to its representatives on the IPSFC, including the director of Washington's Fisheries Department, as follows:

> * * * with the aim of accommodating the *United States v. Washington* decision regarding Indian treaty rights * * * you are instructed to support it at the next commission meeting and vote for its adoption.

App. Pet. No. 78-119, pp. 168-169.

In its adoption and promulgation of regulations for the IPSFC fishery, the Departments of Interior (adopting treaty Indian regulations) and Commerce (all citizen regulations) have continued to provide special Indian fisheries under regulations not consistent with those passed by the IPSFC. In proposing these regulations, the Department of Interior expressly noted in the Federal Register that the regulations were to be adopted in order

> to implement treaty rights "affirmed in *United States v. Washington*."

25 CFR 256(b) (Federal Register, Volume 43 No. 122, Friday, June 23, 1978.)

Those special regulations for treaty Indians were challenged. A District Court decision upholding them was appealed to the Ninth Circuit. Recognizing the continuing nature of the controversy involved the Ninth Circuit in its most recent decision in this matter retreated from its former determination that the District Court's 1975 orders regarding the IPSFC fisheries were moot observing:

> Despite the procedural cloth in which this proceeding is garbed, the real attack is upon the decree in *United States v. Washington, supra.* The interpretation and effect of the decree in *United States v. Washington* are issues which are presently pending before the United States Supreme Court.*

Under these circumstances it would be in appropriate for us to further pursue the issues.
Purse Seine Vessel Owners Assn. v. United States Dept. of State (9th Cir. No. 77-2968, filed October 26, 1978).[38]

The District Court's 1975 orders have continuing validity in two other senses. Its decree provides:

> * * * defendants must, * * * afford treaty Indians an opportunity to take an equal share of the total number of harvestable fish, which, absent the fishing activities of other citizens, would be available for harvest at their usual and accustomed fishing grounds within Washington waters, *or must otherwise equitably adjust the treaty Indians' share of other species or in other areas to compensate them for disproportionate numbers of fish taken by other Washington citizens under the regulations issued by said [IPSFC] commission.*

App. Pet. No. 78-119, A-117, Fourth Supp. Findings of Fact, Conclusions of Law and Decree, 1975 Frazier River

"*Washington v. United States [No. 78-119] cert. granted (1978) ___ U.S. ___; Puget Sound Gillnetters Assoc. v. U.S.D.C. [No. 78-130] cert. granted (1978) ___ U.S. ___; consolidated with Washington v. Washington State Commercial Passenger Fishing Vessel Assoc. (1978) ___ U.S. ___."

[38]The United States brief in response to Petition No. 78-119 and 78-139 referred to the pendency of this action at pa. 18, fn. 15.

and Sockeye Pink Salmon Harvest (A-105 Pet. No. 78-119) (Emphasis supplied)

As yet, the District Court has not effected such an "equitable adjustment" for non-treaty fishermen catches in IPSFC waters. However, it has made equitable adjustment for non-treaty catches occurring in other waters "outside the jurisdiction of the state of Washington," *i.e.*, in the ocean waters beyond the state's three-mile limit, now under federal jurisdiction (16 U.S.C. §§ 1801, *et seq.*). Nontreaty fishermen and the state therefore continue under the liability that such adjustments will be made. This continuing "liability" for equitable adjustments when Indians catch less than their 50% allocation within the IPSFC waters makes clear that the District Court's determination that the 50%-plus allocation applies to those waters is not a moot question.

The court's decree also enjoined Fisheries "from allowing any fishing * * * by persons not entitled to exercise Indian treaty rights * * * until Fisheries adopts and files with this Court regulations * * *" to provide treaty Indians an equal share of fish or equitably adjustment as set forth above. Fourth Supp. *supra* at A-117.

As a consequence of the state court decisions (discussed *infra* at 94-99), the Department of Fisheries was unable to provide for such a special Indian fishery in IPSFC waters. Because of the terms of the District Court's injunction conditioning state authorization of nontreaty fishing upon the provision of a special Indian fishery in IPSFC waters, the state was forced to abandon its congressionally-authorized and historical role as the enforcement agency for IPSFC regulations. (16 USC § 776(d), RCW 75.40.060, A-159-60, 167 Pet. No. 78-119).

3. The District Court Orders Requiring Special Indian Fisheries Which Are Incompatible With IPSFC Regulations Are Unlawful.

The 1937 Convention[37] with Canada specifically requires that both nations ensure compliance with Commission regulations by all of their citizens.[38] In order to execute this Convention and implement the commitment of the United States to subject all of its citizen fishermen to the regulations of the IPSFC, Congress enacted 61 Stat. 511 (July 29, 1947),[39] P.L. 80-255, which provides:

[37]The Convention was signed in 1930 but was not ratified until 1937. See: A-135, Pet. No. 78-119.

[38]Each High Contracting Party shall be responsible for the enforcement of the orders and regulations adopted by the Commission under the authority of this Convention, in the portion of its waters covered by the Convention. Art. VIII, *supra* A-145, Pet. No. 78-119. Also see, Art. IX, *supra*, at A-145, referring to "Every national or inhabitant, * * *" and Art. X, *supra*, at A-146.

[39]The ten year interval between the 1937 ratification of the Convention with Canada and the enactment of this legislation is due to the provision in the 1937 Convention (A-148, Pet. No. 78-119) that the Commission could not promulgate or enforce regulations until studies had been completed on two cycles of sockeye. On the day the United States Senate completed legislative approval of the bill, the following statement was made on the Senate floor.

> MR. MAGNUSON. Mr. President, by way of explanation, the reason for my request at this time is that this is an emergency measure. The fishing fleets are ready to sail on Monday. This convention must be ratified by the Congress. Under the United States and Canadian salmon fisheries treaty each nation pledges itself to enact enabling legislation. Canada has done so through her Parliament. The House of Representatives has passed the bill unanimously, without a dissenting vote.
>
> This treaty has been the subject of many conferences and negotiations. The Fraser River lies wholly within the Dominion of Canada, but the mouth of the river is about 5 miles north of our nothern border, and all the salmon are caught in international waters in Puget Sound, between Canada and the United States. Because of the fact that the fleets are ready to start the first of the week, I hope the Senate will see fit to follow the House action and the action of the Canadian Parliament in ratifying this convention. Congressional Record Vol. 93, p. 9167 (July 17, 1947).

> "It shall be unlawful for any person to engage in fishing for sockeye salmon [or pink salmon][40]in convention waters in violation of the Convention or this chapter or of any regulation of the Commission."

Codified as 16 U.S.C. § 776 (2).

Originally, the District Court and the Ninth Circuit recognized that the Convention and executing statute required that "all" United States citizens, treaty Indians included, be bound by IPSFC regulations. The District Court noted in its original decision:

> * * * treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission.

(*United States v. Washington*, 384 F.Supp. *supra*, at 411, Joint App. 214.)

The Ninth Circuit observed that Congress intended that all fishermen were to be subject to IPSFC jurisdiction by its statement:

> Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulation.

(*United States v. Washington*, 520 F.2d 676 (1975) at 690, Joint App. 54.)

In originally recognizing the supremacy of the IPSFC regulations, the District Court was aware that those regulations for sockeye and pink salmon would have

> * * * a coincidental effect on the taking of coho, chum, and chinook salmon which are present during the times of such regulations are in force.

(*U.S. v. Washington*, 384 Fed. Supp., *supra*, at 392, FF 214, Joint App. 178.)

During the first fishing season after that decision, Indians complied with the IPSFC regulations.

Shortly after the Ninth Circuit affirmed the District Court (June 4, 1975), the district court reversed its earlier

[40]Pink salmon were included by amendment in 1957. P.L. 85-102, 71 Stat. 294.

ruling that IPSFC regulations apply to all fishermen including treaty Indians. On June 10, 1975, the United States and some tribes asked that Fisheries be ordered to either set special fisheries for Indians in IPSFC waters or refrain from authorizing any fishing in IPSFC waters. The first such injunction was issued on June 26, 1975.

In July, 1975, in response to a motion by the Swinomish Tribe, the court enjoined the application of the IPSFC regulations which were then enforced by the state pursuant to RCW 75.40.060. Also see 16 U.S.C. § 776(d). This court order permitted the tribe to fish for chinook salmon in areas and at times that the IPSFC prohibited fishing. The fishing was permitted by the court provided the Indians used a larger mesh net than normally used for sockeye and pink salmon. (See Order of August 3, 1975, A-125, Pet. No. 78-119). That order was entered despite the uniform testimony that such a Swinomish net fishery would take sockeye and pink salmon which are under IPSFC jurisdiction and that Indian fishermen who had already commenced such fishing had been catching sockeye. (See testimony of treaty fishermen, TR 89 and 99 of August 6, 1975; patrol officer, TR 105, *supra*, and a biologist, TR 114, *supra*).

4. The Court Does Not Have Jurisdiction to Interfere With an International Commission.

The IPSFC is an international commission created by treaty negotiated by the Executive and ratified by the Senate. Three of the six members are appointed by the President and the other three by Canada. The international character of the Commission and its members renders it unamenable to the jurisdiction of the District Court. Indeed, an assertion by the court of jurisdiction over Commission actions, encompassing within it a claim of authority over the actions of the Canadian commissioners, would be tantamount to an assertion of jurisdiction over the executive branch of the Canadian government.

Nevertheless, the District Court attempted to assert such jurisdiction by consciously interfering in the decision-making process of the Commission. The court included several stays of its orders specifically to allow time for United States representatives on the Commission to persuade the Commission to change its regulations. The court directed the Director of Fisheries, in his capacity as an International Commissioner, to "promptly take actions, whatever seems appropriate in the occasion, to press the matter before the Commission." (TR 144, July 11, 1975, quoting the judge.)

Similarly, the court, when ordering that the Swinomish tribe be allowed to disregard Commission closures, as implemented by state regulations, delayed the entry of the order so the state could ask the IPSFC to permit such a fishery (TR 130, 133-34, August 6, 1975). After the IPSFC refused, the court entered its order (A-125-27, Pet. No. 78-119).

As previously noted, implementation of the District Court orders has influenced the United States to direct its commissioners to vote as they (the United States) believe is required by the court's orders.[41] Such interference with the conduct of foreign affairs is a wholly inappropriate function for any federal court.

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[41]The Ninth Circuit in another action involving the IPSFC fishery, *Purse Seine Vessel Owners Assn. v. United States Dept. of State*, *supra*, at p. 5, stated:

> The regulatory scheme promulgated by the Interior Department was expected to provide the treaty Indians with an opportunity to catch about 10 to 15 percent of the catch available to the United States. Evidence introduced at the time of the hearing on the preliminary injunction indicated that the treaty Indians were able to catch about 20 percent of the American share.

The court's statement makes clear that although the United States has consistently taken the position that the state Department of Fisheries is obligated to fully implement the 50%-plus allocation, other United States agencies have moved to implement less than 50% when they exercise jurisdiction over the fishery.

See *infra*., p. 93, where it is noted that the same inconsistency has occurred in the ocean fishery under United States jurisdiction.

In *Z & F Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941), this Court was faced with a similar indirect attempt by a federal court to interfere with an international commission created by a treaty between the United States and Germany to rule on war claims by American citizens. In concluding that an indirect challenge to the Commission's determination could not be entertained by the court, the following statement was made:

> And the fact that petitions sought to challenge the Commission's power by proceedings against the Secretaries of State and the Treasury, and not by direct suit against the Commission, is immaterial. If petitioners cannot directly attack the Commission in the courts, neither can they, in the absence of congressional consent, assail the propriety of its awards through the expedient of suits against others charged with responsibility for executing the final determination of the Commission.

(*Supra*, at 491.)

The challenge there in question would not have required the commission to change its orders, though it would have frustrated their implementation. Here the court was attempting to force the international commission to change its orders.

In the present case, the District Court's interference with an international commission is more flagrant. Its actions have drawn a rebuke by the International Commission which filed two protests with the United States Secretary of State in 1975. (Ex. JX 10 and 11, Joint App. 547.) Others have been filed including as recently as July, 1978 (Supp. App. B-1, B-2, Pet. 78-119) A letter of objection was sent by the government of Canada to the government of the United States. Although the United States agreed that this letter would be provided as an exhibit, TR 10-11, August 6, 1975, it has not done so.

Although the government provides a special Indian fishery through its ocean fishery regulations, there is no attempt by the United States to provide any specific share to Indians in the ocean fisheries. Yet, fish caught in that area under federal jurisdiction are counted by the court against the "inside" nontreaty fishermen's share per the "equitable adjustment" (discussed *infra*, 7, 78-82).

The extent of the District Court's "intrigue" in international affairs is further evident in its manipulation of the terms of its orders. A state department official advised the court by affidavit that the State Department has declined to implement one portion of the court's order:

> No action was taken * * * with regard to the further provision pertaining to a five day fishery, since the Department of State concluded that provision was contrary to the United States obligation and policies under the Salmon Convention in that it was inconsistent with the basic regulatory scheme elaborated by the Commission.

(Record in 9th C.A. No. 75-2835, 76-1092, p. 160). The court then amended the injunction to delete the five-day fishery.

The continuing international ramifications of the District Court's actions are also documented in the record. Donald L. McKernan, who as Chief Negotiator headed the United States' delegation in bilateral negotiations with Canada, testified to the possible disruption of the regulatory system of the IPSFC by the court's actions. (TR 136, July 11, 1975.) When asked whether a disruption of the IPSFC regulatory system could cause problems in the international negotiations with Canada (which encompass all shared fisheries, not just those under the IPSFC), his answer was "yes." (TR 137, July 11, 1975). See also the 1978 protest of the International Commission communicated to the United States, reprinted (App. B-1, Supp. Pet. No. 78-119), and the IPSFC communication to Canada on the same subject (App. B-2, Supp. Pet. No. 78-119).

5. The Convention (50 Stat. 1355) and Congressional Act Providing for Enforcement of IPSFC Regulations (16 U.S.C. 776) Supersede Any Indian Treaty Rights Which Might Have Existed in Waters Now Under IPSFC Jurisdiction.

At the outset, it should be noted that if this Court accepts the argument we have urged above (see discussion

at pp. 38-63, *infra*) that the Indians' "in-common with" right preserved a special easement over property and a guarantee of the same rights as all other citizens, the question of whether the Convention and implementing statutes supersede Indian treaty fishing rights need not be addressed.

That Indians were fully subject to IPSFC regulation has been the historical understanding of the parties to the IPSFC treaty, the United States and Canada. It also remains the understanding of the IPSFC itself (note the continuing protests of the Commission to special Indian regulations).

The courts below should have deferred to, or at least considered, the opinion of the administrative agency, the IPSFC, to which implementation of the Convention was delegated by the two nations pursuant to the Commission. *Udall v. Tallman*, 380 U.S. 1 (1965); *Immigration Service v. Stanisk*, 395 U.S. 62 (1969). While it may be argued that deference to administrative construction is a domestic law concept and should not here be invoked, we submit that reasons for such deference are compelling in the present circumstances. The usual reason for a court's deferring to an interpretation by an administrative body is that such an agency is familiar with its mandate and the mechanisms necessary to implement it. This principle is clearly applicable in the case of the IPSFC and requires that a court should honor the IPSFC's construction of its mandate. That construction holds that the IPSFC has the responsibility to establish a uniform management system for the protection and harvest of the resource without reference to ancestral characteristics of fishermen.

If the Court concludes that the Indian treaty language created a special right to an allocation, then the superseding effect of the subsequent Convention and statute must be considered. That Congress has the plenary authority to amend or abrogate Indian treaty rights by subsequent legislation is well established. *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903); *cf. Chae*

Chan Ping v. United States, 130 U.S. 581, 606 (1889). While courts will not imply abrogation of treaty rights by subsequent legislation that can be fairly construed to allow their continued exercise,[42] their exercise must be compatible with the requirements of the subsequent legislation.

The Court need not find an express abrogation to conclude the Indians must comply with IPSFC regulations. Indeed, such evidence as expressions of Congressional intent to abrogate special Indian treaty rights in IPSFC waters would not be expected since such special rights did not exist until created by the District Court in 1975.[43] The questions are two; the effect of the Convention and the effect of the statute implementing it.

The rules for determining the effect of either a subsequent treaty or statute upon a prior treaty are the same; if inconsistent the later treaty *or* statute will control:

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888); see also, *Kansas, Missouri & Topeka Ry. v. Roberts*, 152 U.S. 114 (1894).

This Court has on a number of occasions considered conflicts between statutes and treaties.

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[42] *Menominee Tribe v. United States, supra; Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934).

[43] One exception: Under this Court's decision in *Tulee v. Washington* 314 U.S. 681 (1942), Indians fishing in IPSFC waters prior to 1975 did not purchase licenses. As the Commission has never engaged in licensing, leaving that to Canada and the State of Washington, there were no special rights vis-a-vis the IPSFC.

In *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), this Court considered the applicability of a tax law for tobacco produced "within the exterior boundaries of the United States." *Id.* at 618. The question was whether a prior Indian treaty which provided for payment of tax "*only*" where a sale occurs "outside of the Indian territory" precluded the collection of the tobacco tax. This Court held that the act and the treaty were inconsistent since the Indian territory was within the exterior boundaries of the United States, and that the legislation being the later in time governed. In upholding the tobacco tax within Indian territory this Court stated:

> A treaty may supersede a prior Act of Congress (*Foster v. Neilson*, 2 Pet., 314) and an Act of Congress may supersede a prior treaty.

Taylor v. Morton, 2 Curt., 454. *The Clinton Bridge*, 1 Walw., 155. *Cherokee supra*, at 621.

> Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed. There being no ambiguity, there is no room for construction. It would be out of place. *U.S. v. Wiltberger*, 5 Wheat., 95. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it. *Morehouse v. Rennell*, 1 Clark & F., 327; *Wolff v. Koppel*, 2 Den., 372.

Id. at 620.

Subsequently, in *Edye v. Robertson*, 112 U.S. 580 (1884), the relationship between a statutory tax for "each and every passenger, not a citizen of the United States, who shall come * * * to any port within the United States" *supra* at 589-90, and a prior treaty was considered. The treaty provided that the United States would not impose any greater duty on friendly aliens than on citizens. This Court, in recognizing the conflict held that the statute was applicable, stated:

> A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the mattter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate.

Id. at 599. Also see *Whitney v. Robertson, supra; Chae Chan Ping v. United States, supra;* and *Pigeon River Improv. Slide & Boom Co. v. Charles W. Cox Ltd.*, 291 U.S. 138 (1934).

Under the principles of construction enumerated in each of the above holdings of this Court, the conclusion must be that the IPSFC and implementing statute supersede any special Indian treaty rights found to have been created by the off-reservation fishing provision.

The IPSFC Convention providing that "taking * * * salmon in violation of an order of the Commission shall be prohibited" (convention, *supra*, Art. IV, A-142, Pet. No. 78-119) and implementing statute "it shall be unlawful for any person to engage in fishing * * * in violation * * * of any regulation of the Commission" (16 U.S.C. 776(a)(a), A-160, Pet. No. 78-119), are clear and unambiguous. These provisions are in clear conflict with the District Court's construction of the earlier treaties with the Indians to provide an exemption for such Indians.

As this Court declared in *Pigeon River, supra*, in the event of any ambiquity, the Court should "* * * look to the practical construction which has been placed upon it." *Id.* at 158. Until the District Court's orders, the IPSFC regulations were regarded to be binding on all citizens, including treaty Indians. Even if the language of the Indian treaties were ambiguous, the practical construction which has beenplaced upon them since the Convention, and the opinion of the administrative agency charged with implementing the Convention, should be given deference by the Court. Under either test the result is that Indians are fully subject to IPSFC regulation; any special right has been superseded.

Finally, as this Court stated in *Cherokee, supra,* at 228;

> "Congress not having thought proper to exclude them, it is not for this court to make the exception."

Congress could have made an exception for treaty Indians in ratifying the Convention or passing the implementing statute. It is not for the District Court to do so. When Congress has in the past sought to provide such an exemption for Indians, it has done so explicitly. For example, in the Marine Mammals Protection Act, 16 U.S.C. § 1361, et seq., an exemption is specifically provided:

> The provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Artic Ocean if such taking * * *

16 U.S.C. § 1371 (b); also see, the Protection of Bald and Gold Eagle Act 16 U.S.C. § 668(2).

No such exception having here been made, the subsequent treaty and statute control. Any special right has been superseded.

6. Establishing a Special Treaty Indian Share in the IPSFC Waters or Providing For an Equitable Adjustment Is Not Appropriate and Constitutes An Abuse of Discretion.

The Ninth Circuit in its 1975 affirmance of the District Court's original orders, *United States v. Washington, supra,* considered the IPSFC fishery in the context of a section entitled "Equitable Adjustment." 520 F.2d *supra* at 688-91, Joint App. 52-54. The District Court's IPSFC orders provide that the court may require an "equitable adjustment", thereby increasing the Indian fish share in other areas to reflect the harvest by other citizens in the IPSFC fishery. The facts of the Fraser River fishery do not support such an adjustment.

We have previously indicated that nature of this "equitable adjustment" concept, *infra*, at 78. According to

the Court the basis for equitable adjustments is that:

> Parties to the treaty did not anticipate shortages of harvestable fish; they did not foresee that downstream fishing by non-Indians would some day injure the Indians' right to fish at their usual places.

United States v. Washington (9th Cir. 1975), *supra,* at 689.

The Ninth Circuit went on to suggest, but not mandate, a remedy for situations when downstream fishing by Washington fishermen take fish before they reach the tribe's usual and accustomed grounds:

> The court may therefore adjust equitably the treaty Indians' share to compensate them for fish taken by other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which would otherwise be available for harvest at their traditional treaty areas. The court may so adjust the tribes' allocation to compensate, of course, only those tribes which share in the harvest of Fraser River salmon. * * *

Id. at 690.

Thus, the propriety of an equitable adjustment must be founded upon a determination that the tribal opportunity to fish was diminished by the harvest by other Washington citizens before the fish reached the Indians' usual and accustomed grounds and stations. The situation of the IPSFC fishery does not support such a determination, and thus does not qualify for an equitable adjustment.

The fish which are subject to the IPSFC fishery are destined for Canada's Fraser River. These fish are *not* returning to terminal areas in Washington which are usual and accustomed grounds and stations of treaty Indians. When the fish pass through usual and accustomed grounds in Washington territorial waters, they are in areas subject to the IPSFC jurisdiction.

Prior to the annual IPSFC fishery by treaty Indian and all other fishermen, there is only an insignificant American harvest because most of those fish migrate directly from northern Canadian waters into the Strait of

Juan de Fuca. Hence, Washington citizens do not fish upon IPSFC runs before those fish reach waters fished by treaty Indians.

Once the Fraser River fish reach the waters where the bulk of the American fishery occurs, the tribes having usual and accustomed areas within the IPSFC waters have an equal opportunity to fully particpate in the initial harvest of these runs. Indeed, the tribes have the opportunity to fish before most of the Canadian net fishery.

Despite this equal opportunity, treaty fishermen have devoted their fishing efforts to the fisheries outside of IPSFC waters in the seasons of the IPSFC fishery. In 1975, for example, the treaty fishing effort in the IPFSC fishery was less than one-tenth of the nontreaty fishing effort.[44] Necessarily, the relatively low effort by treaty fishermen in the IPSFC fishery renders it impossible for treaty Indians to harvest 50% of the United States' share of the Fraser River salmon runs.

Under the District Court's decrees, however, certain treaty Indians can be "compensated" for the difference between the treaty and nontreaty harvests in the IPSFC fishery, even though that difference did not result from a denial of equal opportunity to treaty fishermen to share in the IPSFC harvest, or an interception of the runs by nontreaty fishermen before the fish runs reached tribal

[44]In its decree of July 16, 1975, the District Court made the following findings of fact concerning the respective fishing efforts of Indian and non-Indian citizens in the IPSFC fishery: (FF 254, 274, A 109, Pet. No. 78-119):

	Indian (Predicted for 1975 season)	**non-Indian 1974 season**
Large gillnets	65	1140
Gillnet Skiff	39	
Purse seine	4	272
Reefnet		54

A representative of the Lummi Tribe testified that, of an approximately 175-200 tribal fishermen and boats, only 50 would participate in the IPSFC fishery in 1975. (Tr. June 26, 1975, pp. 60-71).

"usual and acustomed grounds."[45] The "equitable adjustment" formula incorporated in the court's 1975 order operates without regard to the reasons for the relative higher catch of nontreaty fishermen.

We submit that all of these factors render it highly inequitable for nontreaty fishermen to be subject to any further restrictions upon their opportunity to fish because of the failure of treaty Indians to harvest 50% of the American share of the IPSFC fishery.

C. IF AN ALLOCATION IS EQUITABLY REQUIRED, THE DISTRICT COURT ABUSED ITS DISCRETION IN ALLOCATING 50% PLUS OF THE FISHERIES TO INDIAN TREATY FISHERMEN.

1. Introduction.

In an earlier section, *infra*, at 60, we noted that, under special circumstances, the exercise of the state's power to conserve the fishery necessitated an allocation of the fishery between treaty Indians and all other citizens. However, the salmon fishery, unlike the river steelhead fishery in the *Puyallup* cases, is in the marine waters available for both sport and commercial harvest. Therefore, uniformly applied state conservation regulations do not result in a treaty Indian or nontreaty citizen preemption of the fishery. It was the state's attempt to have a preemptive fresh water fishery for steelhead that required an allocation between the two groups in the *Puyallup* cases.

In this section, we assume only for the purpose of argument that the District Court correctly determined that some form of allocation of the fishery resource between treaty Indian and non-treaty fishermen was necessitated. Even if that assumption is made, the District Court abused its discretion — in fact, completely refused

[45]As noted above, the bulk of the United States' fishery in IPSFC waters occurs in areas which are also the "usual and accustomed" fishing grounds of various tribes.

to exercise its discretion and ignored considerations referred to by this Court — in its allocation of a 50% - plus portion of the harvestable fish to treaty Indians.

2. Individual Interests of Fishermen.

From a survey of its original opinion, nothing could be more evident than that the District Court did not exercise any discretion in selecting its allocation formula. The District Court determined, as a matter of law, that the "in common with" language of the Stevens treaties meant that treaty Indians and all other citizens were to "*share equally* the opportunity to take fish," 384 F. Supp. at 343 (Joint App. 89), and its 50-50 allocation formula followed from this determination.

Even the court's special treatment of the Indian ceremonial, subsistence, and on-reservation catches flowed from its determinations of law, and were not, in the court's view, a matter for discretion.[46] The special ceremonial and subsistence fishery was based upon the court's finding of a "special treaty significance distinct from and superior to the taking of fish for commercial purposes." Id., at 343. There is no mention of these fisheries in the treaties. Likewise, the special status for Indian on-reservation catches rested upon the holding that "[a]n *exclusive* right of fishing was reserved to the tribes within the area and boundary waters of the reservation," *Id.*, at 342-43. However, only the Yakima treaty has such a provision.

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[46]The only issue upon which the District Court chose to exercise equitable discretion was in reference to fishing by nontreaty citizens outside of the state's jurisdiction. The court declared that it would make periodic upward adjustments in the treaty fishermen's "50% plus" allocation to:

> compensate treaty tribes for the substantially disproportionate numbers of fish caught by nontreaty fishermen in marine waters closely adjacent to but beyond the territorial waters of the state, or outside the jurisdiction of the state, although within Washington waters.

Id., at 344. (Joint App. 90).

(The latter presumably refers to IPSFC fisheries which occur in Washington waters.)

In its first opinion, the Ninth Circuit affirmed the District Court's exercise of "nondiscretion" in the selection of a 50-50 allocation between treaty Indians and all other citizens. Ironically, the court observed that "the court's apportionment was well within its discretion." 520 F. 2d, *supra* at 688. (Joint App. 53). In the view of the Ninth Circuit, the 50-50 division was "the fundamental principle to be applied in a judicial apportionment of the fish," Id., at 688. This principle was not founded in the present or past equities of the parties but rather form the "formal equality" of the bargaining positions of the United States and each of the tribes at the time of treaties. *Id.* at 688.

In its second opinion, which is the immediate subject of this appeal, the Ninth Circuit retreated from its earlier determination that the 50-50 allocation formula was to be the "fundamental principle" in a judicial apportionment. At the request of the United States, the District Court in 1977 adjusted for the coho fishery in that year the Indian treaty share to 45%. Thus, the Ninth Circuit, when faced with a 45% allocation for one year for one species but 50% for the other species noted that "[t]he numbers question is one of degree, but not one of principle." 573 F. 2d *supra*, at 1130 (A-13, Pet. No. 78-119). Nevertheless, the Ninth Circuit, in adhering to its co-tenancy analogy, held that certain factors should not be considered in a discretionary allocation of the resource. First, the court determined that the number of fishermen in each group, treaty Indians and all other citizens, was "simply irrelevant under the law" *Id.* at 1128 (A-7, Pet. No. 78-119). In the circuit court's view, the only equities to be considered were those of the "quasi co-tenants", not the individual fishermen affected by the allocation. Secondly, while recognizing that the state's hatchery programs, including those supported by license fees and taxes paid only by nontreaty fishermen, producing fish for harvest by all citizens, treaty and nontreaty, constituted one of the "equities that lie on the side of the State of Washington," *Id.*, at 1130, (A-14, Pet. No. 78-119), the Ninth Circuit refused to hold that the state's hatchery contributions were entitled to special recognition in the allocation formula.

Through the orders, decrees, and opinions which have been issued by the courts during this litigation, the nature of the 50-50 allocation formula, as a creature of either law or equity, has remained a mystery. One thing, however, is perfectly clear: Neither the District Court in selecting its allocation, nor the Ninth Circuit in affirming it, has engaged in the discretionary exercise that this Court has required when an accommodation between treaty and nontreaty fishing rights is made necessary. (See *"Puyallup II" supra.*) Both courts have continued to indulge the fiction that the fishing controversy is essentially a dispute over sovereign prerogatives of the State of Washington and the various treaty tribes. As a result, both courts in their various considerations of the allocation issue have entirely ignored the equities of the individual fishermen affected by their decisions. This conceptualization of the controversy has masked the essential nature of the rights at issue — a right to be enjoyed by "every individual Indian," *United States v. Winans, supra,* at 381, "in common with *citizens* of the territory." The proper measure of fishing rights, therefore, involves a consideration of the interests of individual fishermen, as this Court has recognized.

In the first case in which this Court outlined the nature of the Indians' off-reservation fishing right under these treaties, *United States v. Winans, supra,* this Court indicated that the individual interests of treaty Indian and non-Indian fishermen, in contrast to the collective interests of each tribe and the state as "quasi-cotenants", were to be weighed in fashioning an equitable remedy.

In *Winans, supra,* the Court was faced with the claim that the nontreaty respondents were entitled to monopolize the fishery at an upstream location on the Columbia River by their use of four fish wheels set across the river. Respondents' fishing devices were of such a nature as to totally pre-empt fishing by certain Yakima Indians who had "usual and accustomed grounds" at the same location. In rejecting the respondents' claim and ordering an equitable composition of the individual claims of the

Indians and respondents, the Court endorsed the form of equitable remedy proposed by the Solicitor General in his argument to the Court:

> What right the Indians had were not determined or limited. This was a matter for judicial determination regarding the *rights of the Indians and the rights of the respondents.* And that there must be accommodation of them the Solicitor General concedes and points the way.

Id., at 384 (Emphasis supplied.)

The Solicitor's proposals for an equitable adjustment, to which the Court made reference approvingly, are set forth in the concluding section of his brief, which we quote below. For present purposes, the significance of these proposals is that each of them presupposes that the rights of the nontreaty respondents individually, and not merely their collective interests as successor — in — interest to the state as "quasi-cotenant," are to be weighed in an equitable allocation:

> I submit that the decree below should be reversed and the cause remanded for such further proceedings as may be necessary and appropriate. * * * then it will be necessary to consider what justice and equity fairly require. It seems quite clear that the fish wheels are very destructive of the fish, and therefore are improvident and unconscionable devices. It certainly seems that four wheels in the space of a mile and a half are inordinate. If they are to be maintained at all, there should be some restriction as to their number and method and daily hours of operation, in order to give the fish and the Indians a chance. Certainly the wheels should not be permitted to create and maintain a monopoly until all the fish are gone. One at least of these wheels has been placed at a particular spot which was obviously a most advantageous place for the Indians to fish, because there was a great rock there from which their platform or staging projected, so that they could use their dip nets for the longest possible time without being driven back up the bank or bluff by rising water. There were other favorite spots where they ran trestles out over the water for the same purpose. *In any case, if it is true that they can fish to advantage*

> *elsewhere than at the particular points where the wheels are, they should be allowed to fish without undue restriction up and down the river and above and below the wheels throughout the entire water front. On the other hand, they can not claim to have an exclusive right, and, enjoying their right in common with citizens and under the modified injunction in common with defendants, it may be just to restrict in reasonable ways their times and modes of access to the property and hours for fishing.* If it is not fair *under the present conditions* that they should enjoy without restriction their ancient right of camping and curing fish in temporary houses on the defendants' property, * * * It appears clear, as noted below, that the privilege of pasturage, etc., is confined to open and unclaimed land, and here again it would seem to be the duty of the executive Government to facilitate the enjoyment of the Indians of those rights on the nearest and most convenient available land. By some proper route following the old trails, and at proper hours, with due protection for the defendants' buildings, stock, and crops, *a way of easy access, free ingress and egress to and from the fishing grounds ought to be open to the Indians and be kept open.* (Emphasis supplied.)

Solicitor's *Winans* brief, *supra*, at 54-56.

Unfortunately, the decision of the lower court following the remand of the *Winans* case is not reported. However, the approach advocated by the Solicitor in *Winans* was again confirmed by this Court seventy years later when once again faced with the possible preemption of an Indian fishery in their "usual and accustomed grounds."

In *Puyallup II*, *supra*, this Court explicitly enumerated factors that must be considered when it is necessary to make a discretionary allocation of a fishery between treaty Indian and nontreaty fishermen. That enumeration employed terms that make clear that the equities of the individual fishermen affected must be weighed:

> What formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

Puyallup II, *supra*, at 48-49.

Nothing could be clearer from the record in this case than that the District Court completely ignored the equities of the individual nontreaty fishermen in setting allocation percentages. The court rejected motions by individual nontreaty fishermen and their representative organizations to intervene as parties in the original action.

Additionally the District Court's findings of fact in its original decision underscore its neglect of the individual nontreaty fisherman's interest in the fishery. In dividing "equally" various fish runs between the nontreaty commercial fishermen of the state and certain Indian tribes, the court in some instances elevated the aggregate interests of a sparse number of part time treaty fishermen of a given tribe to the same status as the aggregate interests of commercial fishermen many times their number and consequently more dependent upon the opportunity to fish. For example, those findings in the original trial reflect the following number of fishermen for each tribe:

- Hoh—5 full-time, 10 part-time (FF 40, Joint App. 117)
- Lummi—8 commercial, 150 total (FF 58, Joint App. 123)
- Makah—60 regular, 90 part-time (FF 67, Joint App. 127)
- Muckleshoot—35-50 (FF 79, Joint App. 131)
- Nisqually—10 full-time, 10 part-time (FF 93, Joint App. 137)
- Puyallup—30-40 (FF 100, Joint App. 138)
- Quileutte—34 (FF 115, Joint App. 144)

Quinault—few off reservation (FF 124, Joint App. 146)

Sauk-Suiattle—30 (personal use not commercial) (FF 132, Joint App. 148)

Skokomish— (No specific findings re number
Squaxin Island— of tribal fishermen)

Stillaguamish—personal use (FF 146, Joint App. 153)

Upper Skagit—30 primarily subsistence (FF 148, Joint App. 154)

Yakima—fishing Columbia — not case area (FF 157-158, Joint App. 157-58) 5 in case area (FF 163, Joint App. 160)

In contrast to this relatively small number of Indian fishermen, which includes recreational fishermen as well as commercial (when not designated above as commercial or full- or part-time), the court found in FF 188, Joint App. 168, that there were 283,650 sport fishermen and 6,600 commercial fishermen in the State of Washington.

The District Court's insensitivity to the equities of individual nontreaty fishermen has continued through this litigation. It is eptomized by the conclusion expressed by the District Court in June, 1978:

> * * * economic disruption associated with implementing the 1974 decree is not legally cognizable.

(C.L. # 4, June 6, 1978, C-10, Pet. No. 78-139)

That court repeatedly referred to the nontreaty fishermen as having a "privilege" to fish rather than the "right" of Indians; e.g.,

> * * * members of the Lummi Tribe are entitled to and shall have, as a matter of *right*, the opportunity to fish * * * while non-treaty fishermen * * * have the *privilege* of fishing * * * they do not have the *right* to do so.

U.S. v. Washington, 384 F.Supp., *supra*, at p. 345 (emphasis in original). (Joint App. 91).

The District Court's denial of non-Indians' right to fish is in contradiction of the holding of this Court that the treaties recognize the rights of both. In *Winans, supra*, at 384, the Court referred to "the rights of the Indians and

the rights of the respondents." In *Puyallup III, supra*, at 177, the Court noted "the right is to be shared in common with the non-Indian citizens * * *".

This recognition of the parity in rights to the fishery sharred by Indians and non-Indians alike is consistent with this Court's mandate in *Puyallup Tribe v. Department of Game* (*Puyallup I*), 391 U.S. 392, 403 (1968), *quoted in Puyallup II, supra* at 45, that the state court on remand was to consider "the issue of equal protection implicit in the phrase 'in common with'."

The equal protection clause of the Fourteenth Amendment states that "(n)o state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

If the treaties of 1854-55 created or sanctioned special rights for Indians, the subsequent passage of Amendment XIV has superseded the treaties, in the same manner that a subsequently-passed statute overrides a prior inconsistent treaty. pp. 75-77, *infra*. Congress cannot authorize a state to violate the equal protection clause. *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *see also, Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). If the Stevens' treaties require the state to prohibit or limit the exercise of nontreaty citizens' *privilege* to fish, 384 F.Supp., *supra*, at 345 (Joint App. 91), while guaranteeing to Indians a greater *right* to fish, they are now void by virtue of the equal protection clause.

An interpretation of the treaty language that avoids, rather than creates, conflicts with constitutional provisions is therefore required. As this Court has observed:

An interpretation of the treaty language that avoids, rather than creates, conflicts with constitutional provisions is required. It is well-established that even the federal government cannot by treaty violate constitutional restrictions:

> There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything

> in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. * * * It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. (Footnote omitted.)

Reid v. Covert, 354 U.S. 1, (1957).

This Court has noted that the Stevens treaties could be harmonized with relevant constitutional principles by the construction of the treaties in light of equal protection concepts. *Puyallup I, supra* at 403; *cf., Puyallup II, supra*. The District Court, in contrast, has criticized the Court's approach in the *Puyallup* cases (*see* 384 F. Supp., *supra* at 338 (Joint App. 77-80)), and has entirely ignored "the issue of equal protection implicit in the phrase 'in common with'." *Puyallup I, supra* at 403. It has interpreted the treaties in a manner that denies that non-Indians have rights requiring that the law be applied to them in a nondiscriminatory manner. In so doing, the District Court has reached a result that the signers of the Stevens treaties never envisioned.

The only interpretation of the treaties that is consistent with both the intentions of the treatymakers and the dictates of the equal protection clause is the one urged above: the state fulfills its obligations under the treaties by allowing all citizens, Indian and non-Indian, to participate in the fisheries on a nondiscriminatory basis.

3. Collective Interests of the State and Tribes.

This Court has also indicated that, in addition to the interests of individual fishermen, the collective equities of the state and the treaty tribes are to be weighed in an

allocation of the fishery. One such equity is the state's contribution of hatchery produced fish to the resource available for harvest by both treaty Indians and all other citizens.

In *Puyallup II, supra*, this Court called the trial court's attention to the substantial annual contribution to the fish resource made by the state's steelhead hatchery program, supported mainly by license fees charged to nontreaty sport fishermen. Upon remand, the state trial court also recognized this equity and confined the allocation of steelhead between the Puyallup Indian net fishery and the nontreaty sport fishery to the portion of the total fish run derived from the natural run.

This Court's decision in *Puyallup II, supra*, was rendered after the District Court trial but before judgment was entered. Accordingly, the state urged the District Court to exclude from any allocation of the fishery those fish which reflect the state's contribution to the salmon and steelhead resource through its hatchery programs. The District Court, however, declined the request and in its judgment chose to defer the issue until after the state court determined the issue in *Puyallup*. (384 F. Supp. *supra* at 344-45, Joint App. 90-91).

After the state trial court ruled that hatchery fish are excluded from any allocation, and again after the state supreme court affirmed (86 Wn. 2d 664, 548 P. 2d 1058 (1976), the state moved that the District Court modify its allocation formula to remove state hatchery-produced salmon and steelhead fish from the resource pool available for allocation. On both occasions the District Court declined, insisting that prudence required its deferral of the matter until this Court had an opportunity to review the allocation scheme affirmed by the Washington Supreme Court.

On June 23, 1977, this Court entered its opinion in *Puyallup III, supra*, upholding the trial court's allocation of steelhead.[47] The propriety of the trial court's allocation

[47]The petitioner Puyallup Tribe in *Puyallup III*, supra, did not contest the validity of the trial court's exclusion of hatchery fish, and

having been settled beyond any further appeal, the state again moved the District Court to modify its allocation scheme in conformance with the outcome in the *Puyallup* cases. Motion of August 8, 1977. As of this date, December 7, 1978, the court has not ruled on the state's motion.

The hatchery fish issue is not the only equity on the side of the State of Washington which has been ignored by the court in the exercise of its continuing jurisdiction. One of the original "inequities" is the court's "equitable adjustment" (384 F. Supp., *supra*, at 344 Joint App. 90). for fish harvests by state citizens in the ocean of salmon destined for "usual and accustomed grounds." The court has declined to modify this system of adjustments even after Congress enacted the Fishery Conservation and Management Act of 1976 (FMCA), 90 Stat. 331 (codified at 16 U.S.C. § 1801-1882). Congress by that act has preempted state jurisdiction and control over the fishery in waters extending beyond the three-mile limit of the state's territorial jurisdiction. Section 101 of FMCA defines the fishery conservation zone to extend between three and two hundred miles off-shore; and §§ 102 expressly provides:

> The United States shall exercise *exclusive* fishery management authority, in the manner provided for in this chapter, over the following:
>
> (1) All fish within the fishery conservation zone.
>
> (2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone.

(Emphasis added.) Regulation of the salmon fishery beyond state territorial waters is now exclusively within the province of the federal government. Fishermen from California, Oregon and Alaska harvest Puget Sound origin

hence the Court declined to address the issue specifically. 433 U.S. at 177, fn. 17. Thus, the trial court's exclusion of hatchery fish from the allocation remained as the governing law.

salmon in these waters under authority of the United States.[48]

If there is any inequity done to the treaty fishermen by this harvest of salmon outside most of tribes' usual and accustomed grounds, the equity must now lie against the United States and all fishermen fishing under its authority. Yet, under the court's orders, only the Washington nontreaty commercial net fishermen are penalized. Catches by Washington fishermen in this federal fishery are singled out and applied against the nontreaty fishermen's 50% share. Puget Sound commercial fishermen are thereby dealt a particular injustice by the District Court's continuation of its "equitable adjustment." The 50% share of salmon available for harvest by these fishermen is reduced by the fishing activities of Washington fishermen in the federal fishery; yet, because of the federal preemption, the Puget Sound fishermen have no recourse to restrict that ocean fishery, nor does the state.

Indeed, it is worthy of note that presently there are three areas in which jurisdiction is asserted over Washington (and Indian) fishermen. In the ocean the United States government, through the Department of Commerce, regulates Indians and non-Indians. The United States has made no effort to get any percentage of salmon to Indians fishing there, nor to return any specified percentage to inside waters. In IPSFC waters, the United States through Commerce (for non-Indians) and Interior (for Indians) regulates. They have not attempted to provide a 50%-plus allocation of the fishery to treaty Indians. In contrast in those Washington waters where the state regulate the fishery the United States and the tribes demand that the state provide for Indians the

[48]United States regulations (50 CFR 661, et seq.) provide special fisheries for four coastal tribes. Special fisheries have been allowed each year with the special 1978 seasons found in 50 CFR 661.11 (43 Fed. Reg. 15, April 14, 1978). They allow coastal Indians to fish for two months before non-Indians begin and to fish during a two-week conservation closure, but the regulations make no effort to grant a certain percentage of fish to treaty Indians.

50% plus" and also an additional number of fish to reflect ocean harvests of fish caught under the United State's regulations.

4. **Summary.**

The allocation by the District Court and the provision for equitable adjustment for ocean and IPSFC fish caught by non-Indians constitute an abuse of the court's discretion not justified by the "in common with" language. In failing to accord any weight to the equities of the state and, more importantly, to those of the individual fishermen affected by its decision, the District Court has ignored the declarations of this Court and the "issue of equal protection implicit in the phrase 'in common with'." *Puyallup I, supra* at 403.

D. IF THE TREATIES CREATE AN OBLIGATION TO ALLOCATE FISH, THE STATE HAS THE AUTHORITY TO IMPLEMENT SUCH ALLOCATION.

1. **Introduction.**

In 1963, a civil action was commenced in state court to determine the nature and extent of Indian fishing rights derived from the Stevens treaties of 1854-55.[49] Since that time, the state courts have continued to exercise jurisdiction with reference to the *"Puyallup"* case and to take appropriate steps pursuant to remand instructions by this Court.[50]

While the remand from *Puyallup I, supra,* was pending in state court, an action was filed in September, 1970, in the United States District Court for Western Washington requesting an interpretation of the same treaty language (*U.S. v. Washington,* No. 9213). The

[49]The specific treaty there involved was the Treaty of Medicine Creek, *supra.*

[50]*Puyallup I,* 70 Wn. 2d 245, 422 P. 2d 254 (1967), and 391 U.S. 392 (1968); *Puyallup II,* 80 Wn. 2d 561, 497 P. 2d 171 (1972) and 414 U.S. 44 (1973); *Puyallup III,* 86 Wn. 2d 664 (1976) and 433 U.S. 165 (1977).

federal District Court, rather than deferring to the continuing proceedings in state court construing the same treaty provision, proceeded to trial after the state supreme court decision in *Puyallup II* in 1972 and prior to the *Puyallup II* decision of this Court in November, 1973. Subsequently, the state courts and the federal courts have continued to independently construe the same treaty provision and have reached different interpretations of that provision. Both court systems have refused to invoke the doctrines of comity and abstention with respect to proceedings in their sister courts. The divergence of the two separate court systems in their respective constructions of the same treaty provision has made it extremely difficult, if not impossible, for the Washington Department of Fisheries to comply with the conflicting orders from the courts of each system.

The department has attempted in good faith to comply with the orders of the federal court as evidenced by the prior discussion respecting the IPSFC, *infra* pp. 11-15, and the following recognition by Judge Boldt:

> First, I wish to make it clear that in my judgment, particularly during the last several months or year, I believe that the state Fisheries Department has made a bona fide and genuine effort to begin the enormously difficult problem of putting *United States v. Washington* into effect. If we did not know it otherwise, newspaper accounts almost every day show what an extremely difficult task has been layed upon the Fisheries Department.

(TR 42, Oct. 25, 1975, Joint App. 519.)

Yet, on more than one occasion, state courts have immediately enjoined the department from regulating the fishery in a way necessary to achieve full compliance with the District Court's orders. This has precipitated counter-injunctions by the District Court, and a stalemate between the two court systems.

The State of Washington and its Department of Fisheries cannot emphasize too strongly that they do not propose to inhibit the enforcement of proper federal court orders. In fact, the director of the department has

consistently promulgated regulations to implement District Court orders. In the wake of his issuance of those regulations, state court injunctions have followed. As a result, on several occasions, motions have been filed in both the state and federal courts seeking to hold the director in contempt of the respective court systems. Faced with this quandary, the Department of Fisheries has successfully sought the assistance of this Court in resolving the disagreement between the state and federal courts.

As we have noted, the Washington state courts, including the state supreme court, have construed the Indian treaties in a manner different from that adopted by the District Court and the Ninth Circuit. The state courts have held that the equality implicit in the phrase "in common with" is an equality among individual citizens whereas the District Court and Ninth Circuit have found that it is equality between two groups, treaty Indians and all others.

We have argued in this brief that the former interpretation of the treaty provision, the one adopted by the state court, is correct. We believe that the District Court's and Ninth Circuit's construction of the treaties here at issue is erroneous as a matter of law and unjust as a matter of fact. Whatever the decision of this Court, the state will implement it. The state believes that after a decision by this Court it will be in a position to comply with District Court orders, if the same are necessary to comply with this Court's decision. We do not believe the state court could or would take a different point of view: We are confident that they will accede to this Court's interpretation of the treaties in the future just as they have in the past, as this Court expressly found in *Puyallup III*, *supra*, at 177.

2. **State Law.**

The law of the State of Washington, like that of other jurisdictions, is that fish in state waters are a resource for the benefit of all of its citizens. The Washington Supreme

Court again enunciated this principle in *Washington Kelpers v. State*, 81 Wn. 2d 410, 502 P. 2d 1170 (1972):

> "The food fish in the waters of the state belong to the people of the whole state, and the state through its legislature has the same right of regulation and control of this property that it has of any other state property.

Supra at 413; also see, *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15 (1922). The state court's reference to the fish as "state property" is, as this Court has noted, a legal fiction used to express the "importance to its people that a state have power to preserve and regulate exploitation of an important resource." *Baldwin v. Fish & Game Comm'n of Montana*, 46 Law Week 4501 (1978), quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977).

To protect, perpetuate and manage the salmon, the Washington legislature has conferred broad authority upon the director and Department of Fisheries (see RCW 75.08.012, .014, and .080). The nature and extent of that power has been construed by the Washington Supreme Court in a number of cases, including *"Gillnetters," supra*, and *"Passenger Vessel 2," supra*, which are now before this Court.

In recently upholding a statute which prohibited the use of sport gear for commercial fishing, the Washington court extensively discussed the validity of the state allocating fish harvests between types of fishing gear. *Washington Kelpers v. State*, *supra*. In considering that question, the court cited with approval its earlier decisions in *Vail v. Seaborg*, *supra*, and *McMillen v. Sims*, 132 Wash. 265, 231 Pac. 1943 (1925), in which administrative regulations allocating fish harvests between types of fishing gear were upheld. In *Kelpers*, *supra*, the court observed that the state constitutional provision (Article I, § 12), is the equivalent to the United States Constitution, Amendment XIV, as interpreted by this Court, and that both:

> require that *class legislation must apply alike to all persons within a class and reasonable ground must exist for making a distinction between those with, and those without, a designated class.*

Supra at 421, quoting *Clark v. Dwyer,* 56 Wn. 2d 425, 353 P. 2d 941 (1960), cert. denied, 364 U.S. 932 (1961) (emphasis added).

Later in the *Kelpers* decision the court declared:

> A reasonable classification is one 'which includes all [and only those] persons who are similarly situated with respect to the purpose of the law, * * * (brackets by the court)

Supra at 422.

The court then proceeded to conclude that classifications by gear type are permissible but all persons must be allowed the use of any given gear under the same conditions.

In the two decisions before this Court, *"Gillnetters," supra,* and *"Passenger Vessels 2," supra,* the Washington court has concluded that the Department of Fisheries cannot by regulation allocate the harvest of fish between treaty Indians and all other citizens. These decisions are consistent with the earlier opinions previously mentioned which have upheld the allocation of the fish harvest between types of fishing gear but not between persons similarly situated.

> Classification which distinguishes between commercial and noncommercial fishermen has a reasonable basis in fact, which is related to the legitimate governmental purposes of conservation and promotion of the economic welfare of the state.

Gillnetters, supra at 691.

In both *"Gillnetters," supra,* and *"Passenger Vessels 2," supra,* the state supreme court determined that Indian treaty fishermen are of the same class as nontreaty fishermen with respect to the opportunity to harvest fish. In making this determination, the court noted:

> * * * treaty Indians have always been afforded the same opportunities as non-Indians to fish commercially by trolling, purse seining, gill netting, or reef netting, and to fish for recreational and other purposes.

Gillnetters, supra at 691.

Having thus decided that Indian and non-Indian fishermen are members of a single class, the court concluded that the Department of Fisheries could not in its regulatory pattern allocate fish between members of what they have determined to be a single class.

If this Court now concludes that Indian treaty fishermen and all other fishermen are not members of the same class with respect to an allocation of fishery, it will thereby lay the foundation for the validity under state law of a separate classification of treaty Indian fishermen for the purpose of allocation. We would respectfully submit that if the Court rejects our earlier argument and finds that treaty Indian fishermen are a special class for allocation purposes, such a conclusion would remove the impediment found by the Washington Supreme Court to the exercise of necessary regulatory power by the Department of Fisheries to allocate between Indian and non-Indian fishermen.

E. THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S ASSUMPTION OF CONSERVATION MANAGEMENT AUTHORITY OVER THE SALMON FISHERY.

1. Introduction.

Fisheries will be able to comply with the Court's decision in this case even if it requires some type of allocation of the fishery. In such an eventuality, we assume that the District Court will return the allocation and conservation management authority over the treaty Indian fishery to the state and its Department of Fisheries.

In this section of our brief, we shall argue that a return to the fisheries management system which existed prior to the court's extraordinary assumption of authority in August, 1977 will be inconsistent with long-standing principles of federalism governing the management of fisheries resources. Specifically, we contest the lawfulness of the District Court's interference in the state's definition and implementation of a conservation management

program for the fish resource in its territorial waters. This interference commenced with the District Court's judgment in 1974, and has continued to the present day.

2. Nature and Extent of the District Court's Interference With the State's Management of the Salmon Fishery.

The State of Washington, for the protection and effective utilization of a public resource, has exercised its sovereign prerogative to define and implement a conservation policy for the fish found within its territorial waters. Although the state has not historically asserted such authority within Indian reservations, this Court has recently declared in *Puyallup III, supra,* that the state can act even within a reservation if necessary to insure the successful realization of its conservation objectives.

The decisions of the District Court and Ninth Circuit in this case, however, have arrogated the state's traditional management authority in this area and have substituted the District Court as the manager of the fish resource in state territorial waters.

Prior to these decisions, the state had defined and implemented three objectives for its salmon conservation program: (1) to preserve fish stocks; (2) to attain the optimum sustainable yield; and (3) to provide an orderly fishery. The first of these objectives is self-evident in its relationship to conservation and need not be discussed in further detail.

The second objective — optimizing the salmon resource available for harvest over time — recognizes that the salmon in the waters of the state are a valuable, renewable food and recreational resource for the citizens of the state and the nation. In pursuance of this objective, the Department of Fisheries is authorized to reduce or prohibit fishing on immature salmon. This is not because those runs could not withstand a greater harvest, but because the foregoing of a harvest on immature fish in one year will produce proportionately greater pounds of fish in succeeding years.

The third objective — the provision of an orderly fishery — is less obviously but no less indispensably related to the goal of salmon resource conservation. At base, conservation regulations are an attempt to enforce a sacrifice of fishing opportunities upon a group of fishermen with similar characteristics (i.e., Puget Sound gillnetters). The success of a regulatory program is entirely dependent upon its ability to equitably pro-rate this sacrifice among all fishermen within a major gear-area category. If fishing seasons and gear limitations even appear to favor one part of a group over another, disfavored elements will be induced to fish in violation of conservation regulations. When such violations persist to any degree, an avalanche of illegal fishing is bound to occur, as other fishermen quickly realize that unless they too fish in violation of conservation regulations, they will be "cheated" out of their harvests by the illegal fishing of others. Once such a situation erupts, it is virtually impossible for an enforcement agency to save the salmon runs from overfishing.

In order to avoid such anarchy on its waters, and the attendant destruction of salmon runs for future years, the Department of Fisheries divides the state's territorial waters into geographic fishing zones, and sequentially opens and closes these zones to different types of fishing gear. By manipulating fishing times and gear limitations for each zone, the Department is able to insure a fair opportunity for all fishermen to participate in the fishery, and thereby obtains the fishermen's respect for and compliance with its conservation regulations.

For reasons never clearly articulated, both the District Court and the Ninth Circuit have nullified the state's definition of its conservation policy and substituted their own narrower definition of conservation.[51] In the words of the Ninth Circuit:

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[51]It should be noted that the court's definition of conservation is in conflict with that declared by Congress in the Fishery Conservation and Management Act of 1976 (18 U.S.C. § 1802 and 1801(b)).

> "* * * the only rationale for permitting state interference with Indian fishing precludes the adoption of this (the state's) definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run."

(520 F. 2d, *supra* at 686.) (Joint App. 48).

Thus, state regulations designed to maximize the salmon harvest and provide an orderly fishery for all fishermen cannot now apply to off-reservation treaty fishing. With reference to such treaty fishing, the state's regulatory authority, where it exists at all, is confined to the goal of species perpetuation. The adoption of enhancement programs, which would increase the number of fish and the economic value of the harvest for both Indians and non-Indians, is substantially impaired by the court's rejection of the state's policy of seeking an optimum sustainable yield. The dilemma presented is how can a fish management agency effectively manage a single highly mobile resource when different standards of conservation must be used according to who is seeking to harvest the fish.

The courts' rejection of state regulation of treaty Indian fishing to insure an orderly fishery for all is especially baffling. The District Court itself recognized that the realization of this objective can be critical to the perpetuation of the runs, let alone the optimization of the resource:

> It is necessary for the fishing activity of Indians and non-Indians to be regulated in order to assure that conservation of the fishery resource is achieved. [Citing record.] Observance of fishery regulations is important to the achievement of conservation of the resource. A regulation is more likely to be observed if it is simple to understand, reduces conflicts between interest groups, appears fair to, and wins the confidence of, the fishermen. For this reason, regulations which have as their purpose the attainment of an orderly fishery can be helpful in achieving conservation.

384 F. Supp. at 386 (FF 181 Joint App. 166). Nevertheless, the District Court unaccountably excluded this objective

from the lawful exercise of state conservation regulations of off-reservation treaty Indian fishing. If the extent of illegal fishing by both treaty and nontreaty fishermen is any indication, the damage to the salmon resource occasioned by the forced abandonment of the state's orderly fisheries objective has been considerable.

Unfortunately, the District Court's interference with the state's conservation program has not been limited to a redefinition of its objectives. The court has also usurped the state's authority to implement a conservation program. It has permitted numerous separate tribes and bands involved in this litigation to participate in the everyday management of the off-reservation fishing activities of treaty Indians. These tribes, the majority of which have limited experience or expertise in the complex science of fisheries management, may promulgate and enforce season and gear regulations for their members. In some cases, tribal regulations are inflexible instead of being varied and revised during the year or from year to year in order to accommodate the variable conservation needs of the salmon runs affected. Yet, all state general regulations in conflict with tribal regulations are prima facie invalid as applied to treaty Indian fishermen. Before the state can enforce regulations of general applicability on treaty Indians fishing in usual and accustomed grounds, it must first establish to the satisfaction of the District Court that the regulation is "reasonable and necessary for conservation." 520 F. 2d *supra* at 683. The department's management of treaty Indian fishing for conservation purposes has sometimes been reduced to enforcing after-the-fact emergency closures of treaty Indian fisheries when salmon runs have already been overfished.

The District Court's decision has imposed special restrictions upon the state as to the certain tribes denominated "self-regulating". The state is apparently precluded from enforcing any conservation regulations as to members of self-regulating tribes fishing off the reservation. 384 F. Supp. at 340-342, 410. If the fish harvests by members of such a tribe exceed their allocable

share of the salmon resource, or threaten to injure or destroy the salmon runs in a particular area, the state must apply to the District Court for relief. If relief is afterwards granted, the state is still not permitted to enforce compliance with the decree of relief, but must instead rely on compliance by the self-regulating tribe and its members. See 384 F. Supp. *supra*, at 410. (Joint App. 211).

Finally, in addition to its arrogation of state authority to define and implement a conservation policy for the salmon fishery, the District Court has exercised its newly-claimed authority in a manner that discriminates against nontreaty fishermen. The court's management program does not equitably pro-rate the sacrifices necessitated by conservation goals between the two groups — treaty Indians and all other fishermen — let alone among the individual fishermen themselves. Instead, before any restriction on the off-reservation fishing activities of treaty Indians can be imposed, the state is required to exhaust its regulatory alternative upon the participants in the general fishery. 384 F. Supp., *supra*, at 342. (Joint App. 87). In affirming, the Ninth Circuit expressly held:

> "* * * the state must also show that the conservation objective can not be obtained by restricting only citizens other than treaty Indians."

520 F. 2d *supra*, at 683. Not unexpectedly, the District Court's imposition of a disproportionate share of the burdens of conservation upon nontreaty fishermen has precipitated the rash of uncontrollable illegal fishing activities that an intelligent management program attempts to avoid through the provision of an orderly fishery.

3. The District Court's Assumption of Management Authority Over the Salmon Fishery is Unlawful.

At the time of the District Court's original judgment in this case in 1974, the authority of the state to regulate

off-reservation treaty-authorized fishing by Indians had long been established by the decisions of this Court. *United States v. Winans*, 198 U.S. 371 (1905)[52]; *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916)[53]; *Tulee v. Washington*, 315 U.S. 681 (1942)[54]; *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968)[55]; *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973).[56]

Nevertheless, the District Court felt itself unpersuaded by this line of authority, and devoted several pages in its opinion to an attack upon the conceptual foundations of this Court's decisions sustaining state jurisdiction over off-reservation treaty Indian fishing. See, 384 F. Supp. *supra*, at 334-339. (Joint App. 77-81). The court concluded its discussion with an acknowledgment

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[52] "* * * Nor does it [the Indian treaty provision permiting the taking of fish at usual and accustomed places] restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." 198 U.S. 371, 384.

[53] "* * * Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised." 241 U.S. 556, 564.

[54] "* * * while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." 315 U.S. 681, 682.

[55] "* * * Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. * * *" 391 U.S. 392, 398.

[56] "* * * We said that 'the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided regulation * * * does not discriminate against the Indians.' * * * *Puyallup Tribe v. Department of Game*, 391 U.S. 392, at 398." 414 U.S. 44, at 48.

that as a lower federal court it was bound by the decisions of this Court. But the District Court's delegation of daily fishery management authority to each of the tribes and bands involved in this case, and its creation of "self-regulating" authority in certain tribes, belies the sincerity of its humble acknowledgment.

Encouraged by its successes in the District Court, one of the tribes, the Puyallup, again challenged the legitimacy of state conservation regulation of Indian treaty fishing in *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165 (1977). The contentions of the tribe were again firmly rejected by this Court:

> Thus, Puyallup I settled an important threshold question in this case—regardless of tribal sovereign immunity, individual defendant-members of the Puyallup Tribe remain amenable to the process of the Washington courts in connection with fishing activities occurring off their reservation. That conclusion was predicated on two separate propositions worthy of restatement here.
>
> First, even though the individual defendants were members of the Tribe and therefore entitled to the benefits of the Treaty of Medicine Creek, that treaty as construed by this Court does not confer the complete individual immunity they claim. The State may qualify the Indians' right to fish "at all usual and accustomed places." Specifically, we held that the "manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

Id. at 171.

The legitimacy of state regulation of off-reservation Indian treaty fishing must be regarded to have been settled by this Court. The state's authority to regulate such fishing derives from its power to conserve the natural resources within its boundaries, a power which inheres in the state's sovereignty over all of the territory under its jurisdiction. *Kennedy v. Becker, supra,* at 562-63; *Ward v. Race Horse,* 163 U.S. 504, 507 (1896); *Greer v.*

Connecticut, 161 U.S. 519 (1896). More recently, this Court observed:

> the importance of its people that a state have power to preserve and regulate the exploitation of an important resource.

Baldwin v. Fish & Game Commission of Montana, 46 L.W. 4501 (1978), quoting *Douglas v. Seacoast Products Inc.,* 431 U.S. 265, 284 (1977). (That case also discusses the "ownership" theory cases going back to *McCready v. Va.,* 94 U.S. 391 (1876) and *Geer v. Connecticut,* 161 U.S. 519 (1896). The exercise of the state's power over the fishing activities of all fishermen, treaty Indians as well as other citizens, is necessary for the fulfillment of the treaties and the state's fiduciary duty to preserve the resource for the benefit of all citizens.

Congress may preempt the field of management of some natural resources. See, *Missouri v. Holland,* 252 U.S. 416, 64 L. ed 641, 40 S. Ct. 382 (1920). However, Congress has not purported to preempt the state's management of the anadromous fish resources here in question. In fact, the Fisheries Management and Conservation Act of 1976, 90 Stat. 331, Congress expressly provided that:

> except as provided in subsection (b) of this Section (providing for federal control of all ocean fisheries in the event of state interference with a federal fisheries management program in coastal waters beyond three miles), nothing in this section shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

16 U.S.C. § 1856(a). In addition, subsection (b) of the above provision specifically exempts from special federal "takeover" jurisdiction the "internal waters" of the state. (16 U.S.C. § 1856(b)) Congress thus has continued to recognize the authority of the state to regulate the salmon fisheries in its waters rather than preempting the state's authority. It has been preserved. See: *Carey v. South Dakota, 250 U.S. 118 (1919).*

In settling the question of state regulation of off-reservation Indian fishing for conservation purposes,

this Court has also resolved the ancillary issue of whether the state's authority is preemptive or concurrent with the Indian tribes whose members are regulated. Over sixty years ago, in *Kennedy v. Becker, supra,* this Court recognized that the very nature of the activity to be regulated will admit of no other regulatory authority but one. This conclusion is no less true today.

In *Kennedy v. Becker, supra,* the United States, as amicus curiae, joined the plaintiff-in-error in arguing in its brief to this Court that Indian tribes retained the power to regulate the off-reservation fishing activities of their members:

> The hunting and fishing rights involved are a part of the original Indian rights of occupancy, reserved in the very instrument of cossion, never relinquished, and continuously held under the ancient Indian title. The locus in quo, therefore, always remained an Indian reservation pro tanto.

(Brief of the United States in *Kennedy v. Becker,* at p. 9)

This Court, however, rejected the proposition that Indian tribes were entitled to regulate the fishing activities of their members in a manner that thwarted the state's conservation program:

> The *contention of the plaintiffs* in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quod hoc.* As the plaintiffs in error put it: 'The land itself became thereby subject to a joint property ownership and the *dual sovereignty* of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be.' *We are unable to take this view.* It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo,* either would be free to destroy the subject of the power. *Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.*

(Kennedy v. Becker, supra, at 562-63 emphasis supplied.)

This Court's recognition that the task of conservation of the fishery requires that the state exercise preemptive authority over the fishing activities of treaty Indians is no less valid for the salmon fishery in Washington's waters. As we have noted above, see discussion at pp. 19-25, *infra,* the efficacious conservation management of the salmon fishery is a complex and delicate enterprise. As the salmon return to Washington waters, data on the size of the runs and the impact of fishing activities upon them must be rapidly collected, assimilated, and analyzed. In light of this new data, fishing regulations are quickly reformulated, promulgated, and enforced. If these state conservation regulations are to have any hope of success, fishermen must understand that these regulatios are the law that binds them.

Under the current fractionalization of regulatory authority, however, the treaty Indian fisherman is subjected to two different, often-conflicting voices of authority — that of the state and his tribe. In 1976 the state's Department of Fisheries was required to intervene on over 20 separate occasions to close down treaty Indian fisheries on depleted salmon runs, fisheries which had been authorized by their respective tribes.[57]

The federal court has on over a dozen occasions found it necessary to close on-reservation fishing where runs were being depleted. (See, e.g. Joint App. 474) In the fractured regulatory authority characteristic of the current court-ordered system, there is frequently undue delay between the recognition of an unanticipated conservation crises and in the critical terminal areas the cessation of treaty Indian fishing in those areas.[58] That delay can be fatal to a conservation program, as the testimony of expert witnesses underscores.

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[57]In 1977 over *50* such closures were effected.

[58]Sometimes that agreement is not obtained, and treaty fishermen continue to fish in violation of emergency conservation closures of the fishery. See e.g. TR 47, 49, 50, 71-72, 90 May 9, 1977.

Thus, with respect to Indian and non-Indian fishing activities occurring in state territorial waters lying outside of Indian reservation boundaries, the state's authority to implement its conservation objectives should supersede those exercises of Indian tribal authority over tribal members which are in conflict with it. This proposition has always been the law of the land, and until 1974, was the law in the state of Washington. *Ward v. Race Horse, supra,* at 516; *Kennedy v. Becker, supra,* at 562; *Puyallup III, supra,* at 171-72, 173-177. It is also consistent with this Court's enunciation of the modern view of Indian law in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973):

> * * * tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities * * * not on any reservation.' Organized Village on Kake, supra, at 75, 7 L Ed 2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state laws otherwise applicable to all citizens of the State. See, e.g., Puyallup Tribe v. Department of Game, 391 US 392, 398, 20 L Ed 2d 689, 88 S Ct 1725 (1968); Organized Village of Kake, supra, at 75-76, 7 L Ed 2d 573; Tulee v Washington, 315 US 681, 683, 86 L Ed 1115, 62 S Ct 862 (1942); Shaw v Gibson-Zahniser Oil Corp., 276 US 575, 72 L Ed 709, 48 S Ct 333 (1928); Ward v Race Horse, 163 US 504, 41 L Ed 244, 16 S Ct 1076 (1896).

Id., at 148-149.

Adherence to these principles requires that the principal authority for managing the fishing in state waters be returned to the state and its Department of Fisheries. In the first place, the District Court's innovation of the "self-regulating" tribe must be reversed.[59]

Ths District Court's initial act in creating such a jurisdictional species was without any statutory or treaty authority, the court resting the legitimacy of its action upon an amorphous "philosophy of Congress" favoring

[59]Although only two tribes, the Yakima and Quinault Tribes, have been granted the status of "self-regulating" tribes, other tribes have applications for such recognition pending before the District Court.

"the exercise of tribal autonomy." 384 F. Supp. *supra,* at 340.[60]

The Ninth Circuit, in affirming this novel exercise of statutory interpretation, was equally lax in supporting its decisions with relevant authority. The court re-characterized the lower court's innovation as an exercise of "equitable discretion," 502 F. 2d *supra,* at 686, citing both its own holding in *Settler v. Lameer,* 507 F. 2d 231 (9th Cir. 1974), and a principle that "regulatory interference by the state with treaty fishing is obnoxious to the treaty tribes."[61] *Id.* However, the holding in *Settler, supra,* while sanctioning tribal regulation of its members' off-reservation fishing activities, did not conclude that such tribal regulation was preemptive of overriding state conservation regulations. Likewise, the court's determination that state regulation is inherently "obnoxious to the treaty tribes" is at odds with this Court's decisions in *Puyallup I, supra* and *Puyallup III, supra.*

In the absence of any statutory or treaty authority for the recognition of tribal "self-regulating" authority over the Indian fishing activities occurring outside the reservation; in light of this Court's rejection of such authority in *Kennedy v. Becker, supra;* and in view of the

[60]The only authority cited by the District Court to support its reliance on this "philosophy of Congress" was the Indian Civil Rights Act of 1968, Pub. L. 90-284, 90th Cong. H.B. 2516, April 11, 1968. It is difficult to understand the court's reliance. The Act limits Indian tribes "in exercising powers of self-government" by imposing on them requirements comparable to the Bill of Rights, fostering federal codes governing their courts and making provision for the assumption of state jurisdiction. It is regarded by some Indians as destructive of their traditions and government. *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong. 1st Sess. (1969), reproduced in part in 2 Am. Indian L. Newsletter, 92-96 (1969). And, as this Court recently recognized, the application of the Indian Civil Rights Act to actions and prerogatives of Indian tribes is not within the province of federal courts. *Santa Clara Pueb' v. Martinez,* 436 U.S. 49 (1978).

[61]Apparently federal regulation is similarly distasteful to the Indian fishermen. Of the fishermen citied by federal officers for violating the court orders in 1978, one-third were Indians (Tr. November 3, 1978, pp. 14, 25)

threat to the state's conservation management of the salmon fishery that such a jurisdictional entity represents,[62] this Court should repudiate the concept of a "self-regulating" tribe.

These same principles require the reversal of the District Court's determination that, as applied to off-reservation treaty Indian fishing, the state's general conservation management regulations are prima facie invalid. Implicit in this Court's determination that the authority of the state to regulate the off-reservation fishery by treaty Indian derives from the state's sovereign power and obligation to conserve its fishery resources, *Ward v. Race Horse, supra,* is the concomitant recognition that the state in its sovereign capacity can define and implement its conservation program. As applied to treaty fishermen, state conservation objectives and implementing regulations must be "reasonable," *Puyallup III, supra,* at 175, and must "not discriminate against the Indians." *Puyallup I, supra,* at 398; cf., *Puyallup II, supra.* Subject to these substantive qualifications, however, the state's authority to regulate the fishing is sovereign, and cannot be conditioned upon the approval of a federal court or each of the Indian tribes and bands. The intelligent exercise of that authority requires that the state, with its resources, its management expertise, and its familiarity with the daily problems of salmon conservation in all of Washington's waters, be able to bind all citizens, both treaty Indians and other citizens, to its regulations to prevent overfishing of salmon stocks.

The necessity for a unified fisheries management system lies at the center of the United States-Canada convention creating the International Pacific Salmon Fisheries Commission. It also underpins the United States' recent assertion of exclusive jurisdiction of the anadromous fishery beyond the state's territorial waters in the Fisheries Management and Conservation Act of 1976, *supra,* 16 U.S.C. § 1812(a). That necessity is no less

[62] See discussion at pp. 108-109, *infra.*

compelling in the territorial waters of the state, and even in waters adjoining or passing through Indian reservations, as this Court recognized in *Puyallup III, supra.* As this court held in *Tulee v. Washington,* 315 U.S. 681 (1942), that,

> the treaty leaves the State with the power to impose on Indians *equally with others* such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. * * *

Id. at 684 (emphasis supplied; footnote omitted). More recently, in *Puyallup Tribe v. Department of Game (Puyallup III), supra,* the Court expressly rejected an assertion by the Puyallup Tribe that it was entitled to catch the entire harvestable portion of steelhead in the river and thereby force a complete closure of the sport fishery by other citizens in order to save the steelhead runs. *Id.* at 176-177. The ultimate resolution of the *Puyallup* epic recognizes that Indian and non-Indian fishermen, enjoying the salmon fishery "in common," must share the burden of conservation.

The preservation of an orderly fishery, a task which is indispensable to both the perpetuation of the salmon runs and the maximization of the salmon harvest available for all, requires that the state be enabled to apply reasonable conservation regulations uniformly, without distinction between treaty Indian and nontreaty fishermen. Otherwise, the state cannot avoid discriminating against either the Indian treaty right, or "the rights of the non-Indian citizens of Washington recognized in [these] (t)reat(ies)." *Puyallup III, supra,* at 176.

The burdens of conservation must be equitably pro-rated among all fishermen "to conserve an important natural resource." *Id.,* at 175.

Finally, in accordance with the principles set forth in the decisions of this Court which have interpreted the "in common with" portion of the fishing provisions of the treaties here at issue, the determination below that the state must exhaust all conservation regulatory alternatives

upon the activities of nontreaty fishermen before treaty Indian fishermen can be regulated must be reversed.

The nature of the Indian treaty right has never been regarded by this Court to be of such a character as to require that non-Indians bear a disproportionate share of the conservation burden in order that Indians might escape all the conservation restrictions on their fishing activities.

CONCLUSION

The District Court has by its original decision in this litigation attempted to revolutionize the historically established system of fishery management and the practice of an equal opportunity participation in the harvest of anadromous fish in Washington state. This new system simply has not worked. One may argue long, but fruitlessly, about who should be blamed for this result. That this *is* the result is beyond argument.

The court's system has created an administrative nightmare that has beset the state and International Pacific Salmon Fisheries Commission fisheries' managers, state and federal law enforcement officers, and the District Court itself. The number of docket entries in the District Court illustrates the dimensions of this nightmare. As of this writing, over 5,000 separate documents have been filed since the original decision, and they continue to proliferate almost daily.

The ultimate irony in this litigation is that its monstrous dimensions arise from a single paragraph in the Court's original opinion. See, 384 F. Supp., *supra* at 343 (Joint App. 88, 89). Within that paragraph is found the District Court's interpretation of the treaty provision granting or reserving to the Indians "the right of taking fish in common with the citizens of the Territory." The proper interpretation of this treaty provision is what we specially have focused upon, and we invite this Court to do likewise. If this Court reverses the District Court's

construction of the treaty, the Court's consideration of all other issues raised in this brief is obviated.

The District Court was not wrong in assuming that the Stevens treaties created a special fishing right for the Indians of Washington Territory. We have recognized in our brief that, in respect to fishing, treaty Indians do enjoy rights which the other citizens of Washington do not: An easement right over private property for securing access to fishing grounds, and a special protection against state conservation regulations which discriminate against their use of the fisheries resource within those grounds.

But these special rights do not include what the District Court has granted, a guaranteed allocation of 50% plus of the anadromous fish in Washington waters.

We ask this Court to give the "in common with" provision of the Stevens treaties the construction that its wording has always had prior to the District Court's decision, and thereby restore to all of the fishermen of Washington the basic right that the treaty makers intended to secure for them — equality of opportunity for each individual fishermen, Indian and non-Indian alike.

DATED this 6th day of December, 1978.

Respectfully submitted,

SLADE GORTON,
Attorney General

EDWARD B. MACKIE,
Deputy Attorney General

JAMES M. JOHNSON,
Sr. Assistant Attorney General

Counsel for Petitioner State

Nos. 77-983, 78-119 and 78-139

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, *et al., Petitioners,*

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*

STATE OF WASHINGTON, *et al., Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*

PUGET SOUND GILLNETTERS ASSOCIATION, *et al., Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*

BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, *Et Al.*

CHARLES E. YATES
DOUGLAS FRYER
Moriarty, Mikkelborg, Broz Wells & Fryer
3300 Seattle-First National Bank Building
Seattle, Washington 98154

Attorneys for Puget Sound Gillnetters Association, et al.

JOSEPH T. MIJICH
JOHN P. WORLD
3920 Bank of California Center
Seattle, Washington 98164

Attorneys for Purse Seine Vessel Owners Association, et al.

Of counsel:

PHILIP A. LACOVARA
GERALD GOLDMAN
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D. C. 20036

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F. Cohen, *Handbook of Federal Indian Law* (1942)	33,43
K. Henry, *Background Document on Northwest Salmon Fisheries* (U.S. Dep't of Commerce, August 1977)	4
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C. Wright & A. Miller, *Federal Practice and Procedure* (West 1972)	64,65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*

No. 78-119

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *et al.*

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*, *Petitioners*,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*

BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, ET AL.

OPINIONS BELOW

On October 16, 1978, the Court granted certiorari on three petitions (Nos. 77-983, 78-119 and 78-139) and by order dated November 13, 1978, consolidated the cases.

No. 77-983 involves the petition by the State of Washington for review of two decisions by the Washington State Supreme Court: *Puget Sound Gillnetters Association* v. *Moos,* 88 Wash.2d 677, 565 P.2d 1151 (1977) (App. D of Petition No. 77-983) and *Washington State Commercial Passenger Fishing Vessels Association* v. *Tollefson,* 89 Wash.2d 276, 571 P.2d 1373 (1977) (App. B of Petition No. 77-983). The latter case is the decision upon reconsideration of 87 Wash.2d 417, 553 P.2d 113 (1977) (App. F of Petition No. 77-983). In those decisions the Washington State Supreme Court found that United States treaties of 1854 and 1855 did not entitle treaty Indians to a special allocation of the State's harvestable fishery resource. The court further concluded that the Washington Department of Fisheries is not authorized by state law to allocate fish to Indian fishermen, but rather must treat all fishermen in the same class equally.

The State of Washington in No. 78-119 and commercial fishing groups in No. 78-139 separately petitioned for review of *United States* v. *Washington,* 573 F.2d 1123 (9th Cir. 1978) (App. A-1 of Petition No. 78-119). In that decision the Ninth Circuit upheld a specific allocation of the fishery resource and the direct control by the district court of fishing activities in western Washington as an exercise of continuing jurisdiction in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash. 1974) (JA 63), *aff'd,* 520 F.2d 676 (9th Cir. 1975) (JA 39), *cert. denied,* 423 U.S. 1086 (1976).

Also included in the petitions in Nos. 78-119 and 78-139 was a second decision by the Ninth Circuit in *United States* v. *Washington,* 573 F.2d 1118 (9th Cir. 1978) (App. A-29 of Petition No. 78-119). The Ninth Circuit concluded that the district court's determination that treaty Indians do not have to comply with certain regulations of the International Pacific Salmon Fisheries Commission, and that they are entitled to 50% of the American harvest of those fish runs, was moot.

In No. 78-139, the Court has also granted certiorari before judgment in the court of appeals to review an unreported

"preliminary injunction" of the district court (JA 487-490), entered on June 6, 1978, establishing regulations for future fishing seasons.

JURISDICTION

In No. 77-983, the judgment of the Supreme Court of Washington on reconsideration was entered on October 10, 1977. A timely petition for a writ of certiorari was filed by the State of Washington on January 2, 1978. This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

In Nos. 78-119 and 78-139, the judgments of the Court of Appeals for the Ninth Circuit were entered on April 24, 1978. The petition for a writ of certiorari by the State of Washington in No. 78-119 was filed on July 21, 1978, and the petition by the Puget Sound Gillnetters Association *et al.* in No. 78-139 was filed on July 24, 1978. The petition in No. 78-139 also sought certiorari before judgment to review the preliminary injunction of the United States District Court for the Western District of Washington entered on June 6, 1978; a timely notice of appeal from that order was filed, and the case was pending in the Court of Appeals for the Ninth Circuit as No. 78-2523. This Court's jurisdiction over both petitions rests on 28 U.S.C. § 1254(1).

TREATIES AND RULES INVOLVED

1. The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (10 Stat. 1132-1133):

> "ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States,

all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows . . . .

"ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, *** all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; . . . .

"ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing . . . ."

2. Rule 65 of the Federal Rules of Civil Procedure provides in pertinent part:

"Rule 65. INJUNCTIONS

"(a) Preliminary Injunction.

"*Notice.* No preliminary injunction shall be issued without notice to the adverse party.

* * *

"(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be

required. Every temporary restraining order granted without notice . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period . . . .

* * *

"(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

QUESTIONS PRESENTED

1. Whether the federal courts properly construed the assurance in the Stevens treaties that members of certain Indian tribes would have the right to fish "in common with" other fishermen as providing those Indians a guaranteed allocation of the harvestable fish and as excluding other fishermen from an equal opportunity to fish.

2. Whether the district court exceeded its constitutional and equitable powers by:

(a) adopting an apportionment formula effectively allocating more than half the harvestable fish to one small group of fishermen without regard to the economic impact of that allocation on the far larger group;

(b) assuming the power to enforce the treaties by creating specific allocations of fish in the absence of implementing legislation by either the federal government or the State of Washington;

(c) asserting complete day-to-day supervision and control over commercial fishing in the State, deliberately displacing the State's role in this essentially local area of regulation; and

(d) directing state officials to perform functions that under state law they lack authority to perform.

3. Whether the district court violated the due process and procedural rights of non-treaty fishermen by:

(a) holding that citizens of a State are automatically bound by rulings made in litigation to which the State was a party, despite material differences in position and the existence of substantial independent interests; and

(b) applying injunctions to the non-treaty fishermen on the basis of determinations made in a litigation to which they were not parties, and denying them an opportunity to contest the basis for the orders.

STATEMENT

I. INTRODUCTION

The petitioners on whose behalf this brief is submitted are two commercial fishing associations and their presidents. These petitioners adopt the Statement contained in the Petitioner State of Washington's Brief (at 5-35), with the following supplementation.

This is a case in which petitioners' livelihood as commercial fishermen has been virtually destroyed by the interpretation of a seemingly clear phrase in a series of Indian treaties in a way that stands the plain object of the treaties on its

head. The issue is purely one of commercial rights: whether one group of fishermen—treaty Indians—is entitled to a disproportionately large share of the commercially harvestable fish, to the exclusion of all the rest of the citizens of the State, Indians and non-Indians.

Even two of the three judges of the Ninth Circuit expressed candid doubts that the right result has been reached. Nevertheless, these petitioners, who were not even parties to the litigation in which the misinterpretation took place, have been placed under direct federal injunction and have been denied the right to contest the interpretation that threatens their life's work.

The Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association are nonprofit organizations whose members are full-time commercial gillnetters or purse seiners harvesting salmon in the Puget Sound area of Washington State.[1] In addition to the approximately 1,000 members of these associations, it has been estimated that as of 1974 there were 5,800 other commercial fishermen, 283,650 sports fishermen, and 794 Indian fishermen affected by these cases. The actual number of full-time Indian commercial fishermen is much smaller. *See* JA 23-24, 169 (FF 188).[2]

The Washington State Department of Fisheries is authorized under state law to regulate salmon fishing in the interest of conservation "so as to fully utilize the harvestable portions for the economic well-being *of the citizens as a whole.*" *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash.2d 677, 682,

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[1] The gillnetters use gillnets, which are meshes that are suspended from the surface of the water to form a wall against which the salmon collide and are entangled behind the gills. The purse seiners set their nets in a circle that is then "pursed," or closed, at the bottom to trap the fish inside.

[2] Unless otherwise noted, all factual references are to the Joint Appendix, "JA." "FF" refers to the findings of fact in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

565 P.2d 1151, 1153 (1977) (Pet. 77-983, at D6) (emphasis added). As interpreted by the Washington Supreme Court, state law does not permit the Department to apportion fish to Indian fishermen through the manipulation of conservation regulations; rather, state law requires that *all* fishermen be provided an equal opportunity to fish. *Id.*

However, commencing in 1974, Judge George Boldt of the United States District Court for the Western District of Washington began issuing decrees in proceedings, in which neither the Gillnetters nor the Purse Seiners have been parties, to allocate *well more than half* of the state fisheries to Indians who, as the figures above show, comprise a tiny percentage of the total fishermen. These orders rest on the court's interpretation of treaties executed by the United States in 1854 and 1855 with Northwest Indian "tribes" that the United States deliberately created for the purpose of extinguishing Indian claims to lands in Washington Territory. JA 107-09 (FF 17-19).

Each of these treaties provides only that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory . . . .*" JA 97-99 (FF 1) (emphasis added). As Judge Boldt himself found, "[t]he Indians were assured by [Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory] and the treaty commissioners that they would be allowed to fish, but that the white man also would be allowed to fish." JA 109 (FF 20).

Although today it is conceded on all sides that "[i]t is necessary for the fishing activity of Indians and non-Indians to be regulated in order to assure that conservation of the fishery resource is achieved" (JA 166 (FF 181)), this was not true when the Stevens treaties were negotiated. On the contrary, "[b]ecause of the great abundance of fish resources and [the] limited populations, there was no need to regulate the taking of fish by either Indians or non-Indians at treaty times." JA 103

(FF 9). *See also* JA 50, 52, 72, 109 (FF 20). Indeed, it was not until the development of a large-scale commercial fishing industry in the last decades of the Nineteenth Century that the need to implement conservation measures first arose. JA 102-03 (FF 8). Understandably, as the district court found, there is virtually "no evidence at the time of the treaties that either party intended to restrict the others fishing because it was not contemplated that they would interfere with each other." JA 113 (FF 28).

In short, contrary to the dictates of state law, the district judge has concluded that a tiny portion of the State's commercial fishermen today are entitled to more than half the salmon fishery resource. This bizarre result was held to be compelled by the language of the treaties, even though common sense and the historical evidence found by the court itself show that the treaties did not contemplate different treatment for any fishermen, Indian or non-Indian, in the event of scarcity. Moreover, to carry out this apportionment—which the state courts have held to be inequitable and, indeed, unconstitutional[3]—Judge Boldt has assumed final responsibility for management of all of Washington's fisheries, summoned a number of federal agencies to effectuate his plan, directed the State Department of Fisheries to assist the federal allocation program despite the Department's lack of legislative authority to do so, and issued injunctive orders against the Gillnetters, Purse Seiners, and others who have never been subject to the court's jurisdiction or enjoyed their day in court on the merits of the allocation program.

The impact of these extraordinary measures on the Gillnetters and Purse Seiners can scarcely be overstated. In the four years prior to the district court's initial decision in 1974, the commercial net fishing industry in the southern Puget Sound

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[3] *See Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977) (Pet. 77-983, App. B); *Puget Sound Gillnetters Ass'n* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977) (Pet. 77-983, App. D).

averaged 34 days of fishing per season.[4] In 1976, as a consequence of that decision, this allotment for gillnet fishermen like petitioners dwindled to a mere *three days*. As discussed in the State's brief (at 7-8), according to findings issued by the U.S. National Marine Fisheries Service, the average net earnings of Gillnetters dropped between 1973 and 1974 from $9,379 to $1,527, and for Purse Seiners in the same period from $30,568 to $13,026. At the same time, as a result of their age and commitment to this industry, these men have not been able to shift to new careers.[5]

To place the issues of these cases in perspective, it is necessary to review in detail the rationale by which the district court concluded that its apportionment plan was required, the different rationale by which the court of appeals affirmed it, and the irregular procedures that the federal courts have sanctioned to implement it.

II. THE FEDERAL APPORTIONMENT PLAN

A. As Adopted By The District Court In 1974

In his initial decision in 1974 Judge Boldt concluded that the Department of Fisheries is required to implement a complicated formula for apportioning fish between the 794 treaty Indian fishermen and the remaining 290,250 fishermen, most but not all of whom are not Indians. *United States* v.

[4] See K. Henry, *Background Document on Northwest Salmon Fisheries* (U.S. Dep't. of Commerce, August 1977) Table I.

[5] According to the Service's findings, the average number of years spent in commercial fishing by individual gillnetters is 16; for purse seiners, this figure is 28.

Evidence concerning the impact of the federal court's apportionment plan on the Gillnetters and Purse Seiners is scant in the record before the Court, since the associations were not parties to any of the original proceedings in the district court, and then were expressly denied the opportunity to submit such evidence when the district court summarily extended its decrees to them.

Washington, 384 F. Supp. 312 (W.D. Wash. 1974).[6] Although the district judge filed a lengthy opinion and elaborate findings of fact and conclusions of law, the only explanation given by the court for any apportionment at all appears in the following single paragraph:

> "By dictionary definition and as intended and used in the Indian treaties and in this decision 'in common with' means sharing equally the opportunity to take fish at 'usual and accustomed grounds and stations'; *therefore*, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above."

Id. at 343 (emphasis altered; footnote omitted).

In short, Judge Boldt determined that it is necessary to divide fishing opportunities equally between treaty Indians as a group and all other non-treaty fishermen merely because of the treaty language providing rights for all persons to fish "in common" with each other. Significantly, in the 1974 decree the court undertook to assure an "opportunity" for the treaty Indians to take at least 50% of the harvestable fish, not to guarantee that they actually achieve that level of success.

The formula adopted by the court and still in effect is considerably more complex than a 50-50 split. Specifically, the court's apportionment plan calls for the treaty Indians to have the opportunity to take 50% of the total number of fish within the State's regulatory jurisdiction that, absent harvest en route,

[6] The Indian beneficiaries of the apportionment even include a group of intervening "tribes" not recognized by the United States. These individuals are allowed to fish without licenses if they satisfy the court of their "blood quantum." In addition, the district judge awarded the same special privileges to these Indians as to the members of recognized treaty tribes if they are invited to fish by one of those tribes.

would be available for harvest at the treaty Indians' usual and accustomed fishing places, subject to the following adjustments:

> —Subtract from the total number of fish subject to apportionment not only the number of fish necessary for adequate escapement to preserve the fish run, but also the number of fish taken by the Indians on the reservation and the number of fish they say they want for subsistence and ceremonial uses.
>
> —Further adjust the Indian allocation upward and the non-treaty allocation downward to compensate for the disproportionate number of fish that non-Indian fishermen take in the ocean outside the State's regulatory jurisdiction.

Id. at 343-44. The number of fish that the Indians may take, free from apportionment, on the reservation, for subsistence, and for ceremonial use rests in the Indians' discretion. *See id.* at 417 (¶ 17). Moreover, fish caught by the Indians in all-citizen fisheries (as distinguished from their reservations and other "usual and accustomed" places) are not counted toward the Indian share, but are included in the non-Indians' share. *Id.* at 409-10 (¶ 7). In addition, despite the fact that the Department of Fisheries has "contributed significantly to Indian catches" through the state-financed planting of hatchery-reared fish (JA 177 (FF 210)), artificially propagated fish are subject to the 50%-plus allocation.[7]

B. As Affirmed By The Court Of Appeals In 1975

The court of appeals sustained the apportionment as ordered by the district court, but relied on an entirely different theory. Rather than rest the allocation on the language of the

[7] The district court specifically ruled that entirely artificially propagated runs are subject to apportionment. *Id.* at 411 (¶ 19). Although initially the court refrained from deciding whether the same rule governs individual hatchery-reared fish in mixed runs, *id.* at 344-45, the apportionments ordered by the court since then have applied to these fish. *See* JA 3, 26-27.

However, the "permanent" determination whether treaty rights extend to hatchery fish is supposed to be decided in a second phase of this case (Phase II), presently pending.

treaties, the court analogized the suit to an application for an equitable partition of property held by co-tenants—here, assertedly, the treaty Indians as a group and all others as a group. *United States* v. *Washington*, 520 F.2d 676, 686 n.3, 687 (9th Cir. 1975). The court of appeals also affirmed the specific allocation formula adopted by the district court.[8]

Treating the details of the apportionment as subject to "a great amount of discretion" in accordance with the equitable partition theory, the court of appeals ruled that the lower "court's apportionment was well within its discretion." The court reasoned that the 50-50 allocation "reflects the equality existing between the two bargaining parties and [since the Indians allegedly regarded the right to fish as a communal property right belonging to the tribe] best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties." *Id.* at 687-88.

[8] The court ordered one modification concerning the adjustment for fish taken outside the State's jurisdiction. The court held that this extra adjustment in favor of the treaty Indians should not take account of fish caught by non-Washingtonians, since "[t]he treaty granted equal rights at the traditional areas to Washington citizens, and their ability to fish is equally impaired by foreign fishing." *Id.* at 689.

The fish catch giving rise to "equitable adjustment" does, however, include fish taken in the American/Canadian fishery regulated by the International Pacific Salmon Fisheries Commission (IPSFC) and in the 200-mile offshore fishery regulated by the United States under the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, over which the State of Washington and the non-treaty fishermen have no control. Because the United States controls the take in the 200-mile offshore troll fishery, it can ask the district court to compel the non-treaty petitioners to contribute their share to the Indians for what the United States has given away elsewhere in the 200-mile offshore fishery.

By the use of this "equitable adjustment" principle, the district court could prevent the non-treaty petitioners from ever fishing again in waters over which the State has jurisdiction, since a substantial percentage of fish otherwise destined for Washington waters are taken in the IPSFC and the 200-mile offshore fishery.

The court of appeals also specifically upheld the exclusion from apportionment of fish taken on the reservation because only the Indians enjoyed the right to fish on the reservation under the treaties. *Id.* at 690. Finally, the court of appeals affirmed the lower court's ruling concerning fish used for tribal ceremonies or subsistence, noting that this was uncontested by the State. *Id.* The court thus did not find it necessary to discuss the district court's rationale for this ruling—namely, that the opportunity to take fish for these purposes was and remains a matter of utmost concern for the Indians. 384 F. Supp. at 343.[9]

C. As Implemented By The District Court On Remand

In issuing his original decree, Judge Boldt ordered a stay pending appeal, subject to the condition that the Department of Fisheries "make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision . . . ." *Id.* at 420 (¶ 5). The Department complied with this directive by promulgating regulations limiting both commercial and sports fishing. *See* JA 1.

Following the denial of certiorari by this Court, 423 U.S. 1086 (1976), however, the district court adopted a revised apportionment plan for 1977 based on certain unstated "facts, circumstances and equities peculiar to this year's salmon runs."[10] Despite the fact that the court's initial decision was based on the conclusion that a 50-50 allocation was required as a matter of law, the court now provided for a different apportionment to the Indians for many of the runs, varying from 37% to 48%, for an overall allocation of 45%. *See* Memorandum Order and Preliminary Injunction, Aug. 31, 1977, Pet. 78-119, at A44 *et seq.* However, while the 1974

[9] The numbers of fish taken by the Indians on the reservation for subsistence and ceremonial purposes are not trivial. *See, e.g.*, Memorandum Order and Preliminary Injunction, Aug. 31, 1977, Pet. 78-119, at A43-A44.

[10] In a similar vein, the court stated without explanation that the 1977 allocations "shall not be interpreted in any way as an express or implied modification" of the court's earlier decision.

decree had spoken only of an "opportunity" for treaty Indians to take 50% of the catch—a fact stressed by the Solicitor General in opposing certiorari[11]—the court's 1977 decree and its successors are devoted to guaranteeing a disproportionately successful catch for each treaty Indian by banning fishing by non-treaty net fishermen. Moreover, unlike the regulations originally promulgated by the Department of Fisheries, the 1977 order effectuates allocations through limitations only on commercial net (as opposed to recreational) fishing. *See* Preliminary Injunction re: Enforcement of 1977 Fisheries, Sept. 27, 1977, Pet. 78-119, at A89 *et seq.*

On June 6, 1978, the district court adopted similar orders for the 1978 fishing season and subsequent years. *See* JA 479-90. Without explanation, however, the court reverted to the original 50%-plus formula in favor of the treaty Indians, despite the economic impact of the apportionment program on the commercial fishing industry. JA 482 (¶ 1). The court concluded that "[t]he rights of the treaty and non-treaty fishermen have already been adjudicated, therefore economic disruption associated with implementing the 1974 decree is not legally cognizable." JA 483 (¶ 4).

D. As Affirmed By The Court Of Appeals On The Second Appeal

Adhering to its co-tenancy analogy on a second appeal, the court of appeals sustained the district court's special allocation for 1977 as an "exercise of discretion." *United States* v. *Washington*, 573 F.2d 1123 (9th Cir. 1978). Two members of the panel did so, however, only because they felt bound by the earlier decision of the court of appeals; Judges Kennedy and Wallace separately expressed their doubts "that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights." *Id.* at 1136. In any event, noting that "the state does not appear to quarrel seriously with the specific allocation" and that the "allocation can best be

[11] *See* Br. of the United States in Opposition, Nos. 75-588, 75-592, 75-705, at 20.

expressed and enforced . . . by numbers of fish taken," the court stated that "[t]he numbers question is one of degree, not one of principle." *Id.* at 1130 & n.6.

III. FEDERAL MANAGEMENT OF WASHINGTON FISHERIES

The district court's original 1974 decree was lengthy and complex. Among other things, it prohibited the adoption or enforcement of any Department of Fisheries regulation that would limit the harvest of fish by treaty Indians unless the Department first satisfied the court of the conservation need for the regulation and that the State's regulatory program provided for the allocation set forth in the court's opinion. *See* 384 F. Supp. at 413-19. It also required the State to issue revised regulations in accordance with the allocation ordered.

When the commercial net fishermen asked a state court to enjoin the Director of Fisheries from adopting the regulations ordered by the district court, on the ground that the Director has no statutory authority to do so under state law, the district court, on oral motion by the United States without notice, on August 6, 1975 (Docket No. 1240), enjoined the state court from any further proceedings in the matter. *See Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977).

The district court, however, refused to issue a similar injunction relating to the recreational fishery when the non-treaty recreational fishermen sought and obtained an injunction prohibiting the Director from reducing the sport fishing catch. The state court held that the Department had no statutory authority to allocate fish for the apportionment purposes mandated by the federal courts, and could not lawfully comply with the federal decree to that effect. The court also ruled that the treaties did not justify any allocation. *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977) (Pet. 77-983, App. B); *see also Puget Sound Gillnetters Association* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977) (Pet. 77-983, App. D).

Judge Boldt responded in August 1977 by assuming control over all allocations and by removing from state regulatory jurisdiction all fish allocated to the Indian fisheries. He also enjoined the Department "to manage and regulate the harvest of the portions of such runs not herein removed from the defendants' jurisdiction and control in such manner as will assure the escapement from non-treaty harvest of the numbers of fish allocated to propagation escapement and to the treaty fisheries . . . ." Memorandum Order and Preliminary Injunction, Aug. 31, 1977, ¶¶ D-F, Pet. 78-119, at A56-A57. At the same time, he adopted an elaborate plan "establish[ing] guidelines for management of salmonid resources originating in or passing through Washington waters from the mouth of" Puget Sound. The plan included authorization to a previously established Fisheries Advisory Board composed of one representative of the State, one from the tribes, and the court's own fishing expert to resolve disputes under the plan. Memorandum Adopting Salmon Management Plan, Aug. 31, 1977, Pet. 78-119, at A62-A63, A75-A76.

Shortly thereafter Judge Boldt issued an injunction ordering the Gillnetters and Purse Seiners, among other commercial net fishermen, not to take, possess, or sell salmon without first determining from a telephone "hot-line" that the area to be fished is open for non-Indian fishing pursuant to the court's allocation scheme. The decree also directed the State to maintain the "hot-line," to serve the injunction on fishermen, and along with the United States to cite any individual with notice of the order who fished in violation of it. Preliminary Injunction re: Enforcement of 1977 Fisheries, Sept. 27, 1977, Pet. 78-119, at A89 *et seq.* *See also* Preliminary Injunction Order, Oct. 17, 1977, Pet. 78-119, at A93 *et seq.*

The injunctive provisions now in effect for the 1978 fishing season and later years are even more elaborate. In addition to enjoining any fishing not authorized pursuant to the "hot-line" procedure and directing the State to maintain reasonable surveillance to enforce the decree, Judge Boldt's order of June

6, 1978 specifically enlists and deputizes personnel of the National Marine Fisheries Service, the Coast Guard, and the United States Marshal's Service, in addition to the State Department of Fisheries, to assist in the enforcement of the decree by various means, including the boarding of vessels "upon suspicion." Preliminary Injunction re: Enforcement of Limitations on Nontreaty Salmon Fisheries for 1978 and Subsequent Seasons, June 6, 1978, Pet. 78-139 at C1 *et seq.* [12]

In sum, the ultimate authority for management of Washington's fisheries is now in the hands of a federal judge, operating through specially conscripted state and federal deputies. The court has assumed responsibility for approving the adoption of state conservation regulations, providing for the allocation of fish, and supervising and enforcing compliance.

IV. ASSUMPTION OF JURISDICTION OVER THE GILLNETTERS AND PURSE SEINERS

A. The Orders Reviewed By The Court Of Appeals

Neither the Gillnetters nor the Purse Seiners were joined as parties in the original federal proceedings. Indeed, although the Purse Seiners were allowed to file a brief as *amicus* in the district court, their motion to intervene was denied.[13] Nonetheless, as noted above, in August and September 1977 the district court issued a series of *ex parte* orders purporting to regulate the fishing activities of the Gillnetters, the Purse Seiners, and other commercial net fishing interests directly.

The first order issued by the judge directly against nontreaty fishermen was a Memorandum, Order and Preliminary Injunction signed and issued on August 10, 1977, which

[12] Federal officers have, in fact, cited many fishermen for violating court orders in 1978; one third of these have been Indians. Tr., Nov. 3, 1978, at 14, 25. *See also* JA 482 (¶ 25).

[13] Judge Boldt denied the applications of several non-treaty fishing groups for permission to intervene. By contrast, all such applications by Indian tribes (26 so far, including some officially recognized tribes) have been granted.

generally declared that "[n]ontreaty fishermen shall not fish" for salmon "unless prior approval is obtained from the Court or the Court's Fishery Advisory Board."[14] On August 31, 1977, without advance notice to petitioners, Judge Boldt issued a temporary restraining order that specifically assumed jurisdiction over thousands of people who had never been parties to the case—petitioners and all other fishermen licensed by the State—and enjoined them from fishing except with his permission.[15] Despite the requirement in Rule 65(b) of the Federal Rules of Civil Procedure, which permits *ex parte* TRO's only when the affected person cannot reasonably be notified of the application, there is nothing in the record to indicate what efforts were made to give notice and the reasons supporting the claim that notice should not be required.[16]

On September 12, 1977, an order was entered extending this temporary restraining order. Again no prior notice was given to petitioners. On September 22, 1977, the district court issued a "preliminary injunction" prohibiting all gillnet and purse seine fishermen from taking salmon from the Straits of Juan de Fuca in Puget Sound. Like the earlier orders, the preliminary injunction was issued without prior notice to any

[14] Apparently upon realizing that the terms of this order applied to all nontreaty harvesters of salmon including recreational fishermen, the court on August 12, 1977, issued a Minute Order specifically excluding recreational fishermen from the terms of the August 10 decree.

[15] *Compare Carroll* v. *Presidents and Commissioners of Princess Anne*, 393 U.S. 175, 180 (1968), invalidating an *ex parte* temporary restraining order issued to persons "without any effort, however informal, to invite or permit their participation in the proceedings."

[16] The August 31 order provided in part (Pet. 78-139 at E2):

"1. All reefnet, gillnet and purse seine fishermen licensed by the State of Washington, Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, . . . and all persons in active concert or participation with them are hereby temporarily restrained from engaging in, taking, possessing, or selling salmon of any species in violation of this court's orders of August 10, 1977 or August 31, 1977 or state regulations adopted pursuant to the orders of this court."

commercial fishermen. On September 27, 1977, the district court entered another "preliminary injunction," closing Puget Sound to all non-treaty net fishermen

> "unless such person has first ascertained from the Washington Department of Fisheries telephone 'hotline' . . . . that that the area to be fished is open for fishing by non-treaty fishermen at the time the individual intends to fish . . . ." Pet. 78-119, at A89-A90.

On appeal the court of appeals dismissed challenges to the pervasive non-compliance with Rule 65 as "technical attacks . . . . We find them to be without merit." *United States* v. *Washington, supra,* 573 F.2d at 1133 n.16. In addition, the court sustained the application of the September 27, 1977 injunction to non-parties on the fiction that they are "privies" of the State, which had been a party to the litigation from the outset. The court reasoned:

> "[U]nder Washington law the citizen's right to take fish is purely derivative of the state's power to regulate rights in the fish. The fisher's interest is therefore derivative of the state's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party." 573 F.2d at 1132.

Evidently recognizing that the State was an inadequate representative of the interests of the Gillnetters and the Purse Seiners, the court lamely concluded that "[a]ny complaints the fishers may have concerning the state's representation of their interests are matters between them and the state." *Id.* at 1133.

As a result of the issuance of the September 27, 1977 injunction, a number of commercial net fishermen were cited during the 1977 Puget Sound salmon fishery for criminal contempt. As of the date of this brief, five are presently serving jail terms of up to 60 days as a result of conviction for criminal contempt.

B. The Later Orders

On December 7, 1977, Judge Boldt ordered the State of Washington not to issue any net salmon fishing licenses for 1978 or subsequent seasons. He set a hearing on the United States' motion for an injunction comparable to the one issued in 1977 and directed that any individual or organization wishing to appear at that hearing should file a notice of appearance and a memorandum setting forth any objections to the proposed 1978 injunction. Pet. 78-139, App. I. Copies of this order and the proposed injunction were served on a large number of commercial fishermen.

At the hearing on the proposed injunction, which was held April 5, 6 and 24, 1978, several fishermen appeared represented by counsel and a larger group appeared *pro se.* Neither petitioner Puget Sound Gillnetters Association nor petitioner Purse Seine Vessel Owners Association participated in the hearing. When counsel for an individual fisherman attempted to clarify the extent to which the non-treaty commercial fishermen would be authorized to participate in the hearing, the court emphasized their non-party status.[17] The testimony that

[17] "Mr. Yates: You indicated we can present testimony. Do we have the authority to subpoena witnesses?

"The Magistrate: To subpoena persons?

"Mr. Yates: Yes.

"The Magistrate: I would say no.

"Mr. Yates: O.K.

"The Magistrate: As a nonparty, I would say no.

"Mr. Yates: We do not. Do we have the authority to use interrogatories, requests for admission, the other discovery devices contained in the rules?

"The Magistrate: I would again, as a nonparty, say no." JA 541.

Judge Boldt later acknowledged that "[t]he fact that [the commercial fishermen] are not parties to this lawsuit has placed restrictions on the scope of their participation." The court also acknowledged that the Magistrate before whom the hearing was held had been powerless to grant the status of party to any non-party. JA 480 (¶¶ 11-12).

was permitted during the hearing was restricted to a determination of the need for the enforcement mechanisms contained in the proposed injunction. The court specifically precluded inquiry (JA 538-41) into the economic impact that would result from the enforcement of the 50%-plus allocation scheme that Judge Boldt had adopted in his original decision.

On June 6, 1978, still another "preliminary injunction" was entered, dealing with the enforcement of limitations on non-treaty salmon fisheries for 1978 and subsequent seasons. By the terms of that order (Pet. 78-139, at C2):

> "All gillnet, purse seine and reefnet fishermen licensed by the State of Washington, all other persons who attempt to net or assist in netting salmon in . . . [Puget Sound], the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, . . . and all persons in active concert or participation with them, are hereby enjoined and prohibited from taking, attempting to take, or offering for sale, salmon of any species taken from such waters, or assisting in any of the foregoing, unless such person has, within the previous twenty-four hours, ascertained from the National Marine Fisheries Service telephone 'hot line' . . . that such fishing in the area in which the individual intends to fish is not prohibited by this court at the time of such fishing . . . ."

The injunction further subjects the commercial fishermen to sweeping—and perhaps unprecedented—enforcement powers conferred on government agents (Pet. 78-139 at C3):

> "4. Personnel of the National Marine Fisheries Service, the Coast Guard, the United States Marshal's Service and the Washington Department of Fisheries and persons lawfully deputized by any such agency *may board fishing vessels for the purpose of investigating suspected violations* of this injunction.
>
> "5. At the direction of any enforcement agent . . . all . . . [non-treaty fishermen] are hereby *ordered to stop their vessels, permit boarding* by enforcement agents, *permit themselves* and their vessels *to be photographed*, permit their catch to be examined, identify themselves and their vessels to the satisfaction of the boarding enforcement agents, *and produce* either a valid Washington Department of Fisheries net salmon fishing license or a valid treaty Indian *identification card* for the then current fishing season which, by this order, all fishermen are required to carry when engaged in any salmon fishing activity described . . . . Any fisherman failing to identify himself as provided herein may be placed under arrest . . . ." (Emphasis added.)

As a result of this injunction, more commercial net fishermen have been cited for criminal contempt and are presenting awaiting trial on that charge.

This order was appealed to the Ninth Circuit, and is now before this Court on certiorari before judgment.

SUMMARY OF ARGUMENT

I

The decision by the federal courts below takes the simple language of the Stevens treaties and gives it an effect that is not justified either by its plain meaning or by its historical understanding. The treaties assured the Indians the right to fish "in common with" the newly arriving settlers of the territory. Nothing in that phrase suggests that there was any expectation that the harvestable fish would be or could be mathematically apportioned between the treaty Indians and the rest of the populace as separate groups. There is certainly nothing in the text of the treaties that provides a foundation for the decision by the federal courts to exclude non-treaty fishermen from the opportunity to fish at all, in order to guarantee the treaty Indians a certain proportion of the harvestable catch.

Moreover, the available historical evidence demonstrates that the natural meaning of the phrase "in common with" was the one understood by both parties to the treaties. The Anglo-American understanding of a "common fishery" was that all persons are entitled to undivided access to it. The attempt by the court of appeals to justify a proportionate allocation by using a "co-tenancy" analogy is wide of the mark because that concept has no application to common fisheries, as the treaty negotiators well knew. Contemporaneous documents manifest the intent of the parties that, while the Indians' right to fish at their usual and accustomed places was to be protected, the right of other people to fish as well was also to be secured. The rights guaranteed by the treaties consist of the equal opportunity of each individual fisherman to pursue that effort, and those rights are not properly or fairly apportioned between treaty Indians as a group and others as a group.

Indeed, the prior decisions of this Court construing the Stevens treaties confirm that the treaties confer rights of equal dignity on individuals, Indian and non-Indian alike. As a result, any apportionment, which necessarily prefers some individuals over others, flounts the essential guarantee of the treaties themselves. Moreover, such disparate treatment violates the Equal Protection Clause of the Constitution, since there is no difference between Indian and non-Indian fishermen that justifies any favoritism in the regulation of fishing opportunities.

II

A. The allocation designed by the district court is unsupportable even without regard to the absence of a foundation for an apportionment in the treaties themselves. The formula constructed to guarantee the treaty Indians a definite proportion of the total harvestable catch does not reflect any sound exercise of discretion; indeed, the district judge treated his percentage allocations as a product of legal compulsion, and he deliberately refused to weigh the economic hardships being

inflicted on thousands of non-treaty fishermen whose livelihoods have been virtually destroyed by his decrees.

Beginning with the assumption that treaty Indians as a group should be guaranteed half the harvestable catch—even though Indians make up only a tiny fraction of the commercial and recreational fishermen in the State—the district judge compounded the error of his apportionment by conferring still further premiums on the Indians. The allocated shares are so disproportionate to the respective numbers of affected fishermen that the district judge's plan makes a mockery of elemental notions of equity and the equal protection of the laws.

B. The district judge also overstepped his judicial function by undertaking to enforce these treaties according to his own design, without the guidance of implementing federal or state legislation. Treaties are normally not self-executing when their terms constitute a general commitment that leaves open a wide range of policy choices and requires extensive administrative machinery. In deciding to enforce these treaties himself, the district judge improperly devised his own elaborate mechanisms that have ultimately come to establish the district judge as master of the State's fisheries, with various federal and state agencies under order to police the detailed and far-ranging restrictions he has imposed.

C. Contrary to a basic principle of federalism, the federal courts here have sought to order state agencies to take official enforcement action beyond the scope of the powers the agencies have been given by the state legislature. The people of the State of Washington, acting through their elected representatives, have decided to authorize state officers to regulate the State's fisheries only for the purpose of promoting conservation. The federal courts lack the power to impose upon the State the obligation to enforce a mathematical allocation of fish among groups of fishermen solely because the federal courts have concluded (wrongly, we submit) that treaties allow certain Indians to harvest a disproportionate share of the resource.

III

A. Non-treaty fishermen like petitioners were not parties to the litigation in which the United States and treaty Indians joined in an effort to force the State of Washington to allocate a specific share of the fish to the Indians. Despite this exclusion, the lower federal courts have ruled that the non-treaty fishermen are bound by the rulings that are adverse to their interests because they assertedly were in "privity" with the State. Due process, however, prevents the courts from holding that non-parties are bound by the outcome of a litigation unless one of the parties to that litigation was a legally adequate representative of their interests.

That could not be true here, however, since, to the extent that the State was in "privity" with its citizens, it was equally in privity with all of its citizens, including the treaty Indians. Since under the "privity" theory the State therefore had conflicting interests imputed to it, it cannot be regarded as the legally adequate representative of any group or person with distinct interests. Moreover, throughout the course of the federal and state court litigations, the State has taken various positions that diverge from the views of the non-treaty fishermen or that conflict with their interests.

B. There can be no privity sufficient to bind a non-party unless there is a true identity of interests between party and non-party, but here the non-treaty fishermen had distinct, independent interests. Those cases in which a state has been treated as an adequate representative of its citizens have involved situations in which all its citizens were similarly situated. In the cases now before the Court, however, various groups of Washington citizens are arrayed against each other. It is a pure fiction to pretend that one group of the State's citizens may fairly be bound by the earlier litigation on the assumption that the State was representing them.

C. Finally, the federal district judge violated both due process and Rule 65 of the Federal Rules of Civil Procedure by

extending his injunctions directly to petitioners, who had not been parties to the litigation in which the underlying rulings were made. Petitioners have never had their day in court and have been repeatedly denied the opportunity to contest the premises on which the injunctions rest. Rule 65 allows a federal court to apply its orders to non-parties only when they are acting in concert with a party in an attempt to evade the court's decrees or are resting on a common legal right. Neither of those conditions is satisfied here, since petitioners and the State have been acting at arm's length—and have actually been in conflict on various aspects of this situation—and the State's unquestioned power to regulate commercial fishing does not make the State's rights and interests legally identical to those of commercial fishermen like petitioners.

For all these reasons, the federal orders must be set aside.

ARGUMENT

I. THE TREATIES PROVIDE NO BASIS FOR THE APPORTIONMENT OF FISH.

A. Apportionment Is Fundamentally At Odds With The Stevens Treaties Themselves And With The Equal Protection Of The Law.

The lower federal courts have split the Washington State fishing industry into two *groups*—Indians and non-Indians—to which fish are to be apportioned. Because of the population disparity between the groups, the necessary consequence is that some individual fishermen have been accorded a dramatic preference over others. This result is inconsistent with the very treaties on which the apportionment is said to be based.

The treaties state that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to *said Indians*, in common with *all citizens* of the Territory . . . ." It seems obvious that this language was intended to

accord individual Indians and individual citizens the right to fish at the Indians' accustomed fishing places. As the Court said in *United States* v. *Winans*, 198 U.S. 371, 381 (1905), the language reserves a non-exclusive right to fish "to every individual Indian, as though named" in the treaty. *Cf. McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 181 (1973). The Court has held on other occasions that this language also establishes "rights of the non-Indian citizens of Washington," *Puyallup Tribe, Inc.* v. *Department of Game of the State of Washington*, 433 U.S. 165, 176 & n.16 (1977) (*Puyallup III*), which the courts must strive "to accommodate [with] the rights of Indians . . . ." *Department of Game of the State of Washington* v. *Puyallup Tribe*, 414 U.S. 44, 49 (1973) (*Puyallup II*).). *See also Puyallup Tribe* v. *Department of Game of the State of Washington*, 391 U.S. 392, 398 (1968) (*Puyallup I*). The decisions below, however, subordinated the rights of one group of commercial fishermen to the rights of the other group at what were declared to be "common" fisheries.[18]

The essential point is that the parties to the Stevens treaties themselves perceived the rights of all fishermen, Indian and

[18] Treaty Indians today effectively enjoy greater freedom to fish than other citizens. *See Tulee* v. *Washington*, 315 U.S. 681 (1942) (immunity from fishing license fees); *United States* v. *Winans*, *supra* (easement to fishing grounds); Wash. Rev. Code §§ 75.28.450 *et seq.* (limitations on commercial fishing licenses; not applicable to treaty Indians). But this is not inconsistent with the equality of rights under the treaties. The Indians' superior freedom to fish today arises merely because the State of Washington succeeded to the plenary powers of the federal government over only the non-Indian citizens of the Territory when the State was admitted to the Union. As Mr. Justice Douglas explained, "A 'right' which the Federal Government grants an Indian may 'not be qualified or conditioned by the State,'" apart from "conservation measures, applicable to all . . . ." *Antoine* v. *Washington*, 420 U.S. 194, 211 (1975) (Douglas, J., concurring) (quoting *Puyallup I*, 391 U.S. at 399). *See generally Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962).

non-Indian, to be of equal dignity.[19] Indeed, the Court has already declared that there is a principle "of equal protection implicit in the phrase 'in common with,'" *Puyallup I*, 391 U.S. at 403. The treaties' description of the specific right in question—the right to fish "in common"—compels the conclusion that all individual fishermen must be treated equally. In short, the right of "said Indians [to fish] in common with all citizens" can hardly be turned into a right to exclude citizens from equal fishing opportunities. To allocate more fish to some individuals simply because they are Indians thus stands the treaties' central assurance of equal individual rights on its head.

Only last Term in *University of California Regents* v. *Bakke*, 438 U.S. ____, 98 S. Ct. 2733 (1978), this Court underscored that the focus of the Equal Protection Clause of the Fourteenth Amendment is on the rights of individuals. As Mr. Justice Powell stated there:

> "The guarantees of the Fourteenth Amendment extend to persons. Its language is explicit: 'No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. They are personal rights' . . . ." 98 S. Ct. at 2748 (citations omitted).

[19] Although the district court below blinded itself to this truth, *see* 384 F. Supp. at 332, the court of appeals so held in clarifying the equitable adjustment to be made to the 50-50 allocation for fish taken outside the State's regulatory jurisdiction. "The treaty," the court of appeals correctly noted, "granted equal rights at the traditional areas to Washington citizens . . . ." 520 F.2d at 689. *See also* 573 F.2d at 1128 ("[t]he rights of each sovereign are reserved or granted in the treaties"); Br. for the United States, Nos. 78-119 and 78-139, Sept. 1978, at 24 (recognizing the existence of "rights possessed by all citizens of the State to fish 'in common' with the treaty Indians"). Inexplicably, the court of appeals failed, however, to give effect to this fact in approving the district judge's apportionment plan.

The federal courts below have simply ignored this fundamental truth. In response to petitioners' equal protection challenge to the apportionment program, the court of appeals specifically ruled that comparisons of the numbers of Indian and non-Indian fishermen and the quantity of fish that each is allowed to take is "irrelevant under the law" as a result of the treaty parties' alleged co-tenancy. The Indians obtain their rights and fish under the regulation of one co-tenant, the tribes, said the court, while the non-Indians derive their rights and fish under the regulation of another, the State as the successor to the United States. "The population-head-count disparity," the court concluded, "is the unremarkable result of normal principles of property law applied to changing numbers within cotenant classes." 573 F.2d at 1128.

The fictions indulged by the court of appeals do not assist its analysis because they do not establish a classification that has any relation, let alone a fair and substantial one, to the object of apportionment. Indians and non-Indians alike have the right to fish in common at the Indians' customary fishing grounds, and both are subject to state conservation regulation in the exercise of this right. The sole difference between them is that the State can regulate the treaty Indians only in the interest of conservation. But this difference cannot justify disparate treatment of individual non-Indians through apportionment. Under the court of appeals' own co-tenancy rationale the need for apportionment arises only because of the present scarcity of the resource and the need for conservation.

In short, since both Indians and non-Indians are subject to the State's conservation control, any favoritism in the regulation of fishing opportunities flouts the guarantees of the Equal Protection Clause by failing to treat similarly circumstanced persons alike. As the state courts have concluded, there is no basis for "an allocation of more than 50 percent of a natural resource of a state to a group of citizens comprising a little more than .028 percent of the population . . . ." *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson, 89 Wash. 2d 276, 571 P.2d 1373,1373 (1977).*

B. The Rationales Adopted By The Lower Federal Courts To Justify An Apportionment Are Untenable.

The allocation program ordered by Judge Boldt and approved by the court of appeals defies simple common sense. Under this program a *single* treaty Indian fisherman would be entitled to harvest *more fish than* all of the State's other fishermen combined. Likewise, under the 50-50 entitlement, the Makahs, whose customary fishing grounds are at the entrance to Puget Sound, together with the citizens of the State would be able to take under the Treaty with the Makah *all* of the harvestable salmon passing their customary grounds, to the complete exclusion of the other tribes below the Makahs in the migratory flow.

Moreover, even the dictionary definition relied on by Judge Boldt to support his decision belies his interpretation, when the Court considers the portion of the definition that, curiously, he neglected to quote. JA 111 (FF 24). This excluded portion of the definition of "common" from a contemporary dictionary states: "The right to a highway is common."[20] This usage is particularly significant since the Yakima treaty (12 Stat. 915; A-133 Pet. 78-119) specifically refers to the use of the highway. The paragraph immediately preceding the reference to fishing rights in Article III in the Yakima treaty secures for the Yakima Indians, ". . . the right, *in common with* citizens of the United States, to travel on all public highways." (Emphasis added.) Under the normal rules of construction, identical language in the same instrument should be identically construed. Applying Judge Boldt's interpretation of that phrase, however, would give the Yakima Indians the right to control half of the highways in the State of Washington and to exclude non-treaty citizens of the United States from using them.

It is evident, therefore, that Judge Boldt's unnatural interpretation of the phrase "in common with" is facially inequitable

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[20] Webster's *American Dictionary of the English Language*, (1862 ed.). JA 325.

and textually unsupportable. It is absurd to suppose that Governor Stevens or the Indians intended any such results, or would have intended them if they had anticipated conditions of scarcity. As the Washington Supreme Court aptly observed:

> "[I]t is inconceivable that the parties to the Treaty contemplated an allocation of the fish or an advantage of one over the other in the manner of taking fish. The fish were there for the taking. It was important only for the Indians to enjoy the right of taking fish in common with, *i.e.*, on an equal basis with, the citizens of the territory. This is exactly what the parties must have intended." *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wash.2d 664, 548 P.2d 1058, 1067 (1976).

The State in its brief (at 42-63) has convincingly demonstrated on the basis of the actual historical evidence that the parties to the Stevens treaties agreed to establish a common fishery in which Indians and non-Indians alike would enjoy an equal opportunity to fish. Contrary to Judge Boldt's analysis, the "in common" language of these treaties simply does not support the conclusion that the parties meant to divide the resource itself and to give Indians as a group the right to exclude others from the opportunity to fish. This conclusion in no way denigrates the importance of the treaties for the Indians. The treaties, after all, secured and guaranteed to them substantial rights that they would not otherwise have had: access to fishing grounds off their reservations and freedom to fish there on an equal footing with citizens of the Territory. *See Department of Game* v. *Puyallup Tribe, Inc., supra*, 548 P.2d at 1069-70.[21] The Indians, of course, were not citizens at the time of the treaties and thus had only those rights conferred upon them in treaty negotiations.

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[21] Those rights now also allow treaty Indians to fish commercially without purchasing a license and without limitation as to the number of commercial fishermen, restrictions that apply to other citizens. Wash. Rev. Code §§ 75.28.450 *et seq.*

The court of appeals' "co-tenancy" reasoning fares no better than Judge Boldt's misreading of the language and purpose of the treaties. As that court conceded on the second appeal (*see* 573 F.2d at 1128 n.3) and as Judge Kennedy's separate opinion explains (*see id.* at 1134-36), the treaties hardly established a formal co-tenancy subject to the rights and incidents of a co-tenancy at common law. Nothing in the negotiation or language of the treaties indicates that the parties intended that those rights and incidents would govern their relationship. Nor is there any reason to believe that they would have adopted this model if they had focused on the possibility of the resource being depleted. On the contrary, as the State's brief persuasively shows (at 31-35, 48-56), the whole notion of an apportionment of fishing opportunities was foreign to *both* sides. The Anglo-American tradition contemplated non-exclusive access rights to common fisheries, and although the Indians understood a right to common participation in tribal property, this was very distinct from the common law concept of a divisible co-tenancy. *See* F. Cohen, *Handbook of Federal Indian Law* 183 (1942).

There is a more fundamental error in the court of appeals' approach than its historical inaccuracy. This Court has settled that, consistently with the Stevens treaties, the State may regulate fishing by both treaty Indians and non-Indians in the interest of conservation, provided that the regulation is non-discriminatory. *Puyallup I*, 391 U.S. at 398-99. *See also New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563-64 (1916). The Court has only sustained an apportionment of fish when the particular conservation measures adopted actually discriminate against Indians by imposing burdens that fall more heavily on them than on non-Indians. "There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed." *Puyallup II*, 414 U.S. at 48. The case now before the Court, however, involves no disproportionate burdens on Indians. Quite the contrary is true.

Under this Court's decisions, the State is charged with authority to regulate intra-state fishing in the interest of conservation, as long as it does not discriminate. Under the court of appeals' reasoning, however, the federal courts are required, upon application by treaty Indians, to "partition" the taking of all fish. In effect, the court's co-tenancy rationale takes what this Court adopted as a limited, judicial remedial measure for specific instances of discrimination and extends it to govern the full scope of all fishing activities in the State. The co-tenancy analogy thus misallocates to the federal judiciary the regulatory authority that properly belongs to the State.[22]

* * *

The federal courts below have shut their eyes to what the text of the Stevens treaties, the history of their negotiation, constitutional considerations, and simple common sense all show. If they have done so in an effort to remedy some perceived injustice to the Indians, they have exceeded the limited role assigned to the judiciary. "We attempt," this Court has affirmed, "to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945) (footnote omitted). "[E]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice . . . ." *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943).

This must be especially so here, where any apportionment program infringes on the right of others "to hold specific private

[22] *Compare Arizona* v. *California*, 373 U.S. 546, 597 (1963), where this Court held that the doctrine of equitable apportionment as a method of resolving water disputes between states did not apply to disputes between a state and an Indian reservation, in part because those disputes were to be decided according to federal legislation and Executive Order and not judicial discretion.

employment and to follow a chosen profession free from unreasonable governmental interference . . . ." *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959).

II. THE DISTRICT COURT'S PLANS FOR ADMINISTERING THE STATE'S FISHERIES EXCEEDED ITS CONSTITUTIONAL AND EQUITABLE POWERS.

The foregoing analysis shows why the predicate for any apportionment in this case is illusory. Even if there were some basis in the treaties for declaring that Indian fishermen are entitled to more than an equal opportunity to fish, the orders entered by Judge Boldt, and sustained by the court of appeals with varying degrees of enthusiasm or hesitance, cannot be justified.

A. Even If An Apportionment Of Fish Were Permissible, The Particular Apportionment Adopted Below Cannot Be Sustained.

The apportionment formula that Judge Boldt imposed on the state fishing industry requires a complicated series of manipulations to determine the amount of fish that the Indians and the non-Indians may each harvest. *See* pp. 6-16, *supra*. Only one premise reconciles these various manipulations: "heads-the-Indians-win, and tails-the-non-Indians-lose."

1. *The 50-50 Split.* The basic 50% allocation chosen by the courts below is both unprincipled and inequitable. "Sharing equally the opportunity to take fish," which is what Judge Boldt held the treaties to require, surely does not translate into an even split of the fish. As any fisherman knows, the size of each catch depends upon individual effort, skill, and luck, even where there is the same opportunity to fish. What the courts below have done is to guarantee a disproportionate rate of success for certain Indian fishermen.

As Judge Kennedy's opinion below demonstrates, the court of appeals' "co-tenancy" also is an inappropriate guide to "determine what share of the disputed rights should be allo-

cated to each of the parties." 573 F.2d at 1135 (concurring opinion). The factors relied on by the court of appeals in upholding a 50-50 split on the first appeal fail, too, to furnish any principled ground for decision. The court sustained this split in part because of "the equality between the two bargaining parties." 520 F.2d at 688. Yet the formal equality between the United States and each "tribe" hardly provides any assurance that the parties would have settled on a 50-50 division if they had agreed to an apportionment at treaty times. Even if, contrary to the historical record, the parties had settled on an apportionment, it seems far more likely that they would have agreed to divide the fish according to the ratio of their respective fishermen or general populations at any given time. There is not a shred of evidence to suggest that, if this issue had been addressed, the United States would have conceded an allocation of at least half the harvestable fish, coupled with a power to *exclude* non-Indian fishermen.[23]

The court of appeals concluded that the Indians' view of fishing rights as communal property also supports an even allocation. As an historical proposition, the court's view conflicts with the expert anthropological evidence in the record that "[w]hat an individual [Indian] caught and dried was his own." JA 259. It also ignores this Court's holding in *Winans* that the Indians' treaty fishing rights are personal rights. 198 U.S. at 381. Even more importantly, it blinks at the fact that "[t]he individual [Indian] fishermen [today] keep the proceeds of their fish sales, and this money is not shared with the tribe." *Department of Game* v. *Puyallup Tribe, Inc.*, 86 Wash.2d 664, 548 P.2d 1058, 1079 (1976) (concurring opinion). *See also* JA 538-41.

Finally, Judge Boldt's own overall 45-55 apportionment for 1977 concretely dramatizes that there is nothing in the treaties to support an even division. Indeed, in sustaining that

[23] Significantly, the "tribes" with which the United States entered into treaties were artificially created out of smaller bands and did not even exist before negotiations were begun. JA 108 (FF 17-18).

allocation, the court of appeals candidly stated that "[t]he numbers question is one of degree, *not* one of principle." 573 F.2d at 1130 (emphasis added). *See also* 520 F.2d at 688 ("[t]he district court was not required to decree a perfect 50-50 division of fishing opportunity"). The appellate court's holding on both appeals that Judge Boldt could exercise "a great amount of discretion" in fashioning and managing the "details" of the apportionment, 520 F.2d at 687; *see also* 573 F.2d at 1129, of course, concedes that no allocation ratio can be extracted from the treaties themselves.

With the unfounded reasoning of the lower courts cleared away, the inequity of the 50-50 apportionment is evident from the astounding disparity between the catch allowed individual fishermen. However the comparison is made—whether by the ratio of general populations, total fishermen, or merely commercial fisherman—treaty Indians are entitled under the apportionment to a disproportionate share of the State's resource. Indeed, according to the figures appearing in the district court's decision, 794 treaty Indians who engage in fishing are entitled under this apportionment to at least as many fish as approximately 6,600 commercial and 283,650 recreational non-treaty fishermen combined.[24]

2. *The Fish Subject to Apportionment.* Judge Boldt's allocation formula calls for the Indians to take 50% of the salmon that, *absent harvest en route*, would be available for harvest at the Indians' customary fishing grounds. The formula thus effectively reduces the freedom of non-Indians to fish in waters that the Indians did not frequent at treaty times. The State in its brief has cogently explained that this misconceives the right reserved to the Indians in the Stevens treaties by

[24] This degree of disparity may also jeopardize the resource itself. Since both over- and under-harvest of anadromous fish may endanger the run, it is desirable that all fish be taken that are not necessary for optimum escapement. *See* JA at 162-63 (FF 171). This, however, will not occur if Indians are allocated so much that they are unable to harvest their share or if non-Indians are provided so little that their incentive and ability to fish at all disappear.

ignoring the treaties' geographical limitation of off-the-reservation fishing rights to the Indians' "usual and accustomed grounds and stations" and by treating the right to engage in fishing as a right to the fish themselves.[25]

But even if Judge Boldt's approach were correct, consistency would require that fish taken on the reservation that would otherwise migrate through a common fishery at the Indians' customary sites be included in the total to be apportioned. Consistency would also require that fish landed by Indians in the all-citizen fisheries before running through the common fishery be counted toward their share. Yet under Judge Boldt's formula no fish taken by the Indians on the reservation are subject to apportionment, and no fish caught by treaty Indians outside the common fishery are counted in calculating their "50%" entitlement.

3. *Fish Taken on the Reservation.* Both courts below held that the apportionment did not extend to any fish taken on the reservation because the Indians' right to fish there is exclusive. This Court settled in *Puyallup III*, however, that exclusive geographical fishing rights do not afford the Indians freedom to fish on the reservation without regard to the treaty rights of others. The Court stated emphatically that the Indians do not enjoy "untrammeled on-reservation fishing rights" and are not free to "interdict completely the migrating fish run"; otherwise, the Indians could "totally frustrate . . . the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek." 433 U.S. at 176 (footnote omitted). Once again, therefore, the apportionment decreed below impermis-

[25] "[T]he Indians' reserved right, like all rights of fishery recognized in the common law, is defined by and attached to real property — their 'usual and accustomed grounds and stations.' By its nature, the right does not consist of an interest in the fish themselves that would entitle the Indians to restrain the lawful exercise of fishing rights by nontreaty citizens at the same locations. A fortiori the right reserved does not establish any cognizable interest in the fish or lawful fishing activities outside the boundaries of the 'usual and accustomed grounds.'" Br. of Petitioner State of Washington at 53.

sibly stacks the deck. Not surprisingly, the record demonstrates that the exclusion only serves to encourage the Indians to concentrate their fishing activities on the reservation so as to increase their over-all share of the harvest. *See* JA 234-35, 253-54.

Although Indians today are entitled to fish wherever others are, they had no such right when the treaties were negotiated. The Indians reserved the right under the treaties only to fish on the reservation or at their accustomed grounds; elsewhere the fishing rights of citizens were exclusive.[26] As a result, there is a plain lack of equity in now establishing a system of apportionment that allows the Indians to take fish on the reservation free from apportionment on the basis of exclusive fishing rights, while at the same time charging against the apportionment for other fishermen (a) the fish that they harvest in waters that the Indians did not frequent at treaty times, and (b) fish taken by non-Indians outside the State's regulatory jurisdiction.

4. *Fish Taken for Subsistence or Ceremonial Purposes.* Judge Boldt also exempted from apportionment fish taken by the treaty Indians for subsistence or ceremonial purposes. Although these uses may have been and may remain important to the Indians, the Stevens treaties reserve no special rights to the Indians for these purposes. Subsistence fishing may be no less significant for many non-Indians, but there is no special treatment for them.

5. *Hatchery-Reared Fish.* Judge Boldt has effectively required that the apportionment extend to fish artificially propagated at the State's expense. Yet it seems obvious that the Stevens treaties do not obligate the State in planting fish to subsidize Indian any more than non-Indian fishermen, which is precisely the effect of Judge Boldt's orders. As the state courts reasoned on the remand of *Puyallup II*, the absence of any

[26] The treaties predate the adoption of the Fourteenth Amendment, and the Fifth Amendment's due process clause was not held to incorporate equal protection principles until *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

artificial anadromous fish propagation at treaty times makes it "inconceivable that either the tribe or the government intended the Treaty to create any rights beyond the natural run." *Department of Game* v. *Puyallup Tribe, Inc., supra,* 548 P.2d at 1071.[27] In short, there is nothing in the treaties that can give Indians any greater claim than non-Indians to hatchery-reared fish paid for by the State.[28]

6. *Failure to Exercise Sound Discretion.* We have shown that a discretionary apportionment program fundamentally misconceives the Stevens treaties and the proper role of the judiciary in enforcing treaty fishing rights. We have also shown that the allocation formula ordered by Judge Boldt here is incorrect, internally inconsistent, and biased. But even if all of this were not so, the district judge's program still could not be sustained.

The court of appeals ruled that "[t]he district court has a great amount of discretion . . . in . . . devising the details of an apportionment . . . ." 520 F.2d at 687. It obviously follows from this premise that the trial court should actually have exercised discretion in adopting its allocation formula; the court should have weighed all relevant factors, disregarded any irrelevant considerations, and then struck an equitable balance. As Mr. Justice Douglas has stated:

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to

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[27] Significantly, all but one of the Stevens treaties adopt this line of demarcation by expressly prohibiting the Indians from taking "shellfish from any beds staked or cultivated by citizens." *Id. See* Pet. 78-119, at A131-34. The exception is the Treaty with the Yakimas, who occupied territory where shellfish were not found.

[28] The provisions discussed in the text are not the only offensive features of Judge Boldt's apportionment program. Among other things, his 1977 and 1978 orders seek to effectuate the apportionment through the regulation only of non-Indian commercial net fishing. Despite the fact that the law requires "equality of burdens upon those in like situation or condition," *South Carolina ex rel. Phoenix Mutual Life Insurance Co.* v. *McMaster,* 237 U.S. 63, 72-73 (1915), the State's recreational fishermen are not required to contribute to the Indian share in any way.

> the necessities of the particular case. . . . The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944).

Yet one searches Judge Boldt's pronouncements in vain for any intelligible weighing of the equities at any time in the course of his management of the apportionment program. The Judge originally decided upon a 50-50 split as a matter of treaty interpretation and not the exercise of any discretion at all. 384 F. Supp. at 343. Even when he deviated from this conclusion in 1977, he acted only on the basis of unexplained "facts, circumstances, and equities." Pet. No. 77-119, at A44. Judge Boldt's June 6, 1978, decision reverting to the 50-50 division for 1978 and subsequent seasons is similarly bereft of any explanation of the allocation now in effect. *See* JA 479-91.

Even the court of appeals has conceded that there are "equities that lie on the side" of the non-treaty fishermen in this case. 573 F.2d at 1130. Yet Judge Boldt has totally ignored the great disparities in individual treatment and the economic hardships caused by his orders. Indeed, despite the fact that the Gillnetters and the Purse Seiners were not parties to the proceedings that culminated in the 1974 decree, he expressly ruled in issuing the June 6, 1978 "preliminary injunction" that since "[t]he rights of the treaty and non-treaty fishermen have already been adjudicated, . . . economic disruption associated with implementing the 1974 decree is *not* legally cognizable." JA 483 (¶ 4) (emphasis added).

The decisions of the two lower courts have been two ships passing in the night. Judge Boldt has founded an elaborate apportionment program affecting the vital interests of numerous fishermen on a conclusion of law concerning treaty interpretation that even two judges of the Ninth Circuit panel below doubt is supportable. The court of appeals, on the other hand,

has affirmed this action as an exercise of discretion when neither in form nor in substance has equitable discretion been exercised. Thus, even on its own theory of the case, the court of appeals' affirmance cannot be sustained.

B. The District Court Lacked The Power To Enforce The Treaties By Imposing Detailed Allocations In The Absence Of Implementing Legislation By The Federal Government Or By The State Of Washington.

The district court also overstepped its legitimate function by undertaking to implement the general language of the treaties by supplying its own detailed and comprehensive instructions for the conduct of fishing in the State of Washington. By a series of orders, the district court has pyramided its own notions about how treaty Indians and non-treaty Indians should be allowed to fish "in common with" each other and has wound up acting as a super-legislature without any guidance from either Congress or the legislature of the State of Washington. It is impossible to view the Stevens treaties as sufficiently self-executing to provide authority for the district court's elaborate plans and decrees, and the court's extravagant enterprise surely exceeds any proper role for the federal courts in enforcing treaties.

We are aware of no case in which any federal court has undertaken to make so many detailed *affirmative* judgments about how a treaty should be implemented. Properly, those decisions are left to the executive and legislative authorities, with the judicial role confined to a determination whether the governmental action (or private conduct) *violates* some specific provision of the treaty. *See, e.g., Puyallup I, II, and III.*

The role of the courts in enforcing treaties has long been regarded as a relatively modest one, because treaties—unlike statutes—are often not self-executing at all. *See Foster* v. *Nielson,* 27 U.S. (2 Pet.) 253, 314 (1829). Normally, as Chief Justice Marshall explained there, a "treaty addresses itself to the political, not the judicial department; and the legislature

must execute the contract before it can become a rule for the court." *Id.* These principles apply in equal measure to treaties with Indian tribes. *Cf. Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1 (1831); *National Indian Youth Council* v. *Bruce,* 485 F.2d 97 (10th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974). *See generally* F. Cohen, *Handbook of Federal Indian Law* 34 (1942).

Ordinarily, the performance of the commitments made in a treaty is a "political question" beyond the jurisdiction of the federal courts either to review or to enforce.[29] For these reasons, there is a virtual presumption that, in the absence of implementing legislation, the federal courts have no authority to determine how a treaty should be carried out. As the Court of Appeals for the Second Circuit recently explained in *Dreyfus* v. *Von Finck,* 534 F.2d 24, 29-30 (2d Cir.), *cert. denied,* 492 U.S. 835 (1976):

> "[The treaty] may also contain provisions which confer rights upon one of the contracting parties which are capable of enforcement as are any other private rights under the law. . . . In general, however, this is not so.
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> "It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights. . . . Indeed even where a treaty is self-executing, Federal jurisdiction under [28 U.S.C.] Section 1331 will not lie where it is not provided for in the treaty." (Citations omitted.)

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[29] *See, e.g., Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 302 (1918); *Chae Chan Ping* v. *United States,* 130 U.S. 581, 602 (1889) (*Chinese Exclusion Case*); *Dreyfus* v. *Von Finck,* 534 F.2d 24, 29 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976); *National Indian Youth Council* v. *Bruce, supra,* 485 F.2d at 99.

See also Schlesinger v. *Reservist Committee to Stop the* War, 418 U.S. 208 (1974); *Baker* v. *Carr,* 369 U.S. 186 (1962); *Jensen* v. *National Marine Fisheries Services,* 512 F.2d 1189 (9th Cir. 1975); *Robertson* v. *General Electric Co.,* 32 F.2d 495 (4th Cir.), *cert. denied,* 280 U.S. 571 (1929).

Treaties may, of course, create justiciable rights. Specifically, if the treaty provisions are self-executing, or if a non-self-executing treaty has been executed by implementing legislation, a federal court may enforce it as it would any other statute. *Z&F Assets Realization Corp.* v. *Hall,* 114 F.2d 464 (D.C. Cir. 1940), *aff'd,* 311 U.S. 470 (1941); *People of Saipan* v. *United States Department of Interior,* 502 F.2d 90, 97-98 (9th Cir. 1974), *cert. denied,* 420 U.S. 1003 (1975). To be self-executing, however, the treaty must be clear, definite and mandatory in terms of the rights to be enforced, rather than provide merely general policy language.[30] In *People of Saipan, supra,* 502 F.2d at 97, the Ninth Circuit set forth some of the considerations involved in determining whether a treaty provision is self-executing:

> "The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self or non-self execution. . ." (Citations omitted.)

Applying these guidelines to the Stevens treaties, the courts below should have concluded that it was not their proper function to develop a comprehensive scheme to implement the "common" fishing rights of treaty Indians and non-treaty fishermen. Congress has not passed any implementing legislation on this subject that provides a basis for an apportionment

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[30] *Cf.* Restatement (Second), *Foreign Relations Law of the United States* § 141 (1965): "(1) A treaty made on behalf of the United States . . . that manifests an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States (a) is self executing . . . ."

of fish or that justifies federal judicial control over state fisheries. Nor has the State of Washington. While state authorities have developed mechanisms that generally regulate fishing in the State's waters and have embarked on various conservation measures, they have not undertaken to go beyond that non-discriminatory objective. Indeed, the Washington State Department of Fisheries lacks the statutory authority to promulgate regulations to allocate fish to specific fishermen or groups of fishermen for non-conservation purposes. *E.g., Puget Sound Gillnetters Association* v. *Moos,* 88 Wash.2d 677, 565 P.2d 1151 (1977).

In the absence of action by either Congress or the Washington legislature, it was not up to the district court to decide how to structure the complex economic, political, social, and cultural interests affected by the Stevens treaties.

The federal district court is not an appropriate institution to supervise fisheries management. As recognized in *People of Saipan, supra,* implementation of a treaty on a subject that depends on a large number of policy choices and requires a high degree of technical expertise and administrative supervision is not the proper function of a federal district court, at least in the absence of clear language in the treaty or implementing legislation assigning that unusual role to the court. A reading of the State's description of the intricacies of administering these major fisheries (Br. at 19-28) vividly illustrates why Judge Boldt was unwarranted in charting the course that he has pursued.

The history of Judge Boldt's involvement in this case surely demonstrates that enforcement of the Stevens treaties requires the making of basic policy choices. Most fundamentally, Judge Boldt has decided that the treaties are self-executing. Acting on that premise, he concluded that the treaties confer on the signatory tribes the right to an equal division of the resources, and he constructed the 50%-plus allocation accordingly. He

also concluded that the individual members of those tribes have judicially enforceable rights under the treaties.[31]

Despite these decisions about the self-executing effect of the treaties, the district judge has also decided that the other fishermen, both collectively and individually, can be denied their right under the treaties to fish "in common with" the treaty Indians. This is the plain result of his decision to close off commercial fishing by non-treaty net fishermen on all but a few days of the year, while allowing the treaty Indians to fish virtually at will. The results of that "judicial" election have been predictably disasterous.[32]

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[31] The United States itself, however, has asserted in a related litigation pending in the Ninth Circuit that fishing treaties do not necessarily confer judicially enforceable rights on fishermen. In *Purse Seine Vessel Owners Ass'n, et al.* v. *United States Department of State, et al.* (9th Cir. No. C77-471M), the United States has stated on page 28 of its brief:

"The nonjusticeable nature of plaintiff's suit is not affected by their claim to protection of their rights under the convention with Canada. In the first place, the convention does not guarantee any rights to U.S. fishermen as individuals, it merely authorizes U.S. fishermen as a whole to take up to fifty percent of the fishermen as individuals, it merely authorizes U.S. fishermen as a whole to take up to fifty percent of the harvestable catch. Certainly, plaintiffs do not possess anything approaching the level of constitutionally protected property rights."

[32] As simply one illustration of the chaos resulting from Judge Boldt's displacement of the State as sole manager of the State's salmon resource, we call the Court's attention to one of the consequences of the Judge's decision to allow the treaty Indians to be essentially self-regulating.

In his separate opinion in *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 76 (1962), Justice Douglas described at length why "fish traps"—which the Court there upheld the authority of the State of Alaska to prohibit Indians from using—are a "nefarious" device whose "notorious" destructiveness can have a "devastating effect" on a state's economy. 369 U.S. at 77-79. In this light, it is easy to understand why the State of Washington has banned the use of fish traps. Wash. Rev. Code § 75.12.060.

Judge Boldt's involvement has also embroiled him in an exceptionally high volume of administrative activity, and he has resorted to unorthodox innovations in order to formulate and execute his notions of the proper assignment of the benefits and burdens. Just to list a few of the questionable mechanisms he has employed, we note that:

He has seen fit to designate himself as, in effect, the State Fisheries Commissioner.

He has appointed his own Fishery Advisory Board.

He has inaugurated a special telephone "hot line" with recorded messages informing non-treaty fishermen whether they are eligible to fish.

He has decided to extend treaty privileges to Indians not covered by the treaties so long as they have a certain "blood quantum" or are "invited" to fish by treaty Indians.

He has enlisted an array of federal administrative and law enforcement agencies into the execution of his constantly evolving master plan.

He has ordered enforcement officials to board fishing vessels to investigate "suspected" violations of his decrees.

He has required fishermen to allow themselves to be photographed by the boarding officials and decreed the arrest of any fisherman who declines to exhibit a special identity card that the Judge requires all fishermen to carry.

It is difficult to imagine a federal court straying more boldly from its properly limited role under the general language of a treaty. By contrast, for example, in *United States* v.

Now that Judge Boldt has exempted treaty tribes from the regulations of the State of Washington and allowed them to be self-regulated, fish traps are being operated on Puget Sound. *Cf.* Tr., April 6, 1978, at 299. The court's allowance of these destructive devices compounds the economic hardship inflicted on the non-treaty commercial fishermen and directly undermines an important and legitimate state policy.

Winans, 198 U.S. 371 (1905), the Court held simply that an individual Indian was entitled to the "right of taking fish at all usual and accustomed grounds and stations." That right "is secured" expressly in the treaties, and interference with it can be easily declared and directly enjoined. The judicial enforcement of access to usual grounds poses no particular difficulty. Here, however, the district court has established a comprehensive and seemingly perpetual fishery management plan on the basis of vague, general language in a compact over a century old. This endeavor has brought him into a series of direct clashes over political questions that the judiciary should avoid.

We respectfully submit that in pursuing his cause, Judge Boldt has crossed the line that separates judicial decisions from legislative choices and, indeed, has contravened the only explicit congressional policy judgment in this area. Frustrated by the failure of the State of Washington to enact fishing regulations that he deems appropriate, Judge Boldt has taken over the management of the salmon fishery. This was not done in compliance with specific legislative guidelines promulgated either by the State or by Congress, and in fact runs counter to the judgment made by Congress in the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, which expressly reserves to the states their traditional right to control fisheries within their boundaries. That congressional judgment explicitly applies to fishing for anadromous fish like salmon that pass into and out of federal jurisdiction. *See* 16 U.S.C. § 1856(a).[33]

This Court has consistently recognized the constitutional restrictions upon the powers of the federal courts to usurp what

[33] This Act reinforces this Court's rejection of prior efforts by the federal government to regulate state fisheries. *See, e.g., New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 563 (1916); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 64 (1962). The prior decisions of this Court construing the Stevens treaties, including *Puyallup I, II, III*, have settled that it is the basic right of the State of Washington to manage its fisheries.

are essentially legislative responsibilities.[34] The Court has, for example, refused "to propose regulatory schemes for the States," even where constitutional rights are involved, because the proper judicial function is "to await their concrete legislative efforts." *Miller* v. *California*, 413 U.S. 15, 25 (1973). Judge Boldt's master plan and its implementing orders constitute just such a regulatory scheme, superimposing duties on state officials unauthorized by the state legislature and preempting state authority where Congress has decided to preserve it. The federal judiciary has no power to create a program of regulation to be implemented by a state or federal agency in this way.

There are no prior instances in which federal judges have arrogated such powers under Indian treaties, but in other contexts this Court has been prompt and firm in warning district judges to avoid entanglements that turn on non-constitutional policy judgments or require excessive administrative innovation and supervision. Instead, the lower courts have been told to recognize the primary responsibilities of legislative and administrative authorities.[35] The district judge here erred in making his own choices.

C. A Federal District Court May Not Mandate That State Officials Act Affirmatively In Excess Of Their Authority Under State Law.

Framed with special clarity in No. 77-983, the case coming from the Supreme Court of Washington, but implicit in the federal cases too, is the question whether the federal court could

[34] *E.g., Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 690 (1968) (it is not the province of the Court to draft legislation); *Collins* v. *Hardyman*, 341 U.S. 651, 663 (1951) (it is not for the Court to compete with Congress or attempt to replace it); *Doe ex dem. Poor* v. *Considine*, 73 U.S. (6 Wall.) 458, 480 (1868) ("Our function is to execute the law, not to make it").

[35] *See, e.g., Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 410 (1977); *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 741-44 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Burns* v. *Richardson*, 384 U.S. 73, 84-85 (1966).

lawfully direct state agents to implement the treaty by performing official functions that they lacked authority to perform under state law.

Judge Boldt has ordered officials of the Department of Fisheries, a statutory agency of the State of Washington, to promulgate and enforce regulations for the purpose of allocating the harvest of fish in Puget Sound between treaty Indian fishermen and non-treaty fishermen in accordance with that court's interpretation of various treaties.[36] The Supreme Court of the State of Washington, however, has held unequivocally that, as it interprets various Washington statutes,[37] the Department of Fisheries has the power to regulate the taking of fish *only* for the purpose of conservation. The state court further explicitly declared that officials of that Department have not been vested by state law with the authority to allocate the harvest of fish in order to facilitate a federal court's interpretation of an Indian treaty.[38]

This definitive interpretation of state law by the Washington Supreme Court is, of course, binding on the federal courts. *See Mullaney* v. *Wilbur*, 421 U.S. 684, 690-91 (1975); *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961).[39] The state court decisions represent a clear limitation on the power granted by

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[36] *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *United States* v. *Washington*, 573 F.2d 1123 (9th Cir. 1978) [Nos. 78-119 and 78-139 before this Court].

[37] *See* Wash. Rev. Code §§ 75.08.012, 75.12.010, 75.08.080.

[38] *See Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson*, 89 Wash.2d 276, 571 P.2d 1373 (1977) [No. 77-983 before this Court]; *Purse Seine Vessel Owners Ass'n* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977); *Puget Sound Gillnetters Ass'n* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977) [No. 77-983 before this Court]. *See also Hartman* v. *State Game Comm'n*, 85 Wash.2d 176, 532 P.2d 614 (1975).

[39] *See also Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Board of Supervisors of Carroll County* v. *United States ex rel. Reynolds*, 85 U.S. (18 Wall.) 71, 81-92 (1873).

the State of Washington to officials of the Department of Fisheries. This Court is therefore faced with a stark confrontation between the authority of the federal court to issue mandatory injunctions to state officials, and the power of the State of Washington to limit the activities and authority of its officials.

Conflicts between federal and state authority such as that presented here require an examination of the very foundations of our federal system. It is a truism that a delicate balancing of interests is often required to ascertain the proper relationship between federal and state power. Indeed, this Court has recently demonstrated its sensitivity to encroachments on legitimate state sovereignty by the federal government, both in the case of congressional action,[40] and in the case of judicial decrees.[41] When the federal government seeks to impose affirmative mandates on the governments of the states, an even greater "awareness of the delicacy, and the difficulties of enforcement" of such mandates is required. *See* Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 515 (1954). *See also Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951). It is, of course, essential that there be such a "sensitivity to the legitimate interests of both State and National Governments." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). The maintenance of a "proper respect for state functions" assures that the "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, [will] always endeavor to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

The federal courts below, however, have failed to accord "proper respect" to what is clearly a state function—the delineation of the authority of state officials. By enjoining those

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[40] *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[41] *See Rizzo* v. *Goode*, 423 U.S. 362 (1976). *See also Juidice* v. *Vail*, 430 U.S. 327 (1977); *Hicks* v. *Miranda*, 422 U.S. 332 (1975); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Younger* v. *Harris*, 401 U.S. 37 (1971).

officials to act in excess of their legitimate authority, Judge Boldt has acted in a manner inconsistent with the most basic principles of federalism. The courts have consistently recognized the principle that state or local officials cannot be required to exceed their authority under state law. *See, e.g., Bell* v. *School Board of Powhatan County*, 321 F.2d 494, 499 (4th Cir. 1963); *Thaxton* v. *Vaughan*, 321 F.2d 474, 477 (4th Cir. 1963); *Wright* v. *County School Board*, 309 F. Supp. 671, 677 (E.D. Va. 1970), *rev'd other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); *Bradley* v. *School Board*, 51 F.R.D. 139, 142 (E.D. Va. 1970). Indeed, this Court has specifically held that mandamus does not lie to compel state officers to perform an official act that they are not authorized to perform by the laws of the state from which they derive their power. *See Missouri ex rel. Laclede Gaslight Co.* v. *Murphy*, 170 U.S. 78 (1898); *United States ex rel. Johnston* v. *County Court of Clark County*, 95 U.S. (5 Otto.) 769 (1878); *Board of Supervisors of Carroll County* v. *United States ex rel. Reynolds, supra.*

While federal courts may issue prohibitory injunctions against state officials to prevent them from interfering with federal rights, *see Ex Parte Young*, 209 U.S. 123 (1908), a federal court must be more circumspect in attempting to order a state official to act affirmatively. As one of the leading authorities on our federal system has noted:

> "Judicial mandates to non-judicial state officers to enforce either primary or remedial duties requiring the performance of affirmative acts are relatively infrequent. Lower federal courts may *prohibit* state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment."[42]

While mandatory injunctions do sometimes issue against state officials, most notably in desegregation cases, they do not

[42] Hart, *supra*, 54 Colum. L. Rev. at 516 (emphasis in original; footnote omitted).

purport to confer additional powers beyond those official responsibilities entrusted to them by the state.

In *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964), for example, this Court held that a federal district court had the power to order school officials, who had closed the public school system in order to avoid implementing a desegregation order, to reopen the system. The Court held that the district court was authorized, "if necessary to prevent further racial discrimination, [to] require the [county officials] *to exercise the power that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination, a public school system . . . ." *Id.* at 233 (emphasis added). Thus, even in the context of blatant and explicit racial discrimination, the Court has signified that a federal injunction is not available to order official action outside the scope of powers provided under state law. *See also Milliken* v. *Bradley*, 433 U.S. 267 (1977).[43]

In *Rizzo* v. *Goode, supra*, this Court overturned a district court injunction that required a local police department to put into effect a comprehensive program for improving the handling of citizen complaints. Moved by a concern for the principles of federalism, the Court viewed the decree as "an unwarranted intrusion by the federal judiciary into the discretionary authority committed to [police officials] by state and local law to perform their official functions." 423 U.S. at 366, 378-80. *See also O'Shea* v. *Littleton*, 414 U.S. 488 (1974). Clearly, it is a much greater intrusion for the federal judiciary to compel a state official not simply to exercise his discretionary authority in a particular way, but actually to assert authority that the state has not granted to him.

[43] In *Milliken* this Court approved, as part of a desegregation decree, a district court order requiring the implementation of and financing of remedial programs for children who were subject to past discrimination. Even there the Court was aware of a lurking Tenth Amendment and federalism problem, 433 U.S. at 291, but held the district court had acted within its powers because it had not attempted to restructure local government or mandate a particular method of financing. *Id.*

The district judge in this case, just as in *Rizzo*, has impermissibly interfered with the State's administration in an area of vital concern. The evidence in this case makes apparent the difficulty, complexity and delicacy of the management of the fishery resource in the waters of the Pacific Northwest. *See generally* Br. of Petitioner State of Washington at 19-24. As the State explains, efficient and effective conservation entails extremely detailed regulation, which must vary from area to area and from day to day. Conservation "crises" are frequent, and must be handled quickly and on a local level. In fact, in passing the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, Congress recognized the fact that effective conservation of fishery resources requires essentially local activity and control and, as we have previously noted, specifically did not preempt state authority over fishing in internal waters. 16 U.S.C. § 1856.

The State of Washington, in exercising its power over this essentially local subject of regulation, has determined that its regulatory agency with jurisdiction over fisheries should concern itself only with conservation and, indeed, should not be empowered to regulate the State's fisheries for any other objective. The federal court, however, has chosen to ignore this legislative judgment of the State in an area where the State clearly has primary authority. *See* 16 U.S.C. § 1856. Instead, the court has ordered state fishery officials to perform governmental functions that, according to the state supreme court, the Washington legislature has not empowered them to perform. This type of intrusion by a federal court into the internal workings of a state government is precisely the kind of judicial action found objectionable in *Rizzo*. It should not be countenanced here.[44]

[44] The State of Washington has taken a more or less neutral position on this issue, asserting only that it will implement (as it must) the decision of this Court. Br. of Petitioner State of Washington at 96. The position on this question taken by a state executive department cannot in any event be controlling. A state legislative judgment as to the authority of that department has been made, and has been unambiguously interpreted by the state supreme court. What is controlling in the federal courts are those legislative and judicial decisions.

The State has suggested that a decision of this Court that Indian treaty fishermen are not "of the same class" as non-treaty fishermen would undercut the state supreme court's decision in *Puget Sound Gillnetters Ass'n* v. *Moos*, *supra*, and *Washington State Commercial Passenger Fishing Vessels Ass'n* v. *Tollefson*, *supra*. Br. of Petitioner State of Washington at 97-99. We strongly disagree. The state court decided clearly—and independently of its reasoning concerning the interpretation of the treaty and the Equal Protection Clause—that state statutes vested the Department of Fisheries with the power to regulate for conservation purposes only. Any decision that this Court might render in this case could have no effect on either the reasoning or outcome of that aspect of the state court's opinions.

In this case the United States and the treaty Indians would have the federal courts by "judicial fiat" impose official responsibilities in "total disregard of state laws," *United States* v. *Yazell*, 382 U.S. 341, 349 (1966), even though those laws are in no way inconsistent with the federal constitution and consequently ought to be respected by the federal judiciary. To sustain the position taken by Judge Boldt would be to upset the delicate balance of state and federal authority so carefully set by this Court, and to compromise the underlying principles of federalism so jealously guarded in *Rizzo* v. *Goode*, *National League of Cities* v. *Usery*, *Younger* v. *Harris*, and many other cases.

III. DUE PROCESS BARS EXTENSION OF THE DISTRICT COURT'S INJUNCTIONS TO NON-TREATY FISHERMEN WHO WERE NOT PARTIES TO THE MAIN ACTION AND ALSO ENTITLES THEM TO CONTEST ISSUES THAT THE STATE MAY HAVE LITIGATED UNSUCCESSFULLY.

The remaining issues in this case need be reached only if the Court is otherwise inclined to sustain the lower court's interpretation of the Stevens treaties and to leave in force the district court's plan for managing the State's fisheries. The issues that the Court must then confront test the power of a

federal court to treat non-parties as bound by prior adjudications and to extend injunctions to persons who were not parties to the underlying litigation, who did not participate in the underlying litigation, and whose only connection with the proceedings is their status as citizens of the named party-defendant, the State of Washington.

In separate orders in August and September 1977 and June 1978, the district court took the extraordinary step of issuing injunctions running not against the State and its various agencies—the original named party-defendants in this litigation—but directly against all non-treaty fishermen, including by name petitioners Purse Seine Vessel Owners Association and Puget Sound Gillnetters Association. Most of the orders were issued *ex parte,* and the non-treaty fishermen were expressly denied the opportunity to contest the legal and factual foundation for the June 1978 order. Thus, without the opportunity for a hearing on the major, substantive issues involved in this case, the non-treaty fishermen have been subjected to rigid injunctive decrees whose economic impact has been, and continues to be, devastating. As documented by the United States National Marine Fisheries Service, Judge Boldt's decision has reduced by an average of from 60% to 85% the modest incomes of the men who for many years have earned their livelihoods as fishermen.[45] In addition, for a number of the non-treaty fishermen, the financial blow inflicted by the district court's orders has been compounded by prosecution and conviction for criminal contempt.

The orders extending the injunctions to non-treaty fishermen were affirmed by the court of appeals on the theory that these non-parties were in "privity" with the State of Washington, and that they were, therefore, bound by the orders to the same extent as the State. The appeals court concluded that the rights of the non-treaty fishermen were purely "derivative" of the State's power to regulate rights in the fish. As to claims that the State was not an adequate representative of the interests of

[45] *See* Br. of Petitioner State of Washington at 7-8.

the non-treaty fishermen, the appeals court stated bluntly that "any complaints the fishers may have . . . are matters between them and the State." *United States* v. *Washington,* 573 F.2d at 1133.

A. The State Was Not An Adequate Representative Of The Non-Treaty Fishermen.

The non-treaty fishermen, as non-parties to the original litigation in this case, cannot be bound by the results of that litigation, since they were not adequately represented by the State.

It is by now a truism that adequacy of representation is a constitutional prerequisite for the binding of non-parties. *See, e.g., Hansberry* v. *Lee,* 311 U.S. 32 (1940); *Chase National Bank* v. *Norwalk,* 291 U.S. 431 (1934). In *Chase National Bank,* for example, the Court held that "well-settled principles of jurisdiction" were violated where a mortgagee of certain property was barred from relitigating issues resolved in a prior suit against the mortgagor. 291 U.S. at 438. The Court held that "the facts and considerations affecting the [mortgagee's] rights may be different from those presented to the State court on behalf of the [mortgagor]." *Id.* at 439.[46]

Identical considerations apply here, since, as we show below, the non-treaty fishermen have independent interests and positions that differ from those of the State. Hence, it is legally irrelevant to the rights of the non-treaty fishermen that, in the original case, the district court actually reached conclusions with hostile implications for them over the opposition of the State.

In this case the lower courts not only have sought to preclude the non-treaty fishermen from asserting their legal and equitable claims about the interpretation and enforcement of the treaties, but, by summarily applying injunctions to them,

[46] *See also Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 691 (1961) (defendant class); *Gonzales* v. *Cassidy,* 474 F.2d 67 (5th Cir. 1973) (plaintiff not bound by earlier class judgment because of inadequate representation).

have exposed them directly to civil and criminal contempt. The due process principles reflected in *Hansberry* and *Chase National Bank*, where the Court's specific concern was with the binding effect on non-parties of *res judicata*, apply *a fortiori* to the effort to bind non-parties by injunction. In the absence of adequate representation, non-parties cannot be bound by injunction.

Without at least adequate representation, a judgment that purports to bind non-parties suffers from two constitutional defects. First, since there would be before the court no person standing in the shoes of the non-party, the court would lack *in personam* jurisdiction over the non-party—an essential requisite for the court's ability to bind a person, *see Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100 (1969); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Second, the non-party would be denied his right to a day in court and a meaningful opportunity to be heard, *see Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *cf. Crowell* v. *Benson*, 285 U.S. 22 (1932), since his interests will not have been pursued as vigorously as possible. *See* Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. Pa. L. Rev. 1217, 1228 n.46 (1975).

These due process concerns take on heightened significance in this case, since the lower courts without foundation have treated the original suit against the State of Washington as tantamount to a *defendant* class action, with non-treaty fishermen as the class members. Even apart from the many problems inherent in defendant class actions,[47] the facts here show why that analogy will not work. The State did not volunteer to serve as a representative of a class consisting of all its citizens; it was conscripted into that alleged role. *See Mudd* v. *Busse*, 68 F.R.D. 522, 529-30 (N.D. Ind. 1975). Moreover, the State did not become aware of any obligation to serve as a

[47] *See generally* Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

fiduciary, representing its citizens, until the decision below—long after adjudication of the issues that are critical to the non-treaty fishermen. As a result, the State felt perfectly free to adopt positions inconsistent with the interests and views of the non-treaty fishermen, and it did so.

In any event, the constitutional requirement of adequate representation requires nothing less than complete identity of interest between the State and the non-treaty fishermen. The issue, of course, is not the quality of the State's counsel or the adequacy of its defense of *its* interests. Rather the focus is on whether, as a matter of law, the State stood in the shoes of the non-treaty fishermen and was bound to serve as advocate for *their* interests. Viewed against that backdrop, the inadequacy of the State's alleged role as representative is apparent on both the theoretical and the practical level.

First, even assuming *arguendo* the soundness of the holding by the court below that non-treaty fishermen as citizens of the State were in "privity" with the State, that analysis proves too much. It follows necessarily from that analysis that the treaty Indians were *also* in privity with the State, since they are also citizens of the State and it is the status of citizenship that provided the basis for the court's holding as to privity. Thus, the logic of the privity analysis leads inescapably to the conclusion that the State, as party-defendant, was in privity with *both* sides of the present litigation—a conflict of interest as extreme and intractable as that found in *Hansberry*. Hence, the State's participation in the original litigation provides no more predicate for binding the non-treaty fishermen than it would have for binding the treaty Indians, if the original action had turned out differently.[48]

[48] The notion that non-treaty fishermen are in privity with the State for purposes of this litigation was also implicitly rejected by Justice Douglas in *Antoine* v. *Washington*, 420 U.S. 194, 208-13 (1975) (Douglas, J., concurring). In that case, in which the State was a party, the Court held that the State was barred from applying its game laws to Indians as a result of an 1891 treaty ceding certain Indian lands to the federal government. Justice Douglas stated that

Second, the State of Washington had both a legal and moral obligation to take positions in the original litigation that, in its view, accommodated the interests of *all* its citizens, including, of course, the treaty Indians. "The department [of fisheries] is given an affirmative duty . . . to authorize the harvesting of surplus [salmon], so as to fully utilize the harvestable portions for the economic well-being *of the citizens as a whole.*" *Puget Sound Gillnetters Association* v. *Moos,* 88 Wash.2d 677, 565 P.2d 1151, 1153 (1977) (emphasis added). The State's proper role was that of umpire of the public interest, not advocate for any contesting group. That was, in fact, the role it sought to exercise, and not surprisingly *neither* of the contesting groups was satisfied with its positions. It cannot be argued that the State has "represented" either group adequately, so as to bind them from independently asserting their own rights. Each group had, and has, divergent interests that the State could not singly represent.

There can be no question that the Gillnetters and Purse Seiners have substantial economic interests that exist independently of the interests of the State, of the treaty Indians, and of other commercial fishermen. They are entrepreneurs who have invested substantial sums in their vessels, nets and equipment, and who derive their principal source of income from fishing. In the State of Washington entry into the commercial fishery is

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the Indians' immunity from the game laws could not be confined to those areas of the ceded property that had remained public land.

At the same time, however, Justice Douglas stated that "[w]hether the result would be different if the contest were between the owner of the private tract and the Indian is a question that need not be reached." 420 U.S. at 212. If non-Indian citizens of the State are automatically in privity with the State when the State is a party to litigation involving Indian treaties, and automatically bound by the outcome, Justice Douglas would not have reserved the right of a non-Indian citizen to contend for a different outcome on the merits in a later litigation.

absolutely prohibited unless one purchases an existing license;[49] the market value of such a license, at least before the apportionment program ordered by the courts below, was approximately $3,800 in the case of a gillnet license and $16,000 in the case of a purse seine license.

There can be no doubt that the State did, in fact, attempt to advance the interests of various groups—including troller fishermen as well as sportsmen and charter boat operators—whose interests conflict with those of petitioners. Thus, for example, in connection with the 1977 and 1978 orders the State has not sought to increase the number of fish available to commercial fishermen by reducing the number of fish to be made available to sports fishermen; neither has the district court. This is not surprising, since recreational fishermen constitute a substantially larger number of persons, and consequently a far larger political force with which the State has to deal.

There are other examples of action or inaction by the State that actually conflicted with and undermined the interests of the non-treaty fishermen. The State chose not even to litigate the underlying treaty interpretation issue in *United States* v. *Oregon,* 302 F. Supp. 899 (D. Ore. 1969); it acceded to previous orders of the court as a condition of intervention there.

Indeed, during the original district court proceedings, and in clear conflict with the position and interests of the non-treaty

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[49] Wash. Rev. Code § 75.28.450 provides in pertinent part:

"*Limitation upon salmon licenses and delivery permits—Intention.* The legislature finds that the protection, welfare, and economic good of the commercial salmon fishing industry is of paramount importance to the people of this state. Scientific advancement has increased the efficiency of salmon fishing gear. There presently exists an overabundance of commercial salmon fishing gear in our state waters which causes great pressure on the salmon fishery resource. This situation results in great economic waste to the state and prohibits conservation programs from achieving their goals. The public welfare requires that the number of commercial salmon fishing licenses and vessel delivery permits issued by the state be limited to insure that sound conservation programs can be scientifically carried out."

fishermen, the State Department of Fisheries actually supported an apportionment. The department urged the court to "qualify the treaty right by reference to an objective, definite standard" to be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to the waters of the State of Washington in the case area." The Department then proposed that the treaty fishermen be alloted one-third of the runs originating in the rivers that they fish. Moreover, in the first appeal the State acquiesced in at least some aspects of Judge Boldt's apportionment formula, *see* 520 F.2d at 690, and in the second the State accepted without serious challenge the 45-55 overall allocation itself. *See* 573 F.2d at 1130. Indeed, state officials, pursuant to Judge Boldt's initial decision in this case, even brought enforcement proceedings against non-treaty fishermen.

In addition, during the course of this litigation, the Gillnetters and Purse Seiners as well as other commercial fishing interests have been embroiled in a continuous series of lawsuits against the State. The State has resisted demands by certain groups of commercial fishermen in favor of sportsmen, charter boat operators, and others,[50] and in one of the cases now before this Court, *State of Washington* v. *Washington State Commercial Fishing Vessel Association*, No. 77-983, the Washington Supreme Court granted mandatory relief sought by the non-

[50] *Oregon Gillnetters* v. *Moos*, Thurston County Cause No. 55339; *Schroeder* v. *Moos*, Thurston County Cause No. 55387; *Washington State Commercial Passenger Fishing Vessel Ass'n* v. *Tollefson*, 87 Wash.2d 417, 553 P.2d 113 (1976), *on rehearing*, 89 Wash.2d 276, 571 P.2d 1373 (1977); *Hartman* v. *State Game Comm'n*, 85 Wash.2d 176, 532 P.2d 614 (1975); *Columbia River Fishermen's Protective Union* v. *Ray*, Thurston County Cause No. 58054; *Columbia River Fishermen's Protective Union* v. *Moos*, Thurston County Cause No. 55338; *Columbia River Fishermen's Protective Union* v. *Haw*, Thurston County Cause No. 56658; *Mariani* v. *Tollefson*, Thurston County Cause No. 46427; *Puget Sound Gillnetters Ass'n* v. *Tollefson*, Thurston County Cause No. 50757; *Purse Seine Vessel Owners Ass'n* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977); *Puget Sound Gillnetters Ass'n* v. *Moos*, 88 Wash.2d 677, 565 P.2d 1151 (1977).

treaty fishermen against the State. Moreover, even in this Court, the State is taking some positions that are decidedly at odds with the non-treaty fishermen, since it is prepared to concede, for example—despite the holding of the Washington Supreme Court in the case commenced by the petitioner associations—that its agents may be empowered by federal court orders to take actions in contravention of state statutes.

These conflicts are not trivial or speculative; they go to the heart of the State of Washington's alleged "representation" of the interests of the non-treaty fishermen. In light of the losses actually incurred by the non-treaty commercial fishermen, it is not difficult to see why they are convinced, with ample foundation, that it is a grotesque fiction to say they are bound by the outcome of the original litigation and are subject to the district court's decrees because the State "adequately represented them."

Where there have been similar conflicts, the federal courts have consistently recognized that due process does not permit a party to be treated as a legally adequate representative of non-parties, capable of binding them. The issue is most typically addressed in connection with proposed certifications as class actions. For instance in *Phillips* v. *Klassen*, 502 F.2d 362 (D.C. Cir.), *cert. denied*, 419 U.S. 991 (1974), class certification was denied because of the possibility that some members of the class would have different views or interests than the purported class representative: "Class members whose interests are antagonistic to, or even 'potentially conflicting' with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process . . . ." *Id.* Similarly, in *City of Chicago* v. *General Motors Corp.*, 332 F. Supp. 285 (N.D. Ill. 1971), *aff'd on other grounds*, 467 F.2d 1262 (7th Cir. 1972), the City of Chicago was found to be an inadequate representative of all its residents because of the likelihood that some members of such an "extraordinarily diverse class" would have interests adverse to the city.[51]

[51] *See also Dierks* v. *Thompson*, 414 F.2d 453 (1st Cir. 1969); *Lukenas* v. *Bryce's Mt. Resort, Inc.*, 66 F.R.D. 69 (W.D. Va. 1975); *Ward* v. *Luttrell*, 292 F. Supp. 162 (E.D. La. 1968).

Manifestly, the same observation applies here. The State cannot be considered to have been an adequate representative of the interests of *one* of the conflicting groups of its citizens in this litigation. Under the circumstances, the effective destruction of the livelihood of the non-treaty fishermen by a litigation in which they did not have the opportunity to represent themselves is inconsistent with their fundamental rights. *Cf. Green* v. *McElroy*, 360 U.S. 474 (1959) (right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within liberty and property concept of Fifth Amendment); *Ferrell* v. *Dallas Indep. School Dist.*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968); *Fitzgerald* v. *Hampton*, 467 F.2d 755 (D.C. Cir. 1972).

B. Privity Is Not A Substitute For Adequate Representation.

The court below was of the view that adequacy of representation by the State was not a necessary predicate for holding petitioners bound by the earlier litigation and properly subject to the trial court's orders. It disregarded the fact of inadequacy by treating the supposed relationship of "privity" between the State and all its citizens as independently sufficient. In this respect as well the court clearly erred. Common law notions of privity are not substitutes for adequacy of representation. *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 2956, at 568 (West 1972 & Supp. 1977).

This Court has said that privity exists where the non-party is "identified in interest" with the defendant. *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945).[52] Thus, for purposes of binding a non-party, "privity" exists only where the relationship between the party and a non-party is characterized by such a high degree of common interests—and the absence of any

[52] *See also Backo* v. *Local 281*, 438 F.2d 176 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971); *Teas* v. *Twentieth Century Fox Film Corp.*, 413 F.2d 1263 (5th Cir. 1969).

conflicting or divergent interests—that adequacy of representation is assured. *See* C. Wright & A. Miller, *supra*, at 560.

The appeals court's reliance on several water rights decisions to support its privity holding was clearly misplaced, for in each of those cases the state was a legally adequate representative of the rights and interests of the absentees. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935); *Wyoming* v. *Colorado*, 286 U.S. 494 (1932). In *City of Tacoma*, for example, the Court suggested that the State of Washington's participation in an earlier Federal Power Commission proceeding operated as a bar to subsequent relitigation of the same issues in claims brought by the State or by any of its citizens. As the Court pointed out, however, due process safeguards were carefully observed in the agency proceeding and in a subsequent judicial appeal by the appointment of a special state attorney general with the responsibility for representing Washington citizens whose views were in conflict with those of the state. 357 U.S. at 326. Of course, there was no similar effort in this case by the State to serve as the undiluted advocate of the interests of non-treaty commercial fishermen.

In *Wyoming* v. *Colorado* and *Nebraska* v. *Wyoming*, this Court's original jurisdiction was invoked to settle disputes concerning the proper allocation of water between states. In both cases the Court held that a judgment binding a state was equally binding against private appropriators within the state. In relying on these cases, however, the court below overlooked the obvious fact that apportionment *between* states is quite different from resolution of the interests of competing groups of citizens *within* a single state. In the traditional inter-state water rights case, each state represents the interests of its citizens as a whole against the claims of another state and its citizens as a whole.[53] The interests of each state and its citizens are deemed

[53] Significantly, however, in *United States* v. *Nevada*, 412 U.S. 534 (1973), original jurisdiction of a suit was declined in favor of litigation in district court where the individual users of the water rights in dispute could intervene to assert their own interests.

to be coextensive, and thus there is an identity of interest. As we have seen, that is not true in this case. Inapposite for the same reasons are other decisions of this Court in which states brought suits as *parens patriae* on behalf of the common economic or environmental interests of their citizens. In each of these cases, too, there was a complete identity of interest between the state as *parens patriae* and all of its citizens.[54]

Moreover, the doctrine of *parens patriae*, orginally confined to the notion that the sovereign may represent those of its citizens legally incapable of acting for themselves, has developed to the extent that a state has standing to sue in those causes in which it has its own "quasi-sovereign" interest, different from those of its citizens. *See Hawaii* v. *Standard Oil Company*, 405 U.S. 251, 257-58 (1972). The quasi-sovereign interest has been characterized as an "interest independent of and behind the titles of [the state's] citizens . . . ." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), and as an "interest apart from that of particular individuals who may be affected," *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 451 (1945). This application of the *parens patriae* doctrine could not justify binding non-party citizens who have independent rights.

Finally, in *New Jersey* v. *New York*, 345 U.S. 370 (1953) (*per curiam*), this Court made the requirement of adequacy of representation explicit in its denial of an intervention motion by the City of Philadelphia. The State of Pennsylvania had previously been granted leave to intervene in the case—a water allocation dispute between New York and New Jersey. On a

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[54] *See, e.g., Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas); *Missouri* v. *Illinois*, 180 U.S. 208 (1901) (holding that Missouri was permitted to sue Illinois and the Chicago Sanitation District on behalf of Missouri citizens to enjoin the discharge of sewage into the Mississippi River). *See also North Dakota* v. *Minnesota*, 263 U.S. 365 (1923); *New York* v. *New Jersey*, 256 U.S. 296 (1921); *Georgia* v. *Tennesee Copper Co.*, 206 U.S. 230 (1907); *Kansas* v. *Colorado*, 206 U.S. 46 (1907).

subsequent motion by the City of Philadelphia the Court denied intervention because Philadelphia's interests were adequately represented by the State as *parens patriae*. "Counsel . . . have been unable to point out a single concrete consideration to which the [state's] position does not represent Philadelphia's interests." 345 U.S. at 374. Mere "privity" was not enough to exclude Philadelphia from representing its own interests.

In the cases now before the Court, the disputes have divided groups of citizens of the State of Washington with conflicting interests. In no fair or realistic sense can the state be regarded as speaking for each group or with any. That kind of schizophrenia is not recognized either by the "privity" doctrine or by the due process clause.

C. Non-Treaty Fishermen Are Not Affiliated With The State Of Washington For Purposes of Applying Injunctions To Them Directly.

Quite apart from the error in treating the non-treaty fishermen as bound by the substantive rulings against the State in the original litigation, Judge Boldt exceeded his authority in extending a series of injunctions to them as if they were parties to the litigation. Under principles of federal equity, as codified in Rule 65(d) of the Federal Rules of Civil Procedure, the type of "privity" that will permit the direct extension of an injunction to a non-party is quite limited and certainly does not exist in this case.

The basic principles governing the scope of federal court injunctions against non-parties were set forth by Judge Learned Hand in *Alemite Manufacturing Co.* v. *Staff*, 42 F.2d 832, 832. (2nd Cir. 1930):

> "[N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the whole world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not

vested with sovereign power to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court."

Contrary to any claim of expediency that might be offered to justify what Judge Boldt has done here, Judge Hand rejected the notion that an injunction may be extended to a non-party simply because the judge believes it is "necessary" to achieve his objective:

> "Thus the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, *but what it has power to forbid, an act of a party.*" *Id.* at 833 (emphasis added).

These limitations were approved and followed in *Chase National Bank* v. *Norwalk*, *supra*[55], involving an injunction against a city that also purported to bind all persons who might be given notice of the decree. The Court's opinion by Mr. Justice Brandeis held that the injunction was void insofar as it applied to state officials who were neither associates nor confederates of the defendant city. The Court stated that extension of the injunction to non-parties who "act independently and whose rights have not been adjudicated . . . violates established principles of equity jurisdiction and procedure."

The basic teaching of these cases was substantially codified in Rule 65(d) when the Federal Rules of Civil Procedure were adopted in 1938. Rule 65(d) provides in relevant part that a federal injunction or restraining order is

> "binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and *upon those in active concert or participation with them* who receive actual notice of the order by personal service or otherwise." (Emphasis added.)

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[55] *See also Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 180 (1973).

As this Court has explained, Rule 65(d) was intended to prevent injunctions from making "punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Golden State Bottling Co.* v. *NLRB*, *supra*, 414 U.S. at 180. An injunction can only run to parties and those "identified with them in interest [and] in 'privity' with them," and acting as "aiders and abettors," *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1944). Under Rule 65(d), mere "privity" in the common law sense is not enough. The rule requires active cooperation and complicity on the part of the non-party, or, alternatively, the existence of a common legal right linking the party defendant and the non-party.

The non-treaty commercial fishermen were certainly not acting "in concert" with the State, nor were they acting as the State's agents in this matter. Although both the State and the non-treaty fishermen believed that the major underpinnings of the federal decision were wrong, there was no concerted action in its aftermath of the type contemplated by Rule 65(d).

Moreover, the courts below did not rely on any notion of "active concert or participation" by the State and the non-treaty fishermen. Rather, the apparent rationale for the extension of the injunctions directly to the non-treaty fishermen was one of expediency. Judge Boldt expanded his injunctive net because the State could not effectively — or legally, under Washington law — allocate harvestable salmon the way the Judge wanted. For that reason alone, the court of appeals concluded, "the district court had authority to act against the fishers directly when it appeared that the State was unable to do so." 573 F.2d at 1133. That type of pragmatism, however, is precisely what Judge Learned Hand condemned in *Alemite Manufacturing Co.* v. *Staff*, *supra*. [56]

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[56] In its brief acquiescing in the grant of a writ of certiorari in Nos. 78-119 and 78-139 (at 25), the United States suggested that there is an analogy here to various cases arising in the context of judicially enforced school desegregation, where the federal courts have enjoined non-parties from forcible interference with their decrees. *See, e.g., Cooper* v. *Aaron*, 358 U.S. 1, 11-12 (1958); *United*

Apart from the absence of "concert" here, the non-treaty fishermen were not resting on a common legal right linking them and the State in a relationship sufficient to establish privity for purposes of Rule 65(d). Under Rule 65(d), an injunction can be extended to a non-party only where he is asserting the *same* legal right as the party or where he operates under the *identical* legal duty. A more tenuous relationship—like that between the State here and contesting groups of its citizens—is not sufficient. For example, in *Petersen* v. *Fee International Ltd.*, 435 F. Supp. 938 (W.D. Okla. 1975), a contempt proceeding growing out of a patent infringement case, the court held that an injunction barring the use of the infringing product did not bind a person who had purchased

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States v. *Hall*, 472 F.2d 261 (5th Cir. 1972); *Bullock* v. *United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 384 (1957); *Brewer* v. *Hoxie School Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956). The analogy is unfair; nor will it bear analysis.

In those cases injunctions were held to bind various "agitators"—non-parties to the underlying suits—who had deliberately sought to instigate violent confrontations or otherwise block implementation of school desegregation decrees. None of the injunctions or restraining orders, however, purported to adjudicate the non-parties rights in the underlying desegregation litigation. In fact, they did not purport to adjudicate or impose independent legal obligations. Rather, they did no more than direct the non-parties to stand aside so that the decrees could operate directly on the parties to the litigation, whether effectively or not. *See United States* v. *Hall, supra*, 472 F.2d at 264-67 (Wisdom, J.). Indeed, in *Hall* the court of appeals expressly recognized the non-party's right to contest the underlying decree. *Id* at 256.

In the present case, by contrast, the injunctions directed at the non-treaty fishermen may not fairly be characterized as merely ancillary to the underlying litigation or as merely protecting the court's jurisdiction. The orders were the product of Judge Boldt's frustration that directing his orders only against parties proved to be inadequate for his purposes. The school desegregation cases lend no support for that kind of bootstrapping.

the goods pursuant to a supply contract. The court emphasized the narrow scope of privity within the meaning of Rule 65(d):

> "In its broadest sense privity is defined as mutual or successive relationships to the same right or property, *or such an identification of interest of one person with another as to represent the same legal right* . . . . The meaning attached to the word 'privity' . . . in Rule 65 is the latter relationship, such an identification of interest of one person with another as to represent the same legal right and generally not the first relationship. *Id.* at 942 (emphasis added).[57]

The court below sought to link the rights of the State and the non-treaty fishermen by asserting that petitioners' interests were "derivative of" the State's sovereign power to regulate "rights in fish." 573 F.2d at 1132. It is clear that Judge Boldt did not proceed on this theory when he acted, rather than on a more result-oriented one; the district judge's orders were directed to non-citizens as well as citizens.[58] In any event, as we have just seen, a "derivative" relationship is normally insufficient by itself to support the extension of an injunction to a non-party. Moreover, the court's characterization of the relationship between the State and the non-treaty fishermen is meaningless in this context.

The notion that the rights in fish and game are derived from the State is fantasy. The fish are migratory, leaving

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[57] *See also Herrlein* v. *Kanakis*, 526 F.2d 252 (7th Cir. 1975) (injunction not enforceable against non-party which had purchased all the assets of the defendant and had hired defendant to manage those assets); *United Pharamacal Corp.* v. *United States*, 306 F.2d 515 (1st Cir. 1962) (purchaser of drug held not subject to injunction against production and sale, even though it owned 30 percent interest in the defendant corporation); *Swetland* v. *Curry*, 188 F.2d 841 (6th Cir. 1951) (injunction for nuisance against owners of airport not binding on city which took title to the airport through eminent domain).

[58] The "preliminary injunctions" of September 27, 1977, and June 6, 1978, are directed at "all . . . persons who attempt to net . . . salmon" (Pet. 78-119, App. A89; JA 488).

streams of Washington and British Columbia and swimming far out to sea. They are subject to being caught on the high seas by Americans and Canadians in accordance with treaty and federal regulation.[59] They then return to spawn in their streams of origin or to be caught by either Canadian or United States fishermen. While the fish are in state waters, they are no doubt a resource properly subject to regulation. But the State does not have such an interest in them, to the exclusion of others, that its participation in litigation can bind its citizens, non-citizens, or aliens.[60] A fishing license is simply a conservation device, also designed to raise revenue; it is not a royal permit that "derivatively" confers on the fishermen some right to the fish otherwise owned by the State.

Moreover, it would be fatuous to regard commercial fishermen as merely the beneficiaries of the largesse of the State, and to reason that they may take fish as if the fish were State property, available only under terms and conditions that the State has chosen to impose upon it. The court of appeals conceded, as it must, that the State of Washington does not have title to, or otherwise *own,* migratory fish swimming freely off the coast of the state.[61] As this Court noted in *Douglas* v. *Sea Coast Products,* 431 U.S. 265, 284 (1977) (quoting *Missouri* v. *Holland,* 252 U.S. 416 (1920)):

> "'[t]o put the claim of the State upon title is,' in Mr. Justice Holmes' words, 'to lean upon a slender reed . . . .' A State does not stand in the same position as the owner of a

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[59] Regulations of the Pacific and North Pacific Regional Councils are promulgated pursuant to the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*

[60] In *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948), this Court held that a state could not forbid the issuance of fishing licenses to aliens.

[61] The court of appeals itself recognized this principle in the first appeal in the federal proceedings:

"The district court's apportionment does not purport to define property interests in the fish; fish in their natural sense remain free of attached property interests until reduced to possession." 520 F.2d at 687.

> private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture." (Citations omitted.)[62]

Nor does the State's power to regulate fishing establish a legal identity of interest between the State and commercial fishermen. It defies common sense to equate the interests of the regulator with those of the regulated. If the court's analysis were sound, commerical fishermen—Indians and non-Indians alike—would be barred from ever challenging the State's regulatory decisions. The clear gulf between the State and its citizens in that context, however, permits such challenges and exposes the flaw in the lower court's analysis.

Thus, the rights and interests of non-treaty commercial fishermen, although subject to state regulation, stand quite independent of the State's sovereign rights. Accordingly, the identity of legal right required by Rule 65(d) simply does not exist here, and the district court lacked the power to extend its decrees to petitioners solely on the basis of determinations made in a lawsuit to which they were not parties.

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[62] This concept was also approved by the Court in *Toomer* v. *Witsell,* 355 U.S. 385 (1948), where the Court termed the "whole ownership theory" a mere fiction that illustrates the public interest in regulating fisheries.

CONCLUSION

The judgments of the Supreme Court of Washington should be affirmed. The judgments of the United States Court of Appeals for the Ninth Circuit and the extant "Preliminary Injunction" of the United States District Court for the Western District of Washington should be reversed.

Respectfully submitted,

CHARLES E. YATES
DOUGLAS FRYER
Moriarty, Mikkelborg, Broz,
Wells & Fryer
Attorneys for Puget Sound
Gillnetters Association, et al.
JOSEPH T. MIJICH
JOHN P. WORLD
Attorneys for
Purse Seine Vessel Owners
Association, et al.

Of counsel:

PHILIP A. LACOVARA
GERALD GOLDMAN
Hughes Hubbard & Reed

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Nos. 77-983, 78-119 and 78-139

In the Supreme Court of the United States

OCTOBER TERM, 1978

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v.

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STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

LOUIS F. CLAIBORNE
Assistant to the Solicitor General

KATHRYN A. OBERLY
Attorney
Department of Justice
Washington, D.C. 20530

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

By order dated November 13, 1978, the Court consolidated three cases involving related decisions of the Supreme Court of the State of Washington, the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington.

In No. 77-983, the State of Washington challenges the decisions of the Washington Supreme Court in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association* and *Washington* v. *Puget Sound Gillnetters Association* (hereafter "*Fishing Vessel II*" and "*Gillnetters*," or "the state cases").

In No. 78-119, the State of Washington challenges the decision of the Ninth Circuit in the consolidated cases of *Puget Sound Gillnetters Association* v. *United States District Court for the Western District of Washington* and *United States* v. *Washington* (hereafter the "Washington Fishery case" or "*PSGA* v. *District Court*"), and also challenges the separate decision of the court of appeals in *United States* v. *Washington* (hereafter the "International Fishery case").

In No. 78-139, the Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association challenge the decision of the Ninth Circuit in the Washington Fishery case, *supra*, and also challenge, before judgment in the court of appeals, the decision entered by the district court on June 6, 1978, in *United States* v. *Washington*, Civ. No. 9213 (W.D. Wash.) (hereafter the "1978 Enforcement Order").

The United States submits this single brief in all three cases.

OPINIONS BELOW

The opinion of the Washington Supreme Court in *Fishing Vessel II* (77-983 Pet. App. B-1 to B-20) is reported at 89 Wash.2d 276, 571 P.2d 1373. The opinion of the Washington Supreme Court in *Gillnetters* (77-983 Pet. App. D-1 to D-22) is reported at 88 Wash.2d 677, 565 P.2d 1151. The opinion of the court of appeals in the Washington Fishery case (78-119 Pet. App. A-1 to A-28) is reported at 573 F.2d 1123. The opinion of the court of appeals in the International Fishery case (78-119 Pet. App. A-29 to A-33) is reported at 573 F.2d 1118. The findings of fact, conclusions of law, and preliminary injunction of the district court issued upon entry of the 1978 Enforcement Order (78-139 Pet. App. C-1 to C-13) are reported at 459 F. Supp. 1020, 1125-1130.

The initial opinion of the district court, together with its findings of fact, conclusions of law, and declaratory judgment and decree (A. 63-208), is reported at 384 F. Supp. 312. The first opinion of the court of appeals (A. 39-60) is reported at 520 F.2d 676.

JURISDICTION

The judgment of the Washington Supreme Court in *Gillnetters* was entered on October 10, 1977, and that court's judgment in *Fishing Vessel II* was entered on November 23, 1977. The petition for a writ of certiorari in No. 77-983 was filed on January 9,

1978, and was granted on October 16, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

The judgments of the court of appeals in the Washington Fishery case and the International Fishery case were entered on April 24, 1978. The 1978 Enforcement Order was entered by the district court on June 6, 1978, and a notice of appeal to the court of appeals was filed on July 19, 1978. The petition for a writ of certiorari in No. 78-119 was filed on July 21, 1978, and the petition in No. 78-139 was filed on July 24, 1978. Both petitions were granted on October 16, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether principles of finality, judicial comity and jurisdiction prevent relitigation in this Court of issues previously determined in the district court's Final Decision No. 1 and in the affirmance of that decision by the court of appeals, which became final when this Court denied review.

2. Whether treaties concluded in 1854 and 1855 reserved to Indian tribes in the State of Washington an opportunity to harvest up to one-half of any run of fish that normally would pass through the tribes' usual and accustomed off-reservation fishing grounds and stations.

3. Whether the State of Washington must manage and regulate its fisheries in such a manner as to ensure that federally guaranteed treaty fishing rights are protected, notwithstanding the absence of any

state statute specifically authorizing implementation of Indian fishing rights.

4. Whether, in light of the State of Washington's failure to adopt regulations permitting Indian fishermen to harvest their treaty share of fish, the district court properly exercised its discretion by allocating the salmon harvesting opportunity for the 1977-1978 fishing season in accordance with the court's prior decisions.

5. Whether, in light of the State of Washington's unwillingness or inability to prevent its non-treaty fishermen from encroaching on the fishing rights of treaty Indians, the district court properly enjoined state-licensed non-treaty fishermen from harvesting salmon in excess of their allocated share.

6. Whether the matters at issue in the International Fishery case are now moot.

TREATIES INVOLVED

The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and

interest in and to the lands and country occupied by them, bounded and described as follows * * *.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of lands, * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

STATEMENT

A. The Initial Federal Court Litigation

1. *The parties and their positions*

In September 1970, the United States, on its own behalf and as trustee for several Indian tribes of the State of Washington, brought this suit against the State to require it to comply with treaties guaranteeing off-reservation fishing rights to the Indian tribes. The essential questions to be decided were the measure of the fishing rights provided the tribes by treaty, whether the then-existing state regulatory scheme infringed those rights, and, if so, what relief should be granted.

a. At the outset, the district court suggested that "so far as possible all tribes, agencies or organizations having or claiming direct or indirect justiciable interest [should] be brought into the case either as

parties or as amicus curiae * * *" (A. 64).[1] Non-Indian commercial fishermen exhibited little interest in participating. Two loosely organized associations of sportsmen [2] moved to intervene, as did the Washington Reef Net Owners Association.[3] The court denied intervention to the sportsmen, holding that they were adequately represented by the State. The unique position of the Reef Net Owners, whose acquisition and transfer of reefnet locations is not regulated by the State, was held to warrant limited intervention.[4] Many other organizations participated as amicus curiae (see A. 65).

As for petitioners in No. 78-139, neither association moved to intervene before trial, although the Purse Seine Vessel Owners Association did participate as amici curiae (A. 65). The Puget Sound Gillnetters Association never sought to participate in any capacity. On March 15, 1974, after the entry of Final Decision No. 1, the Purse Seine Vessel Owners Association moved to intervene (*id.* at 421-422). This motion was denied, on the court's finding that the motion was untimely and that the Association was in any

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[1] Meanwhile, pursuant to stipulations, additional tribes originally represented by the United States intervened on their own behalf or obtained private counsel. Also by stipulation, the Washington State Department of Fisheries and Washington State Game Commission, and their respective Directors, intervened as additional defendants.

[2] Washington State Sportsmen's Council (Docket No. 25), and Committee to Save Our Fish (Docket No. 34).

[3] Docket No. 39.

[4] Transcript of May 25, 1972.

event adequately represented by the State (A. 423). The Washington State Commercial Passenger Fishing Vessel Association (respondent in No. 77-983) also sought intervention after judgment. Its motion was denied on July 18, 1974, without prejudice to a renewed motion if relief could not be obtained in state court (*id.* at 426-427). Neither association appealed the denial of intervention.

b. The Washington State Game Commission argued that, except for a right of access over private lands and an exemption from the payment of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens, and thus any regulation treating Indians and others equally (such as a prohibition of net-fishing at a usual Indian fishing ground) was valid.[5] The Washington State Department of Fisheries, contrary to the Game Commission, acknowledged that the treaties in question provided the tribes with special fishing rights at their usual and accustomed places and obliged it to afford the tribes a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries, Pretrial Br. at 2; Final Pretrial Order at 83, 87, 137-138). It contended that its regulations were a lawful exercise of state police power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of

[5] Game, Pretrial Br. at 3; Final Pretrial Order at 79.

the State of Washington in the case area" (Fisheries, Pretrial Br. at 8, 22; see also page 2). In its post-trial brief, at page 36, and in argument in the district court (Tr. 4384), the Department of Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the tribes.

The tribes argued that the State was without authority to regulate their fishing, that the State had no right to permit such heavy fishing by non-Indians before the fish reach the Indians, and that the State, contrary to the treaties, was preventing the Indians from taking fish necessary to satisfy their needs. They argued that the test under the treaties should be their needs, not a percentage of the harvest, drawing an analogy to Indian water rights as defined in *Winters* v. *United States*, 207 U.S. 564 (1908) (see *e.g.*, Muckleshoot, Pretrial Br. at 8-11).

The United States conceded that the State had the power to regulate off-reservation Indian fishing, but only if it was shown that the regulation was reasonable and necessary for conservation, met appropriate standards, and did not discriminate against the Indians by making them suffer the brunt of the conservation measures. The United States argued that non-Indian fishing should be regulated in such a manner as to permit the tribes at their off-reservation fisheries the opportunity to catch as many fish as required to fill their needs, but subject to a ceiling of 50% of the harvestable portion of the runs involved (Plaintiffs' Post-trial Br. at 81-84).

2. *The district court decision*

a. After extensive pretrial development of the evidence and an 18-day trial, the court entered detailed findings of fact (Findings 1-253, A. 96-191). Essentially, the court found that at the time the treaties were made the treaty tribes fished for trade as well as subsistence and ceremonial purposes (Findings 2-14, A. 99-105). In negotiating the treaties the tribes were willing to give up large areas of land, but they insisted, and the United States agreed, that they could continue to fish at their usual and accustomed places off the reservations, although they would share those fisheries with the citizens of the territory (Findings 19-28, A. 108-113). At the time of the treaties, neither party intended to restrict the other's fishing because they did not contemplate that they would interfere with each other (Finding 28, A. 113).

Subsequent to the treaties, the Indians continued fishing on their reservations and at their usual and accustomed places off the reservations, and such fishing "still provides an important part of their livelihood, subsistence and cultural identity" (Finding 31, A. 114; Findings 29-34, A. 113-115). Many of the tribes have adopted written fishing regulations for on and off-reservation fishing designed to assure proper escapement (Findings 34, 42, 59, 69, 79, 90, 99, 116, 124, 159, 160, 190, A. 115-169).

The court found that as the number of non-Indian fishermen grew and the State adopted conservation measures, those regulations favored non-Indian fishermen to the detriment of the treaty fishermen. More

specifically, the court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians" (Finding 193, A. 170); that tribal fishermen have avoided using some usual and accustomed fishing places because of State enforcement actions (Finding 33, A. 115); and that the Departments of Fisheries and Game have seized and detained Indian boats, nets, and fish caught by Indians without notice to their owners and without judicial proceedings (Findings 194-195, A. 170-171).

The court also found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply" (Finding 217, A. 179-180).

There was no showing that tribal fishing on reservations, which had been free of state control, had been detrimental to conservation, although many of the reservations straddle the mouths of major river systems, making the essential spawning escapement for any run dependent on passage through them. With respect to off-reservation fishing, the court noted (A. 81):

With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.

b. The district court held that each of the plaintiff tribes had reserved for itself and its members an exclusive right of fishing within its reservation boundaries, and a right to fish at all usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the Territory." Concerning the scope of the latter right, the Court ruled (Conclusion 20, A. 195):

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exist in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.[6]

Thus, the court concluded that "[t]he phrase 'in common with' operates only to limit the exercise of the tribes' right to a share of the resource which will be consistent with preservation and maintenance of the resource and with the reasonable harvest by others of such fish as are not reasonably needed by the tribe * * *" (Conclusion 28, A. 197).

The court also held that the 1937 convention between Canada and the United States did not modify the treaties with the Indians but that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [established by the convention] must comply with regulations of the Commission" (A. 214).

The court reserved for a subsequent trial the question of the effect of fish hatcheries (whether Indian, federal, or state) and environmental changes (such as dams) on the fishing rights (see A. 214). The hatchery aspect is set for trial on June 4, 1979, and motions for partial summary judgment have been filed on the environmental issues.

c. The court issued an injunction which recognized the overriding authority of the State in pre-

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[6] See also Conclusions 21-29, A. 195-197.

serving the fishery (Injunction, para. 8, A. 222), and provided for state emergency regulation over all tribal off-reservation fishing without prior court approval (Injunction, para. 19, A. 225). The court's order also provided that tribes meeting certain standards (A. 84-85) would be permitted to regulate their own off-reservation fishing, subject to monitoring by the State, state emergency regulation, and return to state regulation in case of abuse by the tribe (Injunction, para. 2, A. 219-220). In other cases, off-reservation fishing would be regulated by the State, if the need for such regulation was established in advance (Injunction, para. 3, A. 220).

The court also directed the State to reduce non-Indian fishing on runs that would normally pass through the usual and accustomed off-reservation fishing places of the treaty tribes to the extent necessary to permit treaty Indians to exercise their fishing rights. In response to requests by both the United States and the State (see pages 8-9, *supra*), the court established a formula for determining the maximum extent of the tribes' entitlement (A. 88-89). The formula provides basically that the tribes are entitled to have the opportunity to fish for up to one-half of any run of fish that normally would pass through their off-reservation sites, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. On-reservation catches are not to be included in computing the tribal share (*ibid.*).

The court directed the state defendants, prior to each fishing season, to obtain data from the tribes

concerning the types of gear they expect to use and the quantity of fish they expect to be able to catch, and to take account of such information and the limits of the tribes' entitlement in making their predictions and regulations for the coming season (Injunction, para. 17, A. 224-255). The court also entered an interim plan and stay order for the gradual and orderly implementation of its judgment (A. 229-231).

3. *Appellate proceedings*

a. All parties, except the United States, appealed. In a full opinion (A. 39-60), the court of appeals affirmed in all respects, although clarifying one point. This was that foreign fishing beyond the State's jurisdiction does not justify a compensatory adjustment in determining the run on the basis of which the treaty share is calculated (A. 53, 59).

The court expressly rejected the State's contention that the treaties merely protected the Indians against discrimination, concluding that such a rule would "render[] the treaty guarantees nugatory" (A. 46). In the court's view, the tribes were entitled to an equitable apportionment of the fishery in order to remedy the State's "exploitation of [the] common property" in a manner that "effectively allots [the Indians] a decreasing share of the resource" (A. 50). Express approval was given to the district court's decision that treaty fishermen "are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds" (A.

50). The details of implementation, it was held, were largely within the trial court's broad equitable discretion (*ibid.*). The appellate court found no abuse and accordingly affirmed.

b. Three petitions for certiorari were filed in this Court by the State and the non-Indian groups. All were denied. 423 U.S. 1086 (1976).

B. Implementation Of The Federal Court Decision: 1974-1976

Implementation of the district court's decree has proved difficult. The State of Washington has not discharged its responsibilities under the decision, and non-treaty fishermen have continued to fish throughout the area in disregard of state regulations and the orders of the district court.[7] In each fishing season since the decision, the United States and the tribes have been forced to return to the district court seeking further orders to secure compliance with the decision. At the same time, non-Indian fishermen have instituted numerous suits against the State of Washington in the state courts, seeking declaratory and injunctive relief against implementation of state regulations that limit non-treaty fishing to protect treaty rights in compliance with the federal court's mandate. The state courts have consistently granted such relief, holding not only that the regulations are in violation of state law, but that the federal district

[7] The Joint Appendix contains a summary of the record evidence relating to illegal non-treaty fishing and the inability of the State to combat it (A. 601-609).

court's interpretation of the Indians' treaty rights was erroneous and unconstitutional.

1. The 1974 fishery is illustrative. In its Memorandum Decision on Plaintiffs' Request for Determination and Injunction (A. 427-437), the district court found that the State of Washington had been unable to reduce the non-treaty fishery because of orders issued by the Thurston County Superior Court in *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, No. 50370; *Washington Kelpers Association* v. *Tollefson*, No. 50552; and *Puget Sound Gillnetters Association* v. *Tollefson*, No. 50757.[8] The court further found that the treaty tribes had taken fewer fish, both in terms of numbers and as a percentage of the total harvest, up to that point in the 1974 season than they had during the years preceding the judicial apportionment in Final Decision No. 1 (A. 430). Presented with no alternative by the State, the district court enjoined the state court from enforcing its decision in *Puget Sound Gillnetters, supra.*[9]

2. The problems of the 1974 season were an accurate portent of the difficulties to follow. During

[8] The district court noted that none of the state suits involved a full-scale evidentiary hearing. Affidavits of the litigants provided the only evidence, and these were not subjected to cross-examination (A. 431).

[9] A. 433-434. The district court did not interfere with the state court action in the other two cases in light of its finding (A. 432-433) that the proposed state regulations would not have made significant numbers of additional fish available for harvest by treaty tribes in any event.

the 1975 season, the Department of Fisheries was again unable to make sufficient reductions in the non-treaty fishery to ensure the treaty tribes a fair harvesting opportunity. The 1975 Joint Salmon Catch Report shows that the treaty tribes caught 32% of Puget Sound origin runs (333,900 fish), while the non-treaty fishermen caught 64% (722,200 fish).[10] During the season a series of injunctive orders were issued to remedy the State of Washington's refusal to manage the steelhead, chinook, pink, sockeye, coho and chum salmon runs in accordance with Final Decision No. 1.[11]

Stymied in their legal attempts to frustrate the federal decision, the non-treaty fishermen chose to engage "in a substantial fishery on the 1975 coho salmon run in direct violation of regulations issued by the State of Washington and orders of [the] court" (A. 450). The State of Washington did little to prevent these recurring violations. Citations were routinely dismissed by county prosecutors and judges (A. 521, 524-525). The situation became so aggra-

[10] Ninth Circuit Record in No. 77-3654, at R. 1042. This excludes the much larger Canadian-origin runs, which also pass through the usual and accustomed places of some treaty tribes. On these runs, the tribes took only 1.7% (62,300 fish), while non-treaty fishermen harvested 98.3% (3,537,200 fish). However, the tribes did not then, nor do they now, assert that they have sufficient fishing "power" (boats, gear, experience) to harvest 50% of the Canadian-origin runs.

[11] See Transcripts of January 9 and 14, 1975; and Ninth Circuit Record in No. 77-3654, at R. 745, 752, 756, 770, 775, 782, 790, 797, 799 and 806.

vated that Judge Boldt was led to observe (A. 499-500):

> A factor that has been mentioned but not sufficiently emphasized in my opinion has been disturbing me deeply, not merely for the purposes of this case but for the dignity and honor of the people of this great, wonderful area where I have lived for 50 years. Mr. Moos told us that there have been 300 citations of non-treaty fishermen over a relatively short period, and that out of all of the 300 only one individual has been penalized by the civil and criminal processes of the state. We have indisputable evidence that substantial numbers of non-treaty fishermen willfully and deliberately have obstructed treaty fishermen to a very substantial extent, even in the period where they were entitled to exclusive fishery. This is outlaw fishing, and the Court can do nothing but condemn it as an arrogant and flagrant, as well as unlawful, effort to defeat the basic purposes and intent of *United States* v. *Washington*. * * * I am completely satisfied that the treaty take of chum, as well as other runs, has been substantially diminished from what it would have been had there not occurred this willful violation of the law and the failure to enforce the law.

3. During the 1976 season, the State again failed to restrict its non-treaty fishermen as required by Final Decision No. 1, resulting in additional injunctive orders by the district court (*e.g.*, A. 466-470). The court also attempted to deter the widespread illegal non-treaty fishing by including a penalty pro-

vision (A. 470). Nevertheless, the illegal fishing continued, and the State of Washington publicly announced its inability to control it and requested the assistance of the United States Coast Guard (A. 603).[12]

Throughout the 1974, 1975 and 1976 seasons, the district court relied on the State of Washington to adopt and enforce regulations enabling the treaty tribes to take their share of the harvest. By the beginning of the 1977 season, however, it became clear that the court could no longer expect even minimal compliance from the State, in large measure because of the state supreme court's decision in *Puget Sound Gillnetters Association* v. *Moos*, now before this Court. We accordingly turn to the proceedings in the Supreme Court of Washington.

C. The State Court Cases

We have already noted that injunctions were repeatedly sought and obtained from the state county court. Many such orders were stayed by the federal district court (*e.g.*, A. 434), and the Department of Fisheries, however haltingly, continued to obey the

[12] Although non-treaty fishermen took more than 135,000 fish in violation of state regulations during the 1976 season (78-139, Pet. App. C-9), the district court's efforts to attain a fair division of fishing opportunity moved a step forward. The treaty tribes were enabled to harvest approximately 37% of the Puget Sound origin runs (423,600 fish). Again, this excludes the larger Canadian origin runs, as to which the tribes do not have the ability to take 50% of the harvest. Even on these runs, however, the treaty share increased in 1976 to 7.3% of the American share.

latest court directive. A far more difficult situation resulted, however, after the state supreme court intervened in mid-1977.

1. The first case to reach that court was *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*. The suit had been filed in the Thurston County Superior Court to challenge certain regulations issued by the Washington Department of Fisheries in response to the federal district court's initial decision. Temporary injunctions against the Fisheries Director were issued in the Summer of 1974, but the federal court took no action, concluding (as already noted, *supra*, note 9) that the particular regulations restrained were of only marginal importance (A. 432-433). In January 1975, the superior court invalidated those regulations and permanently enjoined the Fisheries Director from enforcing them (77-983 Pet. App. G-1 to G-7). At no stage did the United States or the tribes participate in the proceedings.

Long before the case was first heard by the state supreme court in 1976, the regulations had been superseded. But, far from interposing that or any other objection to the court's consideration of the case, the Fisheries Director urged a decision on the merits (see 77-983 Pet. App. F-2). The court itself expressly noted the conflict between the order under review and the decision of the federal district court, questioned whether the state courts were free to disregard "with impunity" the inconsistent federal ruling, and concluded that it would be inadvisable to reach issues which had "not been raised, and much less argued,"

and were "ignored in the briefs" of the parties (77-983 Pet. App. F-3, F-5 to F-6). Accordingly, that court initially dismissed the appeal as moot (77-983 Pet. App. F-1 to F-6). In November of that year, however, rehearing was granted and the case was set for re-argument (77-983 Pet. App. E).

2. Before any decision on rehearing was handed down in *Fishing Vessel*, another case had overtaken it. *Puget Sound Gillnetters Association* v. *Moos*, also before this Court. This was an application for mandamus against the Fisheries Director, filed directly in the state supreme court. Neither the United States nor the treaty tribes were parties to the action, although they participated as amici curiae. The application primarily sought an order directing the State Fisheries Department to issue regulations which gave no special recognition to treaty fishermen. Once again, that Department suggested no obstacle to the court's entertaining the action, but, on the contrary, urged a decision on the merits.

On June 9, 1977, the state supreme court issued an opinion accepting the non-Indians' arguments, though declining to issue the requested writ of mandamus [13] (77-983 Pet. App. D-1 to D-17). The court

[13] The court stated that it had "full confidence that the director will abide by our decision" (77-983 Pet. App. D-4). Subsequently, the non-Indian fishing associations filed another motion for mandamus, contending that the Director of Fisheries apparently was still following the orders of the federal district court and that the writ of mandamus was thus necessary to enforce the judgment of the state court. The court heard argument on the motion on October 31, 1977, and the matter is still under submission.

held that, under state law, the Director of Fisheries lacked statutory authority to restrict fishing for any purpose other than conservation. Since, in the court's view, the state agency could not be compelled to act beyond its statutory authority, the court concluded that the Director had no power to enforce the Indian treaty rights by restricting non-treaty fishing. Declining to follow the federal courts' decision in *United States* v. *Washington*, *supra*, the state court held that the treaties guaranteed to the Indians only the same opportunities to fish as are enjoyed by non-treaty fishermen. The court accordingly concluded that state regulations are valid only so long as they treat all fishermen alike. Three Justices dissented, believing the court was bound by the ruling of the federal district court (77-983 Pet. App. D-17 to D-22).

3. On November 23, 1977, the State Supreme Court rendered its decision on rehearing in the *Fishing Vessel* case (77-983 Pet. App. B-1 to B-12). After re-affirming its holding in *Gillnetters*, *supra*, the court added a new rationale: that recognizing special treaty fishing rights for Indian fishermen would violate the constitutional rule of equal protection. The trial court's judgment was affirmed, two Justices voting to dismiss the appeal as moot, two others dissenting on the merits.[14]

[14] In addition to the state decisions before this Court, see also *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash. 2d 799, 567 P.2d 205 (1977); *Grays Harbor Gillnetters Association* v. *Sandison*, Wash. Sup. Ct., No. 45144 (argued Oct. 31, 1977); *Puget Sound Gillnetters Association* v. *Sandi-*

D. Implementation Of The Federal Court Decision: 1977-1978

1. *The 1977 allocation order*

As already noted, the state supreme court's rulings brought to an effective halt the cooperation of the Department of Fisheries in enforcing the federal district court's decree. In July 1977, the State adopted regulations that "[made] no allowance [and] no exceptions for the Indian opportunity to harvest" (A. 507; see also A. 500-513, 603-604). Moreover, the State began enforcing general state fishing laws against treaty Indians in circumstances admittedly not related to conservation (*ibid.*). Under these circumstances, the district court concluded that it could no longer rely on the Department of Fisheries to achieve compliance with its prior rulings. Instead, at the request of the United States and the tribes, the court itself decreed the allocation of the fishing opportunity for the 1977 season. The court then enjoined the State from authorizing or permitting harvest of the treaty fishermen's share, and directed the State to manage only the remaining portion for non-treaty fishermen. Preliminary Injunctions of August 10 and 31, 1977, 459 F. Supp. at 1097-1104.

This action of the federal court was undertaken "reluctantly, but necessarily" (78-119 Pet. App. A-55). Under the federal court order, the Department's only obligation was to ensure that non-treaty

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son, Thurston County Super. Ct., No. 58107 (decided Aug. 24, 1977); and *Columbia River Fishermen's Protective Union, Inc.* v. *Dixie Lee Ray*, Thurston County Super. Ct., No. 55339 (decided Aug. 25, 1977).

fishermen did not harvest in excess of the numbers authorized by the federal court. The State Director of Fisheries then promulgated regulations consistent with this order. Immediately, non-Indian fishermen, as is their annual custom, brought suit against the Director in the Superior Court for Thurston County, Washington. *Puget Sound Gillnetters Association* v. *Sandison*, No. 58107 (see A. 31-32). That court enjoined the Director from adopting and enforcing the regulations ordered by the federal district court. Further, the state court ordered the Director to adopt regulations which would eliminate the opportunity for treaty fishermen to harvest their treaty share, in defiance of the federal district court's prior orders including Final Decision No. 1 (see A. 32).

In order to protect and effectuate its prior orders, and to preserve its jurisdiction over the subject matter, the federal district court stayed the state court injunction and enjoined the state court from proceeding further in contravention of the federal court's orders (Order of August 31, 1977, 459 F. Supp. at 1104-1107; see A. 32-33). In light of the stay of state court proceedings, the Director of Fisheries agreed to promulgate the regulations ordered by the federal court, and a motion to show cause why the Director should not be held in contempt of the federal court was dismissed (Transcript of August 30, 1977, at 3-5).

2. *Injunctions against individual fishermen*

Although the State had finally promulgated the regulations required by the federal court, the holdings of the state courts, including the Washington

Supreme Court, made it impossible for the State to enforce those regulations. At several hearings before the federal court, the State's Assistant Attorney General admitted as much, noting that the only way the regulations could be enforced would be for the court to enter an injunction running directly against non-Indian fishermen and to punish violators through the contempt process. (See, *e.g.*, Transcript of August 25, 1977, at 59-63; Transcript of August 26, 1977, at 31-33, A. 514-515; Transcript of August 30, 1977, at 20-21.)

Accordingly, on August 31, 1977, the district court entered a temporary restraining order directed against all reef net, gill net, and purse seine fishermen licensed by the State of Washington, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, the Grays Harbor Gillnetters Association, and all persons in active concert or participation with them, to prevent them from fishing in violation of the state regulations adopted pursuant to the federal court's orders. In support of the TRO, the court found (in part on the basis of State's own representations) that the State's inability to enforce its regulations "will lead to a breakdown of law and order in the waters of the case area, the substantial denial of federally guaranteed treaty fishing rights and will endanger the preservation of the fishery resource." To effectuate the TRO, the court required non-treaty fishermen to call the Fisheries "hot-line" (a toll-free recorded message which had been operated by the State for several years) to ascertain whether or not the area in which they intended to fish was open to them. State licensees found fishing

in closed areas after having received actual notice of the court's order were to be ordered to show cause why they should not be held in contempt of court (78-119 Pet. App. A-90; 78-139 Pet. App. E-1 to E-3).

Attorneys for the non-treaty fishing associations (petitioners in No. 78-139) were served with notice of the TRO as soon as it was entered. In addition, they were served with notice of the government's request for a 10-day extension of the TRO (which was granted) and with notice that the hearing on the government's motion for a preliminary injunction would be held on September 22, 1977.[15]

Despite this notice, no representative of the non-treaty fishermen attended. The State of Washington opposed entry of the preliminary injunction, although the evidence made it clear that the State did not intend to enforce against illegal non-treaty fishing (A. 519). State enforcement officers showed full knowledge of, but little concern over, the extent of illegal non-treaty fishing (see, *e.g.*, A. 599-600). After consideration of the evidence, United States District Judge Morrell Sharp, on September 22, 1977, entered a preliminary injunction against continued non-treaty fishing in violation of the allocation order, and ordered that a hearing be held on September 27, 1977, to consider extension of the preliminary injunction (78-119 Pet. App. A-79).[16]

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[15] See Supplemental Memorandum for the United States, filed on October 11, 1977, in Ninth Circuit No. 77-3129.

[16] Judge Sharp's five-day preliminary injunction was entered during a period when Judge Boldt was out of the country.

On September 23, 1977, deputy United States marshals personally served Judge Sharp's injunction, as well as notice of the September 27 hearing, on the presidents of the Purse Seine Vessel Owners Association and the Puget Sound Gillnetters Association.[17] The United States also mailed the same documents to the attorneys for the two associations.[18] In addition, National Marine Fisheries Service agents personally served the September 22 injunction and notice of the September 27 hearing on more than 220 non-treaty fishermen, either by handing a copy to the individual or by affixing a copy to the fishing vessel. Repeated radio voice broadcasts were made by the Coast Guard and others regarding the substance of the preliminary injunction; the events received widespread media coverage; and federal officials personally attended fishermen's meetings to read, explain and distribute copies of the September 22 injunction which set the date of the hearing that was to follow.[19]

Despite the publicity of the September 27 hearing, no non-treaty fishermen or representatives of the petitioner associations appeared to contest renewal of the preliminary injunction. However, counsel for

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[17] Ninth Circuit Record in No. 77-3654, at R. 1160-1161.

[18] See Affidavit attached to Supplemental Memorandum for the United States, *supra*, note 15.

[19] See affidavits attached as Exs. D, E, F, G, H and I to Supplemental Memorandum of Respondent Puget Sound Indian Tribes, filed October 13, 1977, in Ninth Circuit No. 77-3129.

the State of Washington was present at this and all other enforcement-related hearings. At the conclusion of the hearing, the district court determined that extension of the preliminary injunction was required. Accordingly, the court on that date entered an order that expressly prohibited all net salmon fishing in certain specifically described geographic areas except during such times and in such specific waters as were opened by regulations conforming to the court's prior orders. The order further enjoined those persons and entities named in the August 31, 1977, TRO from engaging in taking, possessing, or selling salmon of any species taken from the described waters unless such person had first ascertained from the telephone "hot-line" that the area to be fished was open for fishing by non-treaty fishermen at the time the individual intended to fish (78-119 Pet. App. A-89 to A-92).

The order directed the State of Washington immediately to commence service by certified mail, return receipt requested, of the preliminary injunction on all state-licensed commercial salmon net fishermen and to furnish the court with proof of service or written statement of the reason for the inability to serve any particular licensee. The United States, through the Coast Guard, the National Marine Fisheries Service, and the Marshals Service, was also authorized to serve copies of the preliminary injunction. Finally, the State of Washington and the United States were directed to cite any fisherman who, having received notice of the order, thereafter

fished illegally, to appear before the court to be ordered to show cause why he should not be held in contempt (78-119 Pet. App. A-9).

The September 27 order governed enforcement for the remainder of the 1977 season.

3. *Appellate proceedings*

The non-treaty fishermen sought review of the enforcement orders by filing a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. At approximately the same time, the State of Washington appealed from all of the district court's orders relating to the 1977 season. The court of appeals permitted the non-treaty fishermen to intervene in the State's appeals, and the appeals and the mandamus proceeding were consolidated.[20] On April 24, 1978, the court of appeals issued its opinion in these consolidated Washington Fishery cases, in which it affirmed the district court in all respects (78-119 Pet. App. A-1 to A-28).

In its Washington Fishery decision, the court of appeals described the background against which it reviewed the district court's implementation orders (78-119 Pet. App. A-3):

[20] These cases were also consolidated with an appeal and a mandamus proceeding seeking review of similar orders entered by the United States District Court for the District of Oregon to implement the prior decisions in *Sohappy* v. *Smith*, 302 F.Supp. 899 (D. Ore. 1969), and *United States* v. *Oregon*, 529 F.2d 570 (9th Cir. 1976). No party to the Oregon litigation has sought review in this Court, although the court of appeals' disposition of that matter was identical to its disposition of the Washington Fishery case.

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

The court then reaffirmed the validity of the district court's treaty interpretation (78-119 Pet. App. A-3 to A-9).[21]

The court also rejected petitioners' contention that in allocating the 1977 harvest the district court had exceeded the intent of its original decision, which called only for an equal division of fishing opportunity and did not purport to guarantee the Indians specific numbers of fish (78-119 Pet. App. A-11 to A-13). The court held that "[c]onsidered in light of the record as a whole, the orders allocate only the opportunity to take fish. That allocation can best be expressed and enforced, of course, by numbers of fish

[21] In concurring opinions, Judges Wallace and Kennedy stated that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights" (78-119 Pet. App. A-28). Nevertheless, both judges considered the decision in this case to be required by the court's prior decision in *United States* v. *Washington*, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

taken" (78-119 Pet. App. A-11 n.6). Finally, the court of appeals rejected the claim that an allocation of fishing rights among Indians and non-Indians pursuant to the treaties constitutes a denial of equal protection (*id.* at A-6 to A-8). The rights of the treaty tribes are based on their historical status as the successors to sovereign entities and not on their race (*ibid.*).

The court then turned to the questions of enforcement. It affirmed the district court's injunctions against the non-treaty fishermen, holding that, even though the fishermen were not parties to the litigation, they "are in privity with the [State of Washington]" and may thus properly be bound by the district court's orders (78-119 Pet. App. A-19 to A-20). The court of appeals concluded that "the district court had authority to act against the fishers directly when it appeared that the state was unable to do so" and that the fishermen "are subject to penalties for contempt if they have actual knowledge of the court's orders and violate them" (*id.* at A-20).

4. *The 1978 Enforcement Order*

The State of Washington's inability to manage its fisheries and enforce regulations to comply with the federal court decisions was unchanged at the end of the 1977 fishing season. Accordingly, the United States and the tribes again sought an injunction against the non-treaty fishermen. Notice of the hearing at which this injunction was sought was personally served on all licensed commercial fishermen

in the State of Washington and on petitioners. A number of non-treaty fishermen participated in the hearing. The non-treaty associations again chose not to attend.

On June 6, 1978, the district court issued an enforcement order to govern during 1978 and subsequent fishing seasons (78-139 Pet. App. C-1 to C-5). In all material respects, the 1978 Enforcement Order (which is before this Court before judgment in the court of appeals) is identical to the 1977 Enforcement Order reviewed and affirmed by the court of appeals in the Washington Fishery case. Like the 1977 order, the 1978 Enforcement Order enjoins all non-treaty fishing except for fishing conducted in accordance with procedures established by the court (*id.* at C-2, C-3). Violations of the court's orders are punishable by contempt (*id.* at C-4).[22]

E. Litigation And Regulation Respecting The Fraser River Salmon Runs

For the sake of clarity, we deal separately with the proceedings relating to the salmon runs originating in the Fraser River in Canada, insofar as those runs are harvested in the Strait of Juan de Fuca and upper Puget Sound. As we have noted, the district court, in its original decision, found that certain of the coastal treaty tribes traditionally fished these runs and that their right to do so was protected by the treaties negotiated with those Indians.

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[22] The district court also issued allocation orders in 1978, comparable to similar orders issued in 1977 (see pages 24-25, *supra*). None of those orders is before the Court.

The complicating factor here is the Convention of May 26, 1930, between the United States and Canada, 50 Stat. 1355, as amended by 8 U.S.T. 1058. The Convention provides for an equal division of the catch of Fraser River salmon between Canadian and American fishermen and establishes the International Pacific Salmon Fisheries Commission (IPSFC) to implement the agreement. 8 U.S.T. 1060. The Commission proposes regulations each year to govern the time and manner in which Fraser River salmon may be taken by the fishermen of each country. These proposed regulations become effective on approval by each nation. *Ibid.* Enforcement of the regulations within the United States is governed by the Sockeye Salmon or Pink Salmon Fishing Act of 1947, 16 U.S.C. 776 *et seq.* Section 776d of the Act directs the President to designate a federal agency responsible for enforcement. That agency (the National Marine Fisheries Service) may, in turn, authorize the State of Washington to act as the enforcing agent (16 U.S.C. 776d). Pursuant to this statutory scheme, Washington has for many years enacted the Commission's regulations verbatim into state law and enforced them as state law.

In the original litigation, the State of Washington argued that the Indian treaty rights with respect to the Fraser River runs had been abrogated by the international Convention. The United States, on the other hand, took the position that the Convention was not intended to affect the domestic allocation of fishing opportunity within the United States, and that nothing in the Convention conflicted with the tribes'

rights to harvest a fair share of the United States' portion of the Fraser River fishery. Both the district court and the court of appeals agreed that the Convention with Canada neither explicitly nor implicitly repealed the Indian treaties (A. 214, 53-54). Both courts held, however, that all fishermen, including treaty Indians, must comply with the Commission regulations.

Thereafter, the United States attempted, through its membership on the Commission and through diplomatic channels, to have the Commission alter its regulations to permit a special Indian fishery within the United States' entitlement. Because these efforts were unsuccessful, the United States, through the Department of State, withdrew its approval of a portion of the Commission's regulations for the 1975 season (78-119 Pet. App. A-122).

1. *The International Fishery case*

At this point, further proceedings were undertaken in the district court which constitute the so-called International Fishery case.

a. The State Department advised the court that, in its view, the withdrawal action would not harm proper escapement or division of the catch between the two countries and that its effect on the Commission's program would be de minimis (Ninth Circuit Record in Nos. 75-2835 and 76-1092, at R. 129). The State Department further advised that the withdrawal action removed any impediment caused by the Commission's prior regulations to implementation of a special treaty fishery (*ibid.*).

Following these representations, the district court, at the request of the United States and the tribes, ordered the State of Washington to restructure its regulations (which had merely incorporated the Commission regulations) to permit a special treaty fishery for the United States' share of the Fraser River runs (78-119 Pet. App. A-105 to A-124). Mechanically, this was to be accomplished by allowing treaty Indians to fish with any type of gear whenever United States Convention waters were open to American fishermen, thus effectively increasing the fishing time available to treaty Indians.[23]

In issuing this order, the district court took note of the diplomatic actions and, in light of them, found as follows (78-119 Pet. App. A-121 to A-122):

> In light of the need to provide for Indian treaty fishing rights, and with regard to the management scheme of the Commission, of all of the alternatives presented to the Court and practically available to this Court at this time for meeting that need, the one which would cause the least disruption to the Commission's management scheme and to the non-Indian fishery and which would not violate the responsibilities of the United States under the Convention would be [the] one allowing treaty Indians to fish with any gear whenever the Commission's regulations would allow fishing by any United States fishermen in Convention Waters.

[23] In addition to the gear flexibility order described in the text, the district court also entered an order designed to permit the Swinomish Indian Tribal Community to catch chinook salmon in IPSFC waters at times when those waters were closed to American fishermen, so long as they used nets of a size too large to take more than an incidental catch of pink or sockeye salmon (78-119 Pet. App. A-125).

The court concluded that the United States' withdrawal of approval of the Commission's gear regulations was valid, that there was thus no impediment to a gear flexibility regulation, that the treaty Indians must be afforded an opportunity to take up to 50% of the American harvest, and that the court had jurisdiction to order the gear flexibility regulation (*id.* at A-123 to A-124).

b. An action was promptly commenced in the Thurston County Superior Court seeking to have Judge Boldt's injunction declared unlawful. *Purse Seine Vessel Owners Association* v. *Moos*, No. 52881. On July 23, 1975, the county court issued a preliminary injunction requiring the State to suspend the regulations it had promulgated in compliance with the federal district court's injunction. The State complied with the state court's preliminary injunction and repealed the regulations. On July 31, 1975, the State repromulgated the gear flexibility regulation in response to a further order of the district court. On August 1, 1975, the state court amended its preliminary injunction of July 23, 1975, to require suspension of the new gear flexibility regulation. The State again complied with the state court order.

On August 6, 1975, at a previously scheduled hearing at which all parties were present, the federal district court granted the United States Attorney's oral motion to stay the state court proceedings and di-

rected the State to repromulgate the gear flexibility regulation repealed on August 1, 1975 (Ninth Circuit record in Nos. 75-2835 and 76-1092, at R. 163-164). The court also denied the State's motion for a stay of this order (*ibid.*).

Although it had received notice of the stay, the state court nevertheless proceeded to render judgment on the merits. On September 19, 1975, the state court issued its final judgment, holding (1) it should not have been stayed and did not feel itself bound by the federal court's injunction against further proceedings; (2) under state law, the Fisheries Department may not adopt regulations which vary from or expand upon the IPSFC regulations; (3) the United States' withdrawal of its approval of the Commission's gear regulations was ineffective; and (4) the gear flexibility regulation was therefore invalid under state law. Subsequently, the Washington Supreme Court affirmed the trial court in *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977).[24]

c. Washington appealed from the district court's orders pertaining to the 1975 season. On April 24, 1978, the court of appeals dismissed the State's appeal as moot (573 F.2d 1118, 78-119 Pet. App. A-29 to A-33). First, the court of appeals noted that the district court's order pertained only to regula-

[24] No party has sought review of that decision in this Court, although the holding is the same as that reached in *Fishing Vessel II* and *Gillnetters*.

tions for the 1975 season and had therefore lapsed (78-119 Pet. App. A-30). Furthermore, the court determined that the case was not one "capable of repetition, yet evading review," because (as we detail in a moment) the IPSFC regulatory system that was in effect during the 1975 season has since been completely altered by the United States (*id.* at A-31).

2. *Implementation during the 1977 and 1978 seasons*[25]

a. In March 1977, the United States secured the Canadian Government's agreement to a proposal for the 1977 IPSFC regulations which would have provided extra fishing time for treaty Indians. The Commission, however, refused to adopt the proposal. Instead, the IPSFC adopted its staff's recommendation for a two-day per week fishery for all United States fishermen, with no provision for the Indians' treaty rights. Accordingly, the United States, through the Department of State, advised the Government of Canada that the United States would consider achieving the same result contemplated by the government-to-government agreement through the exercise of its authority under Article VI of the Convention, as amended, to approve the IPSFC's proposed 1977 regulations only as applied to non-Indians. Fishing by treaty Indians would be gov-

[25] There is no issue before this Court concerning the validity of the 1977-1978 regulatory system. We describe it in detail only for the purpose of demonstrating that the situation occurring in 1975 is not likely to recur. See pages 76-77, *infra*.

erned by separate federal regulations providing the Indians with extra fishing time.[26]

Canada did not, and to date has not, protested such unilateral action by the United States. Canada did stress the importance of regulating any special Indian fishery adopted by the United States in a manner consistent with the objectives of the Convention.

On June 1, 1977, the IPSFC forwarded to the Department of State for United States approval its proposed 1977 regulations. On June 17, 1977, the Department of State announced United States approval of the IPSFC's 1977 regulations "except as to U.S. Indians who are entitled to exercise fishing rights by virtue of treaties with the United States in U.S. Convention waters and are fishing in accordance with federal regulations providing for the exercise of such fishing rights." The Department of State advised both the Canadian Government and the IPSFC that treaty Indians would fish pursuant to regulations of the Department of the Interior and that such regulations would ensure that the Indian fishery proceeded in a manner consistent with the basic objectives of the Convention.

[26] This is quite similar to the Canadian Government's regulation of subsistence fishing by Canadian Indians, which has always been excluded from IPSFC coverage. In recent years, this Canadian Indian subsistence fishery has grown substantially, amounting in 1976 to approximately 300,000 fish. American Indian fishermen, both commercial and subsistence, that year caught a total of 80,000 fish. See *Purse Seine Vessel Owners Association* v. *United States Department of State*, 584 F. 2d 931, 934 (9th Cir. 1978).

b. On June 17, 1977, the Department of Commerce adopted as federal regulations the IPSFC's 1977 regulations for United States Convention waters, with a caveat stating that the regulations would not apply to Indians exercising treaty-secured fishing rights (42 Fed. Reg. 30841). On June 21, 1977, the Department of the Interior, pursuant to its authority over Indian affairs (25 U.S.C. 2 and 9), published separate regulations for treaty Indians fishing in IPSFC waters (42 Fed. Reg. 31450). Structurally, Interior's regulations for treaty Indians were virtually identical to Commerce's (*i.e.*, the IPSFC's) regulations for non-Indians; however, Interior's regulations authorized extra fishing time for treaty Indians.[27] Unlike the situation in prior years, the United States did not ask the State of Washington to adopt the 1977 Commission regulations as state law. Moreover, the National Marine Fisheries Service did not delegate its enforcement powers under the Sockeye Salmon Act to the State. Instead, the regulations for both treaty and non-treaty fishermen were enforced by the National Marine Fisheries Service and the United States Coast Guard.

c. On June 24, 1977, suit was brought to enjoin the United States from providing extra fishing time for treaty Indians fishing in IPSFC waters. *Purse Seine Vessel Owners Association* v. *United States Department of State*, Civil No. C77-471M (W.D.

[27] Interior's regulations basically adopted the United States' proposal which the Government of Canada accepted in March 1977.

Wash.). The State of Washington was not a party to the litigation, nor did it seek to participate in the case. Following briefing and oral argument, the district court (Judge Walter T. McGovern) denied plaintiffs' motion for a preliminary injunction on July 5, 1977. After noting that the United States, in providing the treaty Indians with additional fishing opportunities, was endeavoring to abide by its treaty obligations, the court held that the IPSFC's proposed regulations were of no effect unless approved by both governments. Since the United States had refused to approve the regulations as applied to treaty Indians, the court concluded that there were no valid Commission regulations applicable to them.

The court further held that the Convention does not authorize the IPSFC to direct the domestic allocation of the fish allotted to the United States. Thus, the court concluded that an "emergency order" issued by the IPSFC after the United States refused to approve the proposed regulations for treaty fishermen, in which the IPSFC stated that its regulations applied to all citizens of the United States, was of no effect because it was designed to effect domestic allocation within the United States, a subject not within the authority of the IPSFC.

Finding that plaintiffs had not demonstrated a strong likelihood of success on the merits, and that the grant of a preliminary injunction would harm the treaty Indians far more than the denial of such relief would harm the plaintiffs, the court concluded that the public interest was best served by permitting the

government to honor its treaty obligations to the Indians.[28]

Plaintiffs appealed. By order dated September 27, 1977, the court of appeals refused to grant injunctive relief (9th Cir. No. 77-2968) and indicated that it would issue an opinion at a later date. On October 26, 1978, the court issued its opinion, in which it held that the district court had not abused its discretion in denying injunction relief. 584 F.2d 931. The court declined to address the substantive issues in the case, noting that the underlying dispute concerning allocation of fishing opportunity is pending before this Court.

d. In 1978, the United States again declined to approve the IPSFC's proposed regulations as applied to treaty Indians, and instead, as in 1977, promulgated separate regulations authorizing extra treaty fishing time. Again, the State of Washington neither enacted the 1978 regulations into state law nor had any authority to enforce such regulations.[29] The matter continues to be administered under federal regulations. 43 Fed. Reg. 26737, 27187.

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[28] Later in the 1977 season, plaintiffs filed a second motion for a preliminary injunction. Holding that no new issues had been raised, the district court denied this motion on August 10, 1977.

[29] The same parties who brought suit in 1977 filed a second suit in 1978, in which they raised the same challenges to the United States' action. *Purse Seine Vessel Owners Association*, v. *Bureau of Oceans*, Civ. No. C78-578 (W.D. Wash.). No action has been taken in that case. It, as well as the merits of the 1977 suit, are still pending in the district court.

ARGUMENT

INTRODUCTION AND SUMMARY

The cases before the Court reflect a controversy of unusual intensity. That is because the anadromous fishery of Washington is at once one of the most valuable resources of the State and the traditional cultural and economic mainstay of the Indian tribes in the area. Not surprisingly, disputes over the right to share in the now limited fishery have raged, in and out of court, for many decades.

At length, in a suit initiated by the United States against the State, the matter came before the district court for a final and complete adjudication of the claims of Indian fishermen. They were invoking treaties which reserved their "right of taking fish", albeit "in common with" others, in areas ceded to the United States. After the fullest consideration, the trial judge apportioned the resource so as to afford treaty fishermen an opportunity to catch half the fish. The decision was affirmed on appeal and this Court declined review.

Unfortunately, that did not close the debate. Conflicting decisions were obtained from the state courts, enforcement proved extremely difficult and the district court found it necessary to issue many additional orders. Some of these are now challenged in this Court. The result is a record of almost unmanageable proportions and a complex series of issues, multiplied by the ingenuity of counsel exploiting every possible argument to fault the district court.

In this situation, we have deemed it our task to attempt to focus on the essential points and to state our submission without undue embroidery. As we analyze the matter, there are three broad questions presented by these cases.

1. At the outset (*infra*, pages 46-53), we submit that this Court may properly invoke the doctrine of finality to reject challenges to the district court's basic apportionment decision—which became final when certiorari was denied in 1976. Insofar as the state courts disregarded that decision, we urge reversal of the judgments on the ground that they were entered without jurisdiction and in violation of the most fundamental rules of judicial comity.

If the Court accepts this submission, there is no occasion to consider, on the merits, the district court's Final Decision No. 1. We defend it only out of abundance of caution.

2. Part II of our brief (*infra*, pages 54-77) addresses (unnecessarily, as we believe) the fundamental question how the treaties of 1854 and 1855, insofar as they reserve off-reservation fishing rights, should be implemented in the changed conditions of today. We look to the historical setting as an aid to discovering the original understanding. In light of the tribal dependence on fishing, both for subsistence and commercial purposes, it seems to us inconceivable that the Indians can be deemed to have agreed to be "crowded out" of their traditional fisheries merely because, in a later time, the number of non-Indian fishermen multiplied. The pledge given

in the treaties, we believe, requires that Indian fishing at "usual and accustomed grounds" be accorded special protection. In the circumstances now prevailing, that can only be done by allocating to treaty fishermen a discrete percentage of each fish run. The natural reading of the treaty provision fixes that share as 50%. That result, we believe, is confirmed by considering the reasonable needs of the treaty tribes. Since experience has shown that the 50% allocation ordered does not exceed that standard, we conclude that it ought to be approved.

3. Finally, we turn to the enforcement issues (*infra*, pages 78-84). Our discussion focuses on three challenge actions of the district court: the direction to state officials to implement the court's apportionment, notwithstanding state law obstacles; the court's later assumption of direct supervision of the Indian fishery; and the injunction directed against individual fishermen, treating them as bound by the allocation ruling. In each instance, we argue that, confronted with the special difficulties of this controversy, the court was justified in issuing the several orders.

I

FINALITY AND COMITY

The question arises how far, if at all, this Court should reexamine, however indirectly, the basic allocation decision underlying all the subsequent proceedings in the case. We refer to the district court's ruling of February 12, 1974, commonly known as

"Final Decision No. 1." For our part, we believe the Court ought not accept the invitation to undertake that task.

So saying, we do not forget that the Court has determined to review both the federal and state cases; nor that we acquiesced in that course. But the grant of certiorari does not require the Court to reconsider all that has been decided in the controversy. Presumably, the Court was moved to bring the cases here because of the intolerable impasse resulting from the state court rulings frustrating the enforcement efforts of the federal court. Of course, the conflict must be resolved, and, in light of past events, this Court must speak directly to the Supreme Court of Washington and the other participants in the controversy. That does not mean, however, that the basic issues in the controversy must be reheard de novo.

The Court, we submit, is entirely free to apply the doctrine of finality to affirm the district court's Final Decision No. 1, as upheld by the court of appeals in 1975, and, on like reasoning, to reverse the Washington Supreme Court rulings here on certiorari. That starting point would leave issues enough for decision "on the merits"—notably, all the enforcement questions, involving the responsibility of state officers and the propriety of directly enjoining non-treaty fishermen.

A. Finality Of The District Court Ruling

1. The district court reached its basic decision only after the most extensive proceedings. Almost four years had elapsed since the United States ini-

tiated the action. Every opportunity was given for discovering and developing evidence, followed by a trial lasting more than three weeks. All parties filed substantial briefs, compendiously discussing the legal issues. The court took ample time to consider and ultimately rendered an elaborate ruling, including more than 250 findings of fact. Thereafter, the court of appeals heard the case and affirmed in a 20 page opinion. And this Court denied petitions for certiorari.

In normal course, that would have been the end of the matter. As it happens, the district court has had occasion to ratify its decision in many subsequent orders, the court of appeals has once again affirmed, and the case has returned to this Court. In these circumstances, although the doctrine of res judicata is not strictly applicable, we submit that the policies underlying that rule may appropriately guide this Court's approach.

2. Indeed, it would be difficult to imagine a situation in which reopening the basic decision were, on the one hand, less justified, and, on the other, more wasteful and potentially disruptive. The State of Washington and its privies (which, as we elaborate in due course, include the non-Indian fishing associations) cannot remotely suggest that they have not had their day in court. It would be uniquely extravagant to allow the very substantial investment made by the courts and the parties in achieving a working plan to be set aside by a new challenge. Nor should this Court lightly assume the burden of reviewing

the complex record in the case. What is more, in the peculiarly sensitive context of this litigation, finality offers the only prospect of lasting co-existence; to invite further proceedings, after more than eight years, to contest what had been thought settled, imperils the precarious accommodation now achieved.

3. There is another consideration arguing against reconsidering the fundamental holding of the case. The matter is now here only because flagrant disobedience of outstanding orders and the irresponsible intervention of the state courts required the district court to enter additional orders which furnished new vehicles for appeal and, ultimately, for fresh certiorari petitions, now made more compelling by an unseemly conflict between federal and state rulings. To reopen the basic holding of the case in this setting would be to reward illegality. This Court is not bound to lend itself to such an exercise.

B. The Breach Of Judicial Comity And Jurisdictional Principles In The State Court Proceedings

In our submission, the state court judgments now here on certiorari ought never have been entered. At all events, they cannot require this Court to reconsider on the merits matters otherwise finally adjudicated.

1. At the time the state cases were filed, the apportionment issue had been clearly decided by a final judgment of the federal court,[30] running against the

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[30] The *Fishing Vessel* suit was filed in the Thurston County Superior Court very shortly after the district court's Final Decision No. 1 and the accompanying injunction were issued

State of Washington and its privies. That ruling was binding on the State's citizens, just as it was on the members of the Indian tribes party to the suit. The whole object of the proceeding had been to apportion the resource between the treaty Indians and the non-Indian fishermen of Washington. Each group had been fully represented by its sovereign and must abide the result.

To be sure, it can be argued that two or more classes of non-Indian fishermen had somewhat different interests. But the same can be said of those who appropriate water from an interstate river. Yet, all users within a State are bound by the judgment against their sovereign, because their common interest outweighs any conflict between them. See, *e.g.*, *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509, and cases cited at n.5 (1932). The same principle governs this case.[31] Any other conclusion would permit an indefinite number of lawsuits over the same question until every individual fisherman, Indian and non-Indian, had litigated. And that, of course, has never been permitted. See *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 340-341, and cases cited at 341 (1958); *New Jersey* v. *New York*, 345 U.S. 369, 372-373 (1953).

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in early 1974. The judgment of the state supreme court in that case was rendered well after this Court denied certiorari in the federal proceedings. *Gillnetters*, the original mandamus action, was both filed and decided by the Washington Supreme Court after those denials of certiorari.

[31] Thus, we assume the ruling in *Idaho ex rel. Andrus* v. *Oregon*, leave to file granted, 429 U.S. 163 (1976)—if that case proceeds to judgment—will be binding on the fishermen of the three States involved, including the Washington associations now before the Court.

It follows that the State, as defendant, could have defeated the suits instituted by the fishing associations by pleading the federal court judgment in bar. *City of Tacoma* v. *Taxpayers*, *supra*; *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938). The State's failure to interpose such an objection is a strong indication that the parties were not true adversaries. Indeed, in the first *Fishing Vessel* decision, the Washington Supreme Court itself stressed the fact that no party had raised or discussed the effect of the conflicting federal ruling and, partly on that ground, declined to give an "advisory opinion." See *supra*, pages 21-22. Plainly, both cases were "friendly suits." That alone would justify vacating the resulting judgments without reaching the merits. *United States* v. *Johnson*, 319 U.S. 302 (1943).

2. There was, moreover, another infirmity. Arguably both the United States and the tribes were indispensable parties; certainly, the suits could not properly proceed in the absence of both. Yet, each of the tribes, as well as the United States, enjoyed sovereign immunity. Since there was no waiver—nor, indeed, an attempted joinder—this defect required dismissal of the actions, regardless that no objection was made. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Minnesota* v. *United States*, 305 U.S. 382, 386-389 (1939). See, also, *Minnesota* v. *Hitchcock*, 185 U.S. 373, 382 (1902).

3. More fundamental, however, is the failure of the state courts themselves to avoid the unseemly conflict. As one member of the Washington Supreme Court said, that court bears "significant responsibility" for a "controversy [which] has escalated to the point at which the lives and property of individual citizens are in peril." *Fishing Vessel II*, 77-983 Pet. App. B-13, B-27 (Utter, J., dissenting). One is reminded of equally sensitive issues in which the attempted intervention of state courts over a subject-matter already pending in, or adjudicated by, federal courts aggravated the confrontation. *E.g.*, *United States* v. *Louisiana*, 351 U.S. 978 (1956); *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42, 43, 46 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961).

Here, as there, the courts of the State should have declined to entertain the cases, or, at the least, should have eschewed reconsidering issues finally resolved by the federal courts. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921), re-affirmed in *Mitchum* v. *Foster*, 407 U.S. 225, 235-237 (1972). The proper response, we submit, was that given by Justice Horowitz (joined by two other Justices) in the *Gillnetters* case when the State Supreme Court was asked to mandamus the Washington Director of Fisheries "to take action which [would] violate the injunction entered in *United States* v. *Washington*" (77-983 Pet. App. D-17, D-19 to D-21):

> Under the circumstances presented, if this court is to adhere to the rule that the office of a writ of mandate is to enforce a duty owing,

> rather than to direct its violation and if due regard is had to protect the integrity of the federal and state constitutional structure of which this court is a part, then this court must deny the writ * * * [and, for] [t]he same reasons, * * * [refrain] from inviting the Director of Fisheries to accomplish the same result by undertaking to do those things on his own violative of the federal court injunction.

A fair summary of the state court cases now pending here must recognize that the plaintiffs were seeking to circumvent a federal judgment by resorting to another forum, with a friendly adversary; that the State itself was willing to participate in the maneuver; and that the state courts, disregarding all principles of comity, lent themselves to this impermissible collateral attack on Final Decision No. 1. This Court, we suggest, ought not allow such tactics to succeed.

The present submission, if accepted would leave only the enforcement issues, discussed in Part III of our brief, *infra*, pages 78-84. The pages that immediately follow—treating the apportionment ordered in 1974 and implemented since that decision—are relevant only in the event the Court declines to accord finality to Final Decision No. 1.

II

APPORTIONMENT

If this Court undertakes to review the district court's basic decision on the merits, the central question is whether that court permissibly implemented the federal treaty provisions defining the off-reservation fishing right of the tribes by allocating to them a roughly equal share of the fishery in dispute. The answer depends, in part, on the original understanding of those who executed the treaties in the mid-nineteenth century, and, in other part, on the circumstances now prevailing. We begin by searching out the historic intent.

A. The Historical Setting And The Original Understanding

1. In 1854 and 1855, when all the treaties in suit were negotiated, the coastal tribes of the Washington Territory held very large tracts of land, stretching along the many rivers and streams of the area, from their sources to Puget Sound or the ocean, where they emptied. Fishing was the chief activity of the Indians. Fish was the staple of their diet. But the Indians also engaged in substantial commerce, selling or bartering fish to other tribes and to the white settlers. Indeed, commerce in salmon was then "the crux of the Indian economy in Western Washington" (A. 341-342). Each tribe had its preferred fishing locations, often at the mouths of the rivers or upstream, sometimes in adjacent marine waters.

At the time, the runs of salmon and trout were plentiful. The Indian population was already much diminished, to somewhat less than 8,000. White settlers were no more than a quarter of that number. There was little need for conservation limits on fishing, although the tribes did protect their fisheries against destructive practices. Except for seasonal restrictions embodied in tribal customs, those who fished, Indian or white, did so as freely as they wished. In practice, however, the fisheries were exploited almost exclusively by the Indians. Few whites fished, depending rather on the more expert Indians to supply them.

Such was the setting when Governor Stevens came to negotiate treaties with the several coastal tribes of Washington. The government's objective was to acquire most of the Indian land for settlement. The Indians, for their part, were willing to relinquish all but small reserves, provided they would retain the right to fish in the ceded area. This was not a marginal point: as the Court noted long ago, fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States* v. *Winans*, 198 U.S. 371, 381 (1905). Accordingly, they made clear their "strong desire * * * to retain the right to hunt and fish in accordance with the immemorial customs of their tribes." *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942). Indeed, in some cases at least, the reservation of fishing rights was expressly made the sine qua non of any cession of tribal lands.

2. The upshot was the insertion in the several treaties of a provision reserving off-reservation fishing rights: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, * * *." *E.g.*, Treaty of Medicine Creek, Art. III, 10 Stat. 1132-1133. This, we must assume, carried out the representation made by Governor Stevens to the Indians when he said: "This paper secures your fish" (A. 331). For it is well-settled that in construing these treaties, one must eschew technical rules and consider how the Indians understood the promise made, resolving doubts in their favor. *United States* v. *Winans*, *supra*, 198 U.S. at 380-381; *Tulee* v. *Washington*, *supra*, 315 U.S. at 684-685. See, also, *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *Winters* v. *United States*, 207 U.S. 564, 576-577 (1908); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-432 (1943); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 174 (1973).

The obvious meaning of the treaty is that the Indians reserved the right—now formally confirmed—to fish as they had been, in all their accustomed locations. There was no new restriction as to seasons or methods of fishing, no limit on numbers, no curb on commercial catches. The Court has expressly recognized that "net fishing by these Indians for commercial purposes was covered by the Treaty." *Washington Game Dept.* v. *Puyallup Tribe* (*Puyallup II*), 414 U.S. 44, 48 (1973). The only difference was that, henceforth, the tribes could not exclude non-Indians from the fishing grounds—something which, in practice, they had never sought to do anyway.

Plainly, the Indians who relinquished most of their lands, but retained the fisheries, believed their "right of taking fish" was, in the words of the treaties, "secured" against future encroachments. The United States, they reasonably supposed, had pledged that the tribal fishing right would not be taken from them by the white community, whether acting privately or publicly—a distinction not likely appreciated by the Indians at the time. Indeed, this Court has consistently upheld this understanding. *United States* v. *Winans*, *supra*; *Seufert Bros.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, *supra*; *Puyallup Tribe* v. *Department of Game* (*Puyallup I*), 391 U.S. 392 (1968); *Puyallup II*, *supra*; *Puyallup Tribe* v. *Washington Game Dept.* (*Puyallup III*), 433 U.S. 165 (1977). See, also, *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975); *United States* v. *Taylor*, 3 Wash. Terr. Rep. 88 (1887).

The cases just cited settle that neither a private landowner by his fence or his "fish wheels," nor the State by its law or its license, can prevent Indian access to the fish at usual tribal fishing places. It is equally clear that private and public action which effectively prevents harvestable fish from reaching the same tribal fishing grounds is subject to a like

challenge. *Puyallup II.* This much, we may safely assume, both parties to the treaties would have unequivocally answered. The question remains, however, how one deals with a less than total abridgment of the right reserved and protected by the treaties.

3. For this purpose, it does not seem to us profitable to indulge the pretense that those who executed the treaties of 1854 and 1855 had in mind the rules of the English common law. Whatever legal erudition informed the government's negotiation, it goes without saying that the Indian chiefs had not the advantage of the *Commentaries* of Sir William Blackstone or those of Chancellor Kent. Moreover, if one were to invoke the arcane law of fisheries, the result would not be as petitioners assert.

It is argued that the fishery was viewed as a common, or public resource, where all might fish "without stint," as the English cases put it. See, *e.g., Goodman* v. *Saltash Corp'n* (1882), 7 A.C. 633, 645-646; *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1914] A.C. 153, 169-171. But that doctrine does not fit the historical setting. "Common fisheries" were those which, from time immemorial, had been deemed to belong to no one, were open to all, and from which no one could be excluded. In Roman and English law, that rule presumptively governed fishing in the sea and tidal rivers. Justinian, *Institutes*, lib. II, tit. I, secs. 1-5; Bracton, *De Legibus et Consuetudinibus Angliae*, lib. I, ch. XII, secs. 5, 6, 8; Britton, Bk. II, ch. II, s. 1; Y. B. 8 Edw. IV 18; *Lord Fitzwalter's Case*

(1673), 1 Mod. 105. That remains the modern law. *E.g., Attorney-General for British Columbia* v. *Attorney-General for Canada, supra*, at 171. This does not, however, describe the *localized* fisheries spoken of in the treaties, which were held exclusively by the tribes. Besides, at least until this century, there is no known instance of a public fishery being *created.* Despite the prohibition of Magna Carta, the tendency has been the other way: to recognize as privately appropriated fisheries that were once public. See, *e.g., Malcomson* v. *O'Dea* (1863), 10 H.L. Cas. 593.

We are dealing here, rather, with exclusive fisheries which, by agreement, are henceforth to be shared with another group. The more appropriate analogy would be to what English law terms a "common of piscary." In that event, the tribes, as grantors, would have conceded no more than a limited liberty of taking fish in their fishery, for purposes of sustenance only. See *Lord Chesterfield* v. *Harris*, [1908] 2 Ch. 397, aff'd [1911] A.C. 623.

But these conjectures are unreal. So far as we can determine, none of the treaty negotiators anticipated the need for restrictive regulations, whether to protect the survival of the run or to assure that both Indians and non-Indians enjoyed a fair share of the fishery. And it is accordingly somewhat artificial to construe the words "in common" as importing a specific body of law to resolve a contingency not envisaged.

It does not follow, however, that we must throw up our hands. Practical problems require solution,

and the courts must do their best to accommodate the original understanding to present conditions. Thus, although the tribal right was never intended to be circumscribed, we now know that it may be when necessary to preserve the resource. *Puyallup I, supra,* 391 U.S. at 398. Like considerations, we submit, justify an apportionment of the fishery between groups of fishermen when they cannot otherwise all have a fair opportunity of harvesting fish —albeit that, too, was not originally contemplated.

Nor does eschewing ready-made common law rules in answering a question never posed leave us wholly without guidance. On the contrary, it is tolerably clear, we believe, what the parties would have responded if today's problems had then been foreseen. As we elaborate in a moment, one must suppose a compromise. But it is not conceivable that the tribes would have agreed to lose both their lands and more than half their fisheries. We turn to those questions in the context of today's overcrowded fishery.

B. The Appropriateness Of Apportionment In Modern Conditions

Today, it need hardly be said, there are too many fishermen and too few fish. But that is not all. Until this Court intervened in the *Puyallup* cases and the district court in this case, the combined effect of private action and public regulation was to prevent or drastically curtail Indian fishing at traditional sites. And relations between Indians and non-Indian fishermen were severely strained. Nor was there strict

obedience to law on either side. What should be done? Petitioners answer with a plea for unrestricted competition, notwithstanding all the advantages that would give to the non-Indian community, with its far greater numbers, superior technology and more developed habits of ocean fishing. We submit the courts below properly rejected this view as inconsistent with the pledge of the treaties.

1. The proper solution for the new conditions was indicated by the Court as early as *Winans* and reiterated in *Puyallup*: "an adjustment and accommodation" of the rights of the Indians and of other fishermen. 198 U.S. at 384; 414 U.S. at 49. At least in circumstances like those presented here, this means that fish "which can be caught within the limits needed for escapement * * * must in some manner be fairly apportioned" between the two groups (414 U.S. at 48). Indeed, in its most recent decision implementing one of the treaties involved here, the Court expressly approved a percentage allocation of a fish run between Indian treaty fishermen as one group and all other residents as the other. *Puyallup III, supra,* 433 U.S. at 177.

These precedents would seem to foreclose the debate whether *some* form of apportionment between Indian treaty fishermen and other fishermen is appropriate in the conditions prevailing today. It is nevertheless argued that no apportionment is necessary, or indeed constitutionally permissible. Out of abundance of caution, we pause to consider that proposition before turning to the question how one computes the treaty share of the resource.

2. History, geography and biology combine to reject the suggested "first come, first served" rule, even if combined with "nondiscriminatory" regulations as to time and manner of fishing and size of catch, as a sufficient way of accommodating the claim of the treaty Indians. For all the appearances of even-handedness, such a formula is, in practice, grossly unfair to the Indians. We are not dealing with a resource confined to an inland lake or other restricted area, but with migratory fish harvestable either in marine waters or, later, as they are returning to their upstream spawning grounds. The traditional Indian fishing places mentioned in the treaties were primarily in the rivers or immediately adjacent marine waters. Hence, for most species, the approach advocated by petitioners would allow the harvestable stock to be "fished out" before it reached the "usual and accustomed grounds and stations" of the treaty tribes, leaving them nothing—unless only they were to "poach" on the fish that must escape in order to preserve the run.

It is no answer to say that the Indians are free to compete with other fishermen in Puget Sound, the Strait of Juan de Fuca or the ocean itself. The tribes reserved, and the United States guaranteed, more inland fishing rights. These cannot be destroyed merely because other fishing places remain more or less available to the Indians. No such alternative was thought sufficient when, in *Winans*, the Court confronted "fish wheels" that effectively gave non-Indians "exclusive possession of the [tribal] fishing

places" (198 U.S. at 382); nor when, in *Puyallup II*, the Court invalidated regulations that prohibited river net fishing and thereby permitted the fishery to be "entirely pre-empted by non-Indians" (414 U.S. at 48-49). On the contrary, as we have seen, in both cases the Court suggested an apportionment of the resource to assure the treaty Indians a proper share. So here.

3. It is not geography alone, however, that requires us to resist the approach of viewing the Indian treaty fisherman as no different from his non-Indian counterpart—entitled as an individual to an equal opportunity to take fish, but no more. The point was fully canvassed in this Court three-quarters of a century ago and squarely resolved. *Winans* expressly held that the off-reservation fishing rights secured by treaty are something more than those "any inhabitant of the Territory or State would have," and more than the Indians "would have without the treaty." 198 U.S. at 380. And, from that day to this, the Court has uniformly discussed the right of the Indians pursuant to treaty as requiring distinct recognition. Thus, the State today is free to limit or prohibit non-Indian fishing as it pleases, while it can restrict treaty rights only if application of an otherwise "reasonable and necessary" regulation to Indian fishing "is necessary in the interest of conservation." *Antoine* v. *Washington*, *supra*, 420 U.S. at 207.

In light of the Court's settled jurisprudence, it is no doubt unnecessary to probe the reasons for notic-

ing the special character of the Indian treaty fishing right. But the cause is not far to seek. As this Court stressed in *Winans* (198 U.S. at 381), the tribes were reserving rights enjoyed since immemorial times. They gave up most of the land adjoining their fisheries, retaining only an easement over it. They further agreed to admit others to their traditional fishing grounds, to fish "in common" with them. But, in light of their critical dependence on fishing, commercial as well as subsistence, it is inconceivable that the Indians were thereby acquiescing in a future when they could be "crowded out" by white fishermen as soon as the latter gained a numerical or technological superiority. That would empty of all substance the government's promise to "secure" their fishing against undue encroachment.

The upshot is that, although not exclusive, the fishing rights reserved by the tribes, and confirmed by the United States in the several treaties before the Court, *are* special. And that unique status of treaty fishermen requires separate consideration whenever the resource is inadequate to meet all needs. Indeed, one can read the treaties as according the Indians an absolute priority to satisfy all their needs, including their commercial fishery—other fishermen being entitled only to the residue, if any. Cf. *Antoine* v. *Washington*, *supra*, 420 U.S. at 207. Plainly, such a construction of the treaties would no more offend equal protection principles than the reservation of a fishery exclusively for Indians. *E.g.*, *Alaska Pacific Fisheries* v. *United States*, 248 U.S.

78 (1918). See *State* v. *Forge*, 262 N.W.2d 341 (Minn.) (1977), appeal dismissed, 435 U.S. 919 (1978). Cf. *United States* v. *Antelope*, 430 U.S. 641, 645-649 (1977).

We do not press the argument so far, however. The express denial of exclusivity embodied in the phrase "in common with all citizens of the Territory" requires some giving way to non-Indian fishermen. As the Court succinctly summarized the matter in *Puyallup II*, *supra*, 414 U.S. at 49, "[t]he aim is to accommodate the rights of Indians under the [t]reat[ies] and the rights of other people." That sentence tells us both that treaty Indians, in respect of their fishing rights, are different from "other people," and that, to some degree, they must make room for fishermen who do not enjoy their special status.

C. The Standard For Apportioning

What has been said requires an apportionment which preserves a distinct share of the fishery for treaty fishermen whenever their rights are in jeopardy; in circumstances like those presented here, that is the only practical way to honor their special rights. It follows also, of course, that the allocation to the treaty fishermen cannot be determined primarily on the basis of their relative numbers.[32] For,

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[32] Significantly, in the court of appeals, the State itself conceded that "it would not be fair to divide the harvest based strictly on number of fishermen." Br. at 51. As we have already noted (*supra*, page 9), in the district court, the Washington Department of Fisheries proposed a one-third share for the Indian treaty fishermen.

if the Indian portion were merely the aggregate of individual shares, computed on a strict per capita basis, the purpose of the apportionment would be defeated. As we have said, the right reserved by treaty cannot become so diluted by the increased number of non-Indian fishermen as to make meaningless the tribes' insistence on retaining it and the government's solemn pledge to secure it. Nor would such a result be consistent with the continuing Congressional solicitude to preserve those treaty rights. 18 U.S.C. 1162 (b); 25 U.S.C. 1321(b). See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

1. In considering how to apportion, it is relevant to stress the *tribal* character of the fishing right reserved and secured by the treaties. Although, derivatively, the members enjoy the right (*Winans*, *supra*, 198 U.S. at 381), it appertains to the tribes, which may regulate its exercise. *Puyallup III*, *supra*, 433 U.S. at 178. See, also, *Menominee Tribe* v. *United States*, *supra*. Accordingly, any apportionment must consider the treaty Indians as a group, not as individuals. To do otherwise would be to forget that it was the tribes that signed the treaty and reserved fishing rights and that the government's promise of protection runs to the tribes as quasi-sovereigns.

The fact that the right belongs, in the first instance, to the tribes makes irrelevant the actual number of treaty Indians presently engaged in fishing. The tribal share cannot fluctuate according as it is harvested by many or few. Nor can it matter what internal rules the tribes may have established to govern fishing by the members. As the Court said in

Puyallup III, *supra*, 433 U.S. at 178, the State "has no interest in how the catch is allocated among the Indians."

2. Recognition that the fishing rights now in dispute were reserved by, and guaranteed to, the tribes, as such forecloses any argument for a *per capita* allocation of the fishery. But that is not all. It helps us to understand what the parties meant when they agreed that the fishery would be held "in common," and guides us in determining how the resource ought to be apportioned.

In 1854 and 1855, the Indian tribes were viewed as quasi-sovereigns, with whom it was deemed appropriate to execute a formal treaty. The United States was dealing with the tribes of western Washington as semi-independent nations, who enjoyed autonomous governmental prerogatives, whose chiefs were authorized to speak for their "citizens." Accordingly, it is appropriate to analogize the present case to one in which the United States was negotiating an agreement with a foreign state.

Let us suppose, for instance, that we had signed a convention with Canada concerning waters that were then within the exclusive domain of the United States, the agreement stipulating that, henceforth, American fishermen were to be entitled to fish in those waters "in common" with the citizens of Canada. In the event circumstances later required a more precise definition of relative rights because Canadians were "crowding out" our fishermen, what would be the result? We venture the opinion that,

in the absence of clear evidence of a different intent, an international tribunal would award half the fishery to each nation, without regard to the population of the two countries, or the number who actually fished, or whether the fishermen kept their profits.

Indeed, that is precisely the position consistently espoused by the United States in construing the Treaty of October 20, 1818, with Great Britain in respect of the Newfoundland fisheries. That agreement provided that "the inhabitants of the said United States shall have, forever, in common with the subjects of his Britannic Majesty, the Liberty to take fish of every kind" in specified areas. 8 State 248. John Quincy Adams, who as Secretary of State had been concerned with the terms of the treaty both before and shortly after its execution, later wrote of it as granting the United States "an equal share" of the fishery. J. Q. Adams, *Fisheries and the Mississippi* 184 (1822). That view was confirmed some years afterwards by Secretary of State Bayard who referred to the treaty as establishing a "tenancy in common." Letter No. 452, Nov. 6, 1886, For. Rel. 1886, 362. Professor Wharton used the same term. 3 *International Law Digest*, § 304 (1887). And, finally, our representation to the International Court in a 1906 case (which involved discrete issues) characterized the treaty as "fixing beyond question the equal measure and quality of right in the fisheries" (S. Doc. No. 870, 61st Cong., 3d Sess. 47 (1910).

This was, in effect, the approach of the court of appeals, invoking the analogy of co-tenancy, and of

the district court, more directly concluding that two parties holding "in common" presumptively enjoy equal shares. It is, we submit, the common sense reading of the treaty language. All analogies aside, the most natural inference, when there is an agreement involving only two parties who stipulate to share a resource "in common," is that, if worst comes to worst and apportionment is necessary, there will be an even division.

3. One would be justified, perhaps, in rejecting this natural construction if it produced a result wholly at odds with what we know about the situation of the parties when they reached their agreement or with modern conditions. But there is no such obstacle here. On the contrary, as the district court said, one must assume the Indians meant to reserve to themselves a fishery "which is sufficient to the fair needs of the tribes" (A. 195). And, at least in the area encompassed by this case, testing the apportionment by the standard of reasonable needs confirms its propriety.

Presumably, the understanding of those who executed the treaties was that the tribes were reserving, and the United States was securing against encroachment, such a share of the fishery as would satisfy the present and future needs of the group. That is the only way to give meaning to the promise made to the Indians that they would continue to enjoy their vital fishing rights. Looking to needs is consistent with the criterion used in water rights cases. Thus, in *Arizona* v. *California*, 373 U.S. 546,

600-601 (1963), the Court in effect implied a provision in the instruments creating the reservations which stipulated that the Indians should have "the right of taking water from the river in common with the citizens of the Territory." The measure of the right was not population, but potentially irrigable acres as a fairer index of needs. So here. Needs, not population, should determine the tribal share of the fishery.

This is not to say that, in the case of fishing rights, the size of the Indian treaty population is wholly irrelevant. The needs of the group are, to some degree, related to the number of members, and it is of course unnecessary to allocate a portion of the fishery in excess of those needs. But we must remember that the right reserved was for the benefit of entire tribes, all the members of which were dependent on fish for food and much else. To the extent that population figures are relevant, one properly looks to the total membership, not the number of active fishermen. What is more, the "right of taking fish" guaranteed by the treaties was not for dietary subsistence only: it was meant to secure also the continuance of the very substantial Indian commerce in fish, by which means the tribes obtained the other necessities of life.

3. Tribal needs could not be determined with precision when the district court made its basic ruling in 1974. It was obviously insufficient to look to the conditions then prevailing. That was a low point for the Indians, whose fishing, in large part,

had been preempted by almost a century of discrimination, official and unofficial. We need only remember the appropriation of traditional fishing places by huge fish wheels, licensed by the State, which the Court confronted in the *Winans* case, and the effective exclusion of treaty steelhead fishing accomplished by the regulations annulled in *Puyallup II*. Under compulsion of such acts in derogation of their treaty rights, substantial numbers of Indian fishermen had abandoned their trade, and the traditional role of the tribes in commercial fishing had been very substantially reduced. Plainly, that artificial situation no more measured the reasonable needs of the treaty tribes than did the actual use of water on the reservations of the lower Colorado determine the irrigation needs of those tribes in *Arizona* v. *California*.

And so, the district court here properly sought guidance beyond the present, attempting to restore the Indians to their true entitlement by examining the past and probing the future. Of course, some degree of inexactness must result. But, except in one instance,[33] the experience of the past five years has shown that the present allocation of roughly 50% of the fishery to the treaty fishermen does not exceed the reasonable needs of the several tribes. That fact vindicates the district court's apportionment

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[33] The only exception is the Fraser River salmon run, in which some tribes have a protected treaty right. Although the district court recognized that those treaty fishermen should have the opportunity to catch 50% of the American share, they have not, to date, taken that full share. See n.38, *infra*.

against any claim that it is over-generous to the Indians.

Arguably, a *larger* share for the tribes would be appropriate. Perhaps their agreement to share the fisheries limits the treaty Indians to 50%, even if a greater need were demonstrated. But they cannot be required to take less on a record that fully justifies an apportionment of at least half the fishery to the tribes.

D. Particular Challenges To The Court's Apportionment

The details of the plan devised to implement the apportionment are not properly matters for this Court. The appropriate mechanisms are necessarily left to the trial court, closer to the "many variables" involved. *Winans, supra,* 198 U.S. at 384; *Puyallup II, supra,* 414 U.S. at 48-49; *Puyallup III, supra,* 433 U.S. at 177. The Court will have fully discharged its duty—assuming it feels compelled to review the merits at all—once it satisfies itself that the allocation made is not manifestly inconsistent with the governing principles. Nevertheless, we briefly answer some of the objections interposed.

1. The resource allocated

Petitioners complain that the district court's formula allocates *more* than half the fishery to treaty fishermen, repeatedly referring to the treaty share as "50% plus." *E.g.*, Wash. Br. 6-7. The impression may be left that the non-Indian citizens of Washington catch less than half the fish. That is far from the fact. According to the State's own figures (A. 635-641), non-Indian fishermen in 1977 caught more

than 82% of the State salmon harvest. The disparity is explained by the fact that the court's order allocates to treaty fishermen a share only of those runs which are destined for the tribal fishing grounds protected by the treaties—probably less than half of the total. This is as it should be. But it dilutes the claim that judicial implementation of the Indian treaties has "precipitated an economic upheaval for commercial fishermen in the State of Washington" (Wash. Br. 7).

What is more, as varied by the court of appeals (see A. 52-53, 59), the rule now is that fish destined for the tribal fishing grounds are not counted in the apportionment if intercepted by foreigners or by citizens of other States and landed outside Washington (A. 458). Although this does not directly advantage non-Indian Washington fishermen, it reduces, by a substantial margin, the size of the run on the basis of which the treaty share is computed. To the extent that such foreign and out-of-state fishing is within the control of the United States (albeit not the State), the tribes properly may point to this circumstance as significantly diminishing the runs that would naturally reach their traditional fishing places.

This consideration, among others, justifies the inclusion of hatchery-reared fish for allocation purposes. The contribution of federal funds to the Washington hatchery program perhaps reflects, in part, the responsibility of the United States for ocean catches which deplete the natural run. It should be stressed, however, that the hatchery issue—a question left open by this Court in *Puyallup III, supra,* 433 U.S. at

177 n.17—is not ripe for determination here. The matter is now pending in the district court on the State's motion to modify the decree (Wash. Br. 91-92)[34] and is, in any event, one of the questions to be taken up in the "Phase II" proceedings (see pages 13, *supra*). Plainly, this Court ought not intervene at this juncture.

2. *On-reservation catches*

Invoking *Puyallup III*, the State argues that on-reservation catches ought to be counted against the allocation to treaty fishermen. The short answer is that, once again, the matter is pending before the district court on the State's motion for modification. In those circumstances, this Court would normally withhold its ruling.

In any event, the applicability of the *Puyallup* decision in the context of the present case is doubtful. That was a narow holding, premised on doubts concerning the continued existence of the reservation, at least beyond 22 acres of non-riparian land (433 U.S. at 173 n.11, 174), and on fears that, in the special circumstances, the tribe might wholly preempt or destroy the fishery (*id.* at 176). It ought not be read as laying down an inexorable rule that on-reservation fishing is always governed by treaty provisions which uniformly have been construed to apply only to off-reservation activities.

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[34] The complaint that the district court has not acted on the motion is not without remedy. At all events, it is no ground for asking this Court to decide the question in the first instance.

Moreover, the focus is different here. In this case, the State initially conceded the exclusive right of the tribes to fish on their reservations (see A. 70 n.12), and the court implicitly found that tribal fishing did not imperil the fishery (See A. 70 n.12). The question is simply whether reservation catches ought to be taken into account. Nor is the size of such catches now uncontrolled. The tribes are required to announce their estimates in advance and seek the State's agreement (A. 224-225, 458). Ultimately, the court reserves power to make adjustments (A. 228). But, in practice, negotiations have almost always produced agreement, involving, in some cases, a significant reduction of the on-reservation exemption. See, *e.g.*, Fisheries Advisory Board Reports Nos. 78-73 and 78-79, Sept. 11 and 25, 1978. There is, accordingly, no reason to apprehend abuse of the exception.

3. *Subsistence and ceremonial fishing*

Complaint is also made that fishing for subsistence and ceremonial purposes is not counted against the allocation of the treaty tribes. But that provision of Final Decision No. 1 (A. 88) was not challenged on appeal (see A. 54), and such a challenge is therefore foreclosed here. See *Anderson* v. *United States*, 417 U.S. 211, 217 n.5 (1974); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

At all events, the point is ill taken. The quantities involved are de minimis. Nor is there any potential for abuse. Advance notification of expected quantities must be given to the State and the court, now

every week.[35] And, of course, the court's continuing jurisdiction is available in the event the estimates are unreasonable or are exceeded. What is more, there is a like unofficial "take-home" catch by non-treaty fishermen, aggregating perhaps as much as 5% of the particular run. Transcript of Hearing, April 6, 1978, at 183. Although known to the court, this "take-home" fishery is not taxed against the non-treaty allocation.[36] Thus, both groups satisfy their personal consumption needs outside the apportionment, the only difference being that the Indians alone must openly declare the size of their catch.

4. *The Fraser River salmon runs*

There is no issue properly before this Court in respect of the allocation of the salmon runs destined for the Fraser River as they traverse the waters of the Strait of Juan de Fuca and upper Puget Sound under the jurisdiction of the International Pacific Salmon Fisheries Commission. Notwithstanding the State's allegations (Wash. Br. 65), the fact is that the district court's 1975 orders in the so-called International Fishery Case have long since expired and have not been renewed. Nor is there any prospect that like orders will be entered in the future. As we detail in the Statement (*supra*, pages 39-43), this fishery is now directly governed by federal regula-

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[35] Memorandum Order and Preliminary Injunction Re Salmon Allocation for 1978 and Subsequent Seasons, August 11, 1978, at 5.

[36] *Id.* at 7. See also A. 611-612.

tions, which implicate neither the district court nor the State of Washington. In those circumstances, as the court of appeals held (78-119 Pet. App. A-29), any issue raised by the district court's orders is moot, and this Court has no occasion to render a decision on the point. Cf. *Environmental Protection Agency* v. *Brown*, 431 U.S. 99, 103-104 (1977).[37]

The International Fisheries Case aside, it is true that there is a ruling in the main case allowing the Fraser River run to be taken into account for the benefit of some of the treaty tribes (see A. 53-54, 214), and it may be suggested that this brings at least the question of compensatory adjustment before this Court. The short answer, however, is that this provision of the original decision is mooted by the Interior Department's regulations allowing treaty fishermen actually to catch a share in IPSFC waters. There is thus no occasion to make an adjustment.[38] Any argument that the Convention with Canada qualifies the Indian treaties in suit must therefore be addressed in the separate proceedings challenging the new federal regulations.

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[37] To be sure, the present scheme of regulation may be open to challenge in separate proceedings. Indeed, as our Statement recites (*supra*, pages 41-43), two such actions are now pending. But those cases were not sought to be brought here, and the Court cannot review the questions there presented on the present writs of certiorari.

[38] As we have previously noted, the eligible treaty tribes do not at present catch their full 50% share of the American portion of this fishery. But the district court has not, on that account, adjusted the entitlement of these tribes on other runs.

III

ENFORCEMENT

Much ink has been spilled attacking the orders by which the district court has sought to implement the basic apportionment decision. Trimmed to the essentials, however, there are three challenges: it is variously said that the court overstepped its jurisdiction in (1) mandating state officials to take action inconsistent with state law, (2) assuming direct supervision of the fishery, and (3) enjoining individual fishermen to obey the decision. We consider these points *seriatim*.

A. The Propriety Of Mandating State Officials

We are heartened by the State's emphatic acknowledgement that its officials will implement the district court's orders if its decision is upheld, and by the expression of confidence that the state courts "will accede to this Court's interpretation of the treaties in the future." Wash. Br. 95-96. We regretfully note, however, that the other petitioners "strongly disagree," correctly adding that neither the legislature nor the courts of Washington are bound by the State Attorney General's concession. PSGA Br. 54-55 n.44. Accordingly, we must address the question.

The answer can be short. Indeed, we need hardly go beyond the Supremacy Clause, which, in relevant part, provides that "all Treaties made * * * under the Authority of the United States, shall be the

supreme Law of the Land," binding on "the Judges in every State," as well as "all executive * * * Officers * * * of the several States," "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cls. 2, 3. Thus, state law obstacles are simply irrelevant when enforcing the command of a federal treaty, as authoritatively construed by the courts of the United States. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Of course, there are limits to the rule. One cannot properly require the State Superintendent of Schools to allocate a fishery. But when the official against whom the injunction is directed has clear responsibility for the subject matter, it is settled that he may not avoid the obligation to enforce federal law merely because a state statute purports to prohibit it. See, *e.g.*, *Griffin* v. *School Board*, 377 U.S. 218 (1964). Nor is the result changed because the state law is construed to deny the officer's "authority" to perform the act required by the "supreme law of the land." If state officials properly can be mandated to operate desegregated schools notwithstanding the most fundamental prohibition of their statutes, they can be ordered to operate an apportioned fishery. *E.g.*, *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va.), appeal dismissed, 359 U.S. 1006 (1959); *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962). See, also, *Graham* v. *Folsom*, 200 U.S. 248 (1906); *County Commissioners* v. *Moulton*, 112 U.S. 217 (1884).

At all events, the present case is governed by *Puyallup II and III*. If the Washington Department of Game could be "mandated" (433 U.S. at 177) to make a separate allocation of steelhead to Indian fishermen under authority of the treaties, notwithstanding identical State law obstacles (77-983 Pet. App. D-5, and see 86 Wash.2d 664, 680, 690, 548 P.2d 1058, 1070, 1075), it is not apparent why the same treaties cannot require the Department of Fisheries to make a like allocation of the salmon fishery.

B. The Propriety Of Judicial Supervision

We address next the orders of August 31, 1977 (78-119 Pet. App. A-35 to A-77) by which the district court assumed direct supervision of the treaty fishery. As we have detailed in the Statement (*supra*, pages 24-25), this remedial device was resorted to, more than three years after the basic apportionment decision of 1974, only when the Washington Department of Fisheries, caught in a cross-fire of injunctions, ultimately declined to implement that decision. Nevertheless, it is said the district judge exceeded his powers in appointing himself "fishmaster."

It is of course regrettable that the federal court should have been driven to assume such unfamiliar responsibilities. But, as the court of appeals found (78-119 Pet. App. A-9), "[t]he current crisis is the result of a breakdown in state law enforcement in 1977." The district court exhausted every effort to secure the help of State agencies in implementing the treaty rights of the Indians. Indeed, for a time, the Washington Department of Fisheries lent its co-

operation. But its regulations were largely ignored by non-Indian fishermen, while the State's enforcement officers looked the other way. And, at length, the Fisheries Department withdrew from the field, after warning shots from the state courts which directed or invited disobedience of the federal court's orders. In those unique circumstances, the trial judge was fully justified in acting as he did.

The court's plan, so much criticized, merely reflects the complexities of the problem and the hostile context in which it arises. A simple directive does not accomplish the effective apportionment of the fishery. Of necessity, detailed regulation is called for. All the more so, when local agencies default and a large segment of the fishing community pledge themselves to defeating the command of the underlying treaties. The district court has done no more than employ the resources of equity to remedy a violation of federal law. Its orders go no further than was necessary effectively to right the wrong. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Milliken* v. *Bradley*, 433 U.S. 267, 280-281, 290 (1977). See, also, *Hills* v. *Gautreaux*, 425 U.S. 284 (1976); *Hutto* v. *Finney*, No. 76-1660 (June 23, 1978).

Of course, one hopes the present situation is merely temporary. If this Court affirms the apportionment decision, the state agencies, we are assured, will issue appropriate regulations and resume their supervisory duties. So, also, the fishing associations before the Court have undertaken to obey the ruling

in good faith. In those conditions, the district court would be free to return the administration of the fishery to the appropriate state officers. But the court cannot be faulted for filling the void until normal enforcement is restored.

C. The Propriety Of Enjoining Individual Fishermen

It is vigorously maintained that the district court acted beyond its jurisdiction when it enjoined individual fishermen from violating its apportionment decision. Problems of contempt aside (and no such question is before the Court in this case), this is something of a false issue. Indeed, if, as the State represents, affirmance of the district court's apportionment decision will require the Washington Department of Fisheries to promulgate and administer implementing regulations which the state courts will sustain, non-Indian fishermen will be ruled by them. The only difference will be that state, rather than federal, authority will enforce compliance. Direct injunctions emanating from the federal court may no longer be necessary.

At all events, we submit that the challenged orders were well within the district court's jurisdiction. There is ample precedent for restraining (and punishing in the event of disobedience) a non-party who actively interferes with the implementation of a court order establishing public rights. *E.g.*, *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir.), cert. denied, 355 U.S. 834 (1957); *Bullock* v. *United States*, 265 F.2d 683 (6th Cir. 1959), cert. denied, 360 U.S. 909 (1959); *United States* v. *Hall*, 472 F.2d 261

(5th Cir. 1972).[39] Whatever the limits of the rule, it certainly encompasses the situation in which the "outsider" is seeking to defeat compliance by a party. That is this case: the Department of Fisheries defaulted *at the instance of the fishermen* who now complain of the injunction running against them.

In this case, moreover, there was a more traditional basis for the injunctions directed at individuals. As we have shown (*supra*, pages 48-51), the addressees of the orders were already bound, as citizens of the State, by the court's apportionment decision. They could not properly relitigate the issue which the State, as their representative, had contested and lost. And, it follows, they could, if necessary, be particularly enjoined to obey the judgment. See *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973), and authorities cited at 179-180. What is more, the present proceeding was one in rem—to apportion a fishery—and it is settled law that the court possessed of the res may enjoin those who would interfere with that custody. See *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 641 (1977).

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[39] For other cases upholding the courts' power to enjoin or to punish the contemptuous conduct of non-parties who have actual notice of an injunction yet seek to frustrate the courts' judgments, see *Russell* v. *United States*, 86 F.2d 389 (8th Cir. 1936); *Minerich* v. *United States*, 29 F.2d 565 (6th Cir.), cert. denied, 279 U.S. 843 (1928); *Garrigan* v. *United States*, 163 F. 16 (7th Cir.), cert. denied, 214 U.S. 514 (1908); *Coffey* v. *Braddy*, 372 F.Supp. 116 (M.D. Fla. 1971); *In re Curtis' Petition*, 240 F.Supp. 475 (E.D. Mo. 1965), aff'd, 362 F.2d 999 (8th Cir. 1966), cert. denied, 386 U.S. 914 (1967).

It is perhaps unfortunate that the absence of state enforcement and the resistance of many required the issuance of particularized orders to non-Indian fishermen. But, in the circumstances, we submit that course was obviously appropriate.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals in the Washington Fishery case and the International Fishery case should be affirmed. The judgments of the Washington Supreme Court in *Fishing Vessel II* and *Gillnetters* should be reversed, and the cases remanded with instructions to dismiss the actions.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

STEPHEN R. BARNETT
Deputy Solicitor General

LOUIS F. CLAIBORNE
Assistant to the Solicitor General

KATHRYN A. OBERLY
Attorney

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Nos. 77-983, 78-119 and 78-139

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION

THOM, NAVONI, HOFF, PIERSON & RYDER
Richard W. Pierson
Dale L. Kingman
Counsel for Washington State Passenger Fishing Vessel Association

Office and Post Office Address:
3737 Bank of California Center
Seattle, Washington 98164
Telephone (206) 623-8433

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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IN THE

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October Term, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
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STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION

OPINION BELOW

On October 16, 1978, the Court granted certiorari on three petitions (Nos. 77-983, 78-119 and 78-139) and by order dated November 13, 1978, consolidated the three petitions for review.

Petition No. 77-983 is a request by the State of Washington for review of two decisions by the Washington State

Supreme Court: *Puget Sound Gillnetters Association v. Moos* (hereinafter referred to as "Gillnetters"), 88 Wn.2d 677, 565 P.2d 1151 (1977) (App. D of the petition) and *Washington State Commercial Passenger Fishing Vessels Association v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977) (hereinafter referred to as "Fishing Vessel 2") (App. B of the petition). This is the decision upon reconsideration of 87 Wn.2d 417, 553 P.2d 113 (1977) (hereinafter referred to as "Fishing Vessel 1") (App. F of the petition). In those decisions the Washington State Supreme Court found that United States treaties of 1854 and 1855 in Washington did not create a special Indian fishing right entitling treaty Indians to an allocation of the harvestable fishery resource. The court further concluded that the Washington Department of Fisheries is not authorized by state law to allocate fish for Indian fishermen.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

The constitutional provisions, treaties and statutes involved which are hereinafter enumerated are reproduced in App. A.-1-9 petition No. 77-983.

Constitutional Provisions of the United States

(a) Article II, Section 2, *Powers of the President* .... A-1 (Section 2 Clause 2) (Presidential powers with the Advise and Consent of the Senate to make Treaties)

(b) Article VI, *Debts, Supremacy Oath*, No. 2, Supremacy A-2

(c) Amendment V, *Due Process* A-2

(d) Amendment X, *Powers Reserved to States or People* A-3

(e) Amendment XIV, *Citizenship rights not to be Abridged* A-3

Constitutional Provisions of Washington State

(a) Article I, *Declaration of Rights* (Section 12, *Special Privilege and Immunities Prohibited* A-4

Treaties

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. Those six treaties each contain similar fishing provisions and only those provisions are set forth in App. A-4-7 Pet. No. 77-983.

(a) Treaty of Medicine Creek, 10 Stat. 1132 ..... A-4

(b) Treaty of Point Elliott, 12 Stat. 927 ..... A-5

(c) Treaty of Point No Point, 12 Stat. 933 ..... A-5

(d) Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939 ..... A-5-6

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(f) Treaty with the Yakimas, 12 Stat. 951 ..... A-6

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Revised Code of Washington

(a) RCW 75.08.012, *Duties of the [Fisheries] Department* A-7-8

(b) RCW 75.08.080, *Rules and Regulations—Scope* [Fisheries] A-8-9

STATEMENT OF THE CASE

A. Introduction

The opening brief of the petitioner State of Washington contains certain facts applicable to the respondent Washington State Commercial Passenger Fishing Vessel Association ("Charter Boat Association") in No. 77-983. The Charter Boat Association adopts the State of Washington's Statement of the Case insofar as applicable.

The Washington State Commercial Passenger Fishing Vessel Association[1] is a group of citizens who have formed an association for the purpose of supporting, enhancing and furthering the interests of charter boat fishing in the ocean waters along the coast of the State of Washington. Membership of the Charter Boat Association consists of skippers and owners of charter boats, owners of charter offices in the ports of Ilwaco, Westport, and all Olympic Peninsula ports, including Neah Bay, Sekieu, LaPush, Agate Beach and Port Angeles. In addition, associate members of the Charter Boat Association conduct businesses affected by the charter boat industries such as restaurants, motels, and support services. (F.F.1, 2 App. G-3, Pet. 77-983)

B. Nature of Sports Fishing

The members of the Charter Boat Association are engaged in business commonly referred to as "sports fishing". There are approximately 350 to 400 charter boats operat-

1. Although the Washington Kelper's Association was originally a party to the instant litigation, it has not participated in any of the proceedings subsequent to the original trial of the case in Superior Court of the State of Washington. This brief is intended to reflect only the position of the Charter Boat Association.

ing from the Washington coastal ports, and, in the communities referred to previously, the industry exerts a major economic dominance.

The typical charter boat is a twelve to eighteen passenger vessel, between forty and sixty feet in length and representing an investment of between fifty and $150,000. (Test. Nyhus, Joint App. 7-8) These charter boats are taken for hire by sports fishermen for the purpose of catching chinook and coho salmon.

The impetus behind the present dispute between the State of Washington and the Charter Boat Association was the February 12, 1974 decision by the Honorable George C. Boldt in the case of *United States of America, et al. v. State of Washington, et al.*, 384 F. Supp. 312, *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. den.*, 423 U.S. 1086 (1976).

For a number of years prior to 1974, the sport catch limit in Washington coastal waters, including the northern portion of the straight of Juan de Fuca, had been three salmon per day, per fisherman. Likewise, the daily limit had been three fish per day per fisherman in the neighboring state of Oregon.[2]

Pursuant to the February 12, 1974, decision in *United States v. Washington, supra*, Judge Boldt, on March 22, 1974, entered an order providing for an interim plan, Paragraph 5 of which provided:

> The defendants (*inter alia* Department of Fisheries) will make significant reduction in the non-Indian fisheries, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathe-

2. There also exists a charter boat industry in Astoria, Oregon, and other Oregon fishing ports in the vicinity of the Columbia River, which compete directly with Ilwaco and Westport.

matical precision but in making such reductions will do so consistent with the concept of permitting the full harvest of fish.

(Interim Plan and Stay Order Pending Final Decision on Appeal, Jt. App. 230.)

On April 24, 1974, the Department of Fisheries, as a direct result of the decision of Judge Boldt, passed certain regulations affecting the Charter Boat Association, the major component of which, was a reduction in the daily fish limit from three fish to two fish (F.F. 7(a), 8, App. G-5, Pet. 77-983). The reduction in the fish limit per fisherman per day went into effect on June 15, 1974. The result was both immediate and devastating.

Traditionally, the sports fishing season in the State of Washington is at its peak from the middle of June through Labor Day in early September. Most boats are booked almost to capacity during these two and a half months (Test. Fender, Jt. App., 5).

As a result of the reduction of the fish limit on June 15, 1974, most charter boat operators experienced more than a two-thirds reduction in clients, with an even greater loss in income, compared with the preceeding year (Jt. App. 5, 7, 13). Many of the sports fishermen cancelling their reservations at Westport and Ilwaco went to Oregon instead, where the three fish limit continued in effect for sports fishermen (Jt. App. 13). The effect on the support services provided in the communities of Ilwaco and Westport such as restaurants and motels was similar, an immediate economic downturn, which, had it continued throughout the sports fishing season, would have, along with the charter boat operators, jeopardized their significant investments (Jt. App. 7-10).

C. History of Court Proceedings

In response to the decision by the Department of Fisheries to reduce the sports fisheries' limit from three fish to two fish effective June 15, 1974, the Charter Boat Association sought and was granted a preliminary injunction enjoining the enforcement of the fishery regulation pending a trial on the merits. At trial, the trial court declared the regulation reducing the salmon limit invalid as beyond the statutory authority of the director of the Department of Fisheries. On appeal, *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 87 Wn.2d 417, 553 P.2d 113 (1976) the Washington State Supreme Court declared the case moot. On a petition by the State of Washington for a rehearing in the matter, however, the State Supreme Court, in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 89 Wn. 2d 296, 571 P.2d 1373 (1977) concluded that an allocation of a major portion of the fish resource to a small percentage of the population who participated in the fishery on a non-discriminatory basis, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and, further, that a treaty is not exempted from compliance with constitutional provisions of the United States Constitution.

SUMMARY OF ARGUMENT

Although a treaty is made the supreme law of the land by the Constitution of the United States, the federal government, neither in enacting a treaty nor in construing it, can suffer a contravention of the Constitution itself. The District Court and the Ninth Circuit Court of Appeals have given a construction to the various treaties at issue in this

case, and acted in furtherance of that construction so as to deny to all of the non-treaty citizens of the State of Washington the equal protection of the laws.

While it is undisputed that the various treaties have granted to the treaty Indians certain rights not possessed by other non-treaty citizens of the State of Washington, the scope of those rights is in dispute. In order to ascertain the scope of these rights, and necessarily the limitations upon either the State of Washington or the treaty Indians, it is necessary to analyze the extent of these parties' jurisdiction. From an historical perspective, it is the view of the Association that the limitations upon treaty tribes necessarily increases the extent of either federal or state influence. By the same token, while the attributes of the "quasi-sovereign" status of treaty tribes is recognized, the historical limitations upon the exercise of this status is also discussed. The conclusion is thus reached that given the limited nature of the "quasi-sovereign" status of Indian tribes in a pluralistic society, and the limitations expressed in the treaties themselves, when balanced with the underlying rationale for regulation of the salmon resource by the State of Washington, there is no rational basis for the State to impose upon its residents measures designed to regulate the resource apart from defined conservation prerogatives.

Even viewing the matter as one within the discretion of the district court in exercising its equitable powers to provide a remedy for a legal definition of a right, the remedy must be consistent with the right to be protected. In the context of the present dispute, the Association believes that the remedy promulgated by the district court and directly imposed upon the Association by the State of Washington cannot rationally be tied to the nature or scope of the perceived violation of the off-reservation treaty right.

Finally, the Association is of the belief that the district court violated fundamental principles of federalism inherent in our constitutional framework by syphoning from the State of Washington the management powers over the resource to the exclusion of the State and the creation of autonomous states in the various Indian tribes with the ability to exercise sovereign powers vested by the Constitution solely in either the federal government or the states.

ARGUMENT

A. The Stevens Treaties Neither Require Nor Permit a Fifty Percent Plus Allocation of the Washington Fishery to the Treaty Indians

The opening brief of the State of Washington contains a lengthy discussion of the questions presented under the above heading. No purpose would be served for the Charter Boat Association to engage in a similarly lengthy dialogue. The Association does, however, concur in, and therefore adopts, the reasoning outlined in the State's Opening Brief with respect to the historical analysis of the pertinent treaty language.*

In the Charter Boat Association's treatment of other issues presented for review, however, much of the Association's argument will complement and, in fact, add to the

*The United States and the various Indian tribes have contended that there is no controversy between the Charter Boat Association and the State. While the Association forthrightly concedes that it concurs in much of the State's position, the fact remains that it was the State's attempt to impose the regulations called for by the District Court that prompted this action. It should be obvious that in the context of Petition 77-983 there existed throughout this litigation an actual controversy, although the State was perhaps an unlikely and uncomfortable real party in interest. It should also not be forgotten that long before this action, the District Court denied the Association's motion to intervene in *United States v. Washington*.

argument presented by the State of Washington. To this extent, the Association believes that portions of its argument on other issues will enhance the Court's understanding and resolution of whether or not the Stevens Treaties require or permit a fifty percent plus allocation of the fish resources under the jurisdiction of the State of Washington to the treaty Indians.

B. A Special Allocation of the Fishery Resource to Treaty Indians When They Have an Opportunity to Participate in the Fishery on a Non-Discriminatory Basis and a Reduction in the Resource to Non-Treaty Fishermen Constitutes a Violation of the Constitutional Doctrines of Equal Protection

1. *Introduction*

Section A of the Argument of the State of Washington in its opening brief, which the Association concurs in and has adopted, contains primarily a factual analysis of the Stevens Treaties with the purpose of interpreting the treaties "in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191, 206 (1978).

It is the Association's position that not only from a factual standpoint do the Stevens Treaties not require or permit a fifty percent plus allocation, but, in addition, from a legal standpoint (both at the time the treaties were ratified as well as with the subsequent passage of the Fourteenth Amendment to the United States Constitution) holding such an allocation to be one of "a matter of law" would be impermissible.

2. *Scope of the Treaty Power*

Article VI of the Constitution of the United States provides that all treaties made under the authority of the

United States shall be the supreme law of the land. Under Article VI, a treaty is "binding within the territorial limits of the state as they are elsewhere throughout the dominion of the United States". *Baldwin v. Frank*, 120 U.S. 678, 683 (1887). The treaties executed by Governor Stevens are treaties within the meaning of Article VI of the Constitution.[3]

While it is true that a treaty is the supreme law of the land under Article VI, it is not true that it is supreme in the same sense as is the Constitution itself. A treaty is equivalent in legal respects to a law of Congress, and a subsequent act of Congress will repeal or annul a prior treaty as will a subsequent treaty annul a prior act of Congress. *The Cherokee Tobacco*, 11 Wall. (U.S.) 616 (1870); *Ward v. Race Horse*, 163 U.S. 511 (1896).

In an early case, it was stated by this court that Article VI of the Constitution:

> . . . has made treaties part of our municipal law. But it has not assigned to them any particular degree of authority in our municipal law nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted. No such declaration is even made in respect to the Constitution itself. It is named in conjunction with treaties and acts of Congress as one of the supreme laws, but no supremacy is in terms assigned one over the other. And when it becomes necessary to determine whether an act of Congress repugnant to the Constitution could be deemed by the judicial power and operative law, the solution of the question was found by considering the nature and object of each species of law and the authority from which each emanated and the consequences of

3. *See* Appendix A-4-7, Pet. 77-983; *United States v. Winans*, 198 U.S. 371 (1905); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968).

> allowing or denying the paramount effect of the Constitution.

Taylor v. Morton, 2 Curt. 454, *aff'd*, 57 U.S. 481 (1868).

The injunction of *Taylor v. Morton* to consider the consequences of allowing or denying the paramount effect of the Constitution is well taken. For, if treaties are supreme in the same sense as the Constitution, then the executive, congressional and judicial branches of the government could quite clearly amend the terms of the Constitution whenever they propose and ratify, or construe, a particular treaty, so as to grant something not found in that instrument or deny something otherwise mandated by the Constitution.

In addition, treatment of a treaty in the same sense as that of the Constitution itself could have the undesirable effect of changing the character of our government or the relationship between the federal government and the respective states.

Because of the danger that exists in assigning to the treaty power the same level of authority as the Constitution itself, this Court recognized early in our nation's development that the treaty power, like the laws of Congress, are subsidiary to the Constitution. In *Whitney v. Robertson*, 124 U.S. 190 (1888) this Court held:

> By the Constitution, the treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will endeavor to construe them so as to give effect to both, if that can be done without violating the language of either, but if the two are inconsistent, the one last in date will control the other; . . .

While this Court's language in *Missouri v. Holland*, 252 U.S. 416 (1920) has been read by some courts[4] in an attempt to assign a broad reading to the interplay between the Constitution and the treaty power, this Court in *Reid v. Covert*, 354 U.S. 1 (1957) laid to rest any notion that a treaty may violate any section of the Constitution.

In *Reid*, the federal government argued that a section of the Uniform Code of Military Justice, which was enacted pursuant to treaties entered into between the United States and Japan and West Germany, respectively, required a military trial for non-service dependents and further argued that it could sustain as legislation that which "is necessary and proper to carry out United States obligations under the international agreements made with those countries." In response to this assertion that the clause in the Uniform Code of Military Justice could be upheld because of some supposed governmental obligation under a treaty, this Court stated:

> The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on Congress, or on any other branch of government, which is free from the restraints of the Constitution.

354 U.S. at 16.

In reaching this conclusion, the Court stated:

> There is nothing in this language (the supremacy clause) which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompany the drafting and ratification of the Constitution which even suggests such a result . . . *It would be manifestly contrary to the ob-*

4. *See e.g. United States v. Washington*, 520 F.2d 676 (9th Cir. 1975).

> *jectives of those who created the Constitution* as well as those who were responsible for the Bill of Rights—let alone alien to our entire Constitutional history and tradition—*to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.* In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.

354 U.S. at 16 (emphasis supplied).

In seems evident that if the words of a treaty can not sanction a contravention of the Constitution, then a legal construction of those words cannot contravene the Constitution.[5] In *United States v. Washington, supra,* the Federal district court held, *as a matter of law,* that the words "in common with" mandated a fifty percent (50%) plus allocation of the harvestable fish to the treaty tribes.

3. *Treaties and the Equal Protection Component*

The preceding discussion focused upon the scope of the treaty power in conjunction with the overriding importance of the Constitution of the United States, and it was determined that no treaty either in its making or its later judicial construction can be allowed to violate any precept of the Constitution. In this section, the Association discusses the equal protection component "implicit in the phrase 'incommon with' ", *Puyallup Tribe v. Department of Game,* 391 U.S. 392, 403 (1968).

Although the Fifth Amendment of the United States Constitution contains an equal protection component[6], this

5. In this regard, it was noted in *Reid, supra*: "The prohibitions of the Constitution were designed to apply to all branches of the National Government." 354 U.S. at 17.

6. Although the Fifth Amendment contains no "equal protection clause" as does the Fourteenth Amendment, the Fifth Amendment's due process clause forbids discrimination that is unjustifiable as to be violative of due process; thus, if a classification is invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process clause of the Fifth Amendment. Moreover, the Fifth Amendment provides the same basic safeguards as the equal protection clause of the Fourteenth Amendment and the general principles of the Fourteenth Amendment are incorporated within and applied to the Fifth. *Bolling v. Sharpe,* 347 U.S. 497 (1954) (Invalidating Racial Segregation in Public Schools of District of Columbia as violative of due process guaranteed by Fifth Amendment); *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Buckley v. Vallejo,* 421 U.S. 1, 93 (1976), "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."

discussion will be limited to consideration of the propriety of a legal mandate requiring a fifty percent (50%) plus allocation to treaty tribes in conjunction with the Fourteenth Amendment.

The Fourteenth Amendment and its equal protection clause is properly analyzed in the present case since the alleged denial of equal protection asserted by the Association and other non-Indian fishermen came about as a result of the Federal District Court's mandate to the State of Washington and its Fisheries and Game Department to promulgate regulations curtailing or eliminating their fishing activities. The fishing regulations which the Association challenged in the State courts are thus the embodiment of the District Court holding that, as a matter of law, treaty Indians are entitled to a fifty percent (50%) plus allocation of the fishery resource. For purposes of equal protection analysis under the Fourteenth Amendment, the requisite State action is present.[7]

In addition, since the State of Washington can make no law denying to any person within its jurisdiction the equal protection of the laws, it cannot be forced to do so by the federal government. *Shapiro v. Thompson,* 394 U.S. 618

7. If an interpretation of an otherwise valid treaty leaves it open to Constitutional objections, laws or regulations made by a state implementing that interpretation must also fail.

(1969).[8] This precept only makes sense inasmuch as both the State and Federal Governments are bound by the Constitution and while the Fourteenth Amendment is not applicable to the federal government, whenever the federal government by law or judicial decree, requires the state to act, the state must act in conformity with the Fourteenth Amendment. Otherwise, the effect of the federal directive is to indirectly amend the terms of the Constitution. *Geofroy v. Riggs*, 133 U.S. 258 (1890).

4. *Scope of State Jurisdiction and Treaty Tribes*

The equal protection clause of the Fourteenth Amendment provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction equal protection of the law.

The equal protection clause secures to every person within the jurisdiction of the state, even if not a citizen thereof, the protection of its laws equally with its other citizens. *Yick Wo v. Hopkins*, 118 U.S. 369 (1886); *Takahashi v. Fish & Game Commission*, 30 Cal.2d 719, 185 P.2d 805, *reversed on other grounds*, 334 U.S. 410 (1948).

Since the Fourteenth Amendment is applicable only where the State of Washington has jurisdiction over a particular person, the threshold problem is to analyze the State of Washington's jurisdiction over Indians in light of the treaties.[9]

8. "Congress may not authorize the states to violate the equal protection clause . . . Congress is without the power to enlist state cooperation in a joint federal-state program by legislation which authorizes the states to violate the equal protection clause." *See also Katzenbach v. Morgan*, 384 U.S. 641, 651 n. (1966).

9. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court, in rejecting the assertion that the federal government had exclusive jurisdiction over the Apache tribe for all purposes and that therefore the state was prohibited in enforcing any of its laws against tribal

Under the enabling act of February 22, 1889, 25 Stat. 76, through which Washington became a state, the people of the State of Washington disclaimed:

> Any right and title to the unappropriated public lands lying within the boundaries thereof *and to all lands lying within said limits owned or held by any Indian or Indian tribes; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress*. . .

(Emphasis supplied).

The apparent effect of the disclaimer clause above excerpted is that the State of Washington has no jurisdiction over persons living on Indian reservations except as ceded by Congress, or inherent in the dependent status of Indians.[10]

The extent of off reservation jurisdiction, of which we are only here concerned, has been fully recognized by this Court in *Mescalero Apache Tribe v. Jones*, where this court stated:

> But tribal activities conducted outside the reservation present different considerations . . . Absent express federal laws to the contrary, Indians beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state.

411 U.S. at 148-149.

enterprises, whether the enterprise was located on or off tribal land, stated: "Generalizations on the subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*, 6 Pet. 515, 556-561 (1832), has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of states, Indians and the federal government." 411 U.S. at 148.

10. This Court, in *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (Puyallup III), rejected an argument by the tribe that they had a right to exclusive control of the steelhead run passing through the Puyal-

In *Mescalero*, this Court cited, as authority for the above excerpted proposition, *Puyallup I*, 391 U.S. 392, *Organized Village of Kake v. Egan*, 369 U.S. 16 (1962); and *Tulee v. Washington*, 315 U.S. 681 (1942).

In *Puyallup III*, this Court in construing the "in common" provision of the Treaty of Medicine Creek, reaffirmed its holding that the right to fish at those respective places was not an exclusive one. 433 U.S. 165 at 175.[11]

The rule that appears to have been formulated in recent years for determining the extent of state jurisdiction over off-reservation activities of Indians, was articulated in *Organized Village of Kake v. Egan, supra*, wherein this Court stated the test to be whether: "the application of that law would interfere with reservation self-government." 369 U.S. 60 at 68.

Applying this test in *Organized Village of Kake*, this Court stated: "But state regulation of off reservation fishing certainly does not impinge on treaty protected reservation self-government." 369 U.S. 75-75.[12]

The exercise of the governmental powers of the State of Washington as opposed to its exercise of its proprietary

lup reservation. In *Mescalero Apache Tribe v. Jones, supra*, this Court stated: "The upshot has been the repeated statements of this Court to the effect that even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." The limitations of tribal sovereignty and thus the increase of state and federal jurisdiction derived from their dependent status is set forth in *Oliphant v. Suquamish Tribe, supra*, and *United States v. Wheeler*, .. U.S. .., 98 S. Ct. 1079 (1978).

11. "Even where reserved by federal treaties, off reservation hunting and fishing rights have been held subject to state regulation." *Organized Village of Kake v. Egan*, 369 U.S. 60 at 75 (1962).

12. This same test was repeated in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 148.

powers (*See Organized Village of Kake v. Egan*, 369 U.S. 60, 67-70) is unencumbered in those areas outside of the reservation.[13]

In *Puyallup III*, this Court stated unequivocably that the rights to fish "in common" were not exclusive in the treaty tribes. Thus, consistent with *Tulee v. Washington, supra*, and *United States v. Winans*, the proprietary powers of the State of Washington are limited in accordance with the exercise by the treaty tribes of their off reservation treaty fishing rights. The State of Washington nonetheless possesses full governmental powers over the treaty tribes off reservation.

That the State of Washington has complete governmental powers over the treaty tribes when fishing off reservation and thus is mandated to govern in conformance with the Fourteenth Amendment of the United States Constitution is buttressed by considering the extent of state jurisdiction in conjunction with the "quasi-sovereign" status of Indian Tribes. This Court has recently considered the limitations upon the "quasi-sovereign status of Indian tribes in two cases, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *United States v. Wheeler*, ... U.S. ...., 98 S. Ct. 1079 (1978).

In determining whether the Suquamish Indian Tribe had the power to exercise criminal jurisdiction over a non-Indian for an alleged transgression of tribal law, on a reservation, this Court held, while acknowledging that Indian

13. In *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 176, n. 15, this Court clarified that part of the Village of Kake opinion which purported to state that the analysis between "governmental" and "proprietary" powers applied even *on reservation*, by stating in *McClanahan*: "It (*Organized Village of Kake v. Egan*) did not purport to provide guidelines in areas set aside by treaty for the *exclusive* use and control of Indians." (emphasis supplied).

tribes do retain elements of "quasi-sovereign" authority, that the tribes' retained powers were not such that they were limited only by specific restrictions in treaties or congressional enactments. In addition, it was recognized that Indian tribes were proscribed from exercising those powers of autonomous states. 435 U.S. .... (1978), 55 L. Ed. 2d 222.

In the *Cherokee Nation v. Georgia,* 5 Pet. 1, 8 L. Ed. 25 (1831), it was held that since Indian tribes were completely under the domain of the United States, any attempt by any foreign nation to acquire their land or form a political connection with them would be considered an invasion of our territory. Thus, the Indian tribal authority was limited by the nature of their dependent status and their inability to exercise powers "inconsistent with their status".

At the same time, it was also recognized in *Oliphant* that from the formation of this Country and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. 435 U.S. ...., 55 L. Ed. 2d at 222. This Court concluded that by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily gave up their powers to try non-Indians. When read in conjunction with earlier opinions of this Court, the conclusions of *Oliphant* is undeniable—the "quasi-sovereign" status of Indian tribes can serve as a limitation on state powers only as it pertains to matters *solely and exclusively* Indian.

In those instances, where an Indian or an Indian tribe does not retain exclusive internal jurisdiction over his or its affairs, the full governmental powers of either the federal government or the state government are applicable.[14]

The principles enunciated in *Oliphant* were reiterated in *United States v. Wheeler,* .... U.S. ...., 98 S. Ct. 1079 (1978). In *Wheeler,* this Court was called upon to determine whether an Indian who committed a crime on an Indian reservation against another Indian could be tried both by the tribal court in accordance with tribal law as well as by a federal court. In rejecting a claim that the double jeopardy provision of the Fifth Amendment barred both prosecutions, a claim grounded upon a finding by the lower courts that the tribal government and the federal government were but one sovereign, this court again analyzed the "quasi-sovereign" status of Indian tribes.

In analyzing the sovereignty question, the Court recognized that Indian tribes were no longer possessed of the full attributes of sovereignty since their incorporation within the United States necessarily divested them of some aspects of sovereignty they previously exercised. In addition, this court recognized that by specific treaty provisions, they yielded up other sovereign powers.[15]

The sovereignty that the Indian tribes still possess is

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14. "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the government of the United States, or of the states of the union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they exist in subordination to one or the other of these two." *United States v. Kagama,* 118 U.S. 375, 379 (1886); *Organized Village of Kake v. Egan, supra; McClanahan v. Arizona State Tax Commission, supra.*

15. One such treaty provision yielding up powers of sovereignty were the various treaties at issue in this case, in which the Indians ceded their land to United States and gave up their exclusive right to fish in coastal and marine waters, preserving only the right to fish "in common" with the citizens of the Washington territory. *See e.g. Puyallup III,* 433 U.S. 165, at 176 and n. 16.

that not withdrawn by treaty or statute, or by implication as a result of their dependent status. *United States v. Wheeler*, 98 S. Ct. at 1086. One such attribute of sovereignty that this Court found was not divested in any of the foregoing ways by the Navajo tribe was the right of the tribe to charge, try, and punish its own members for violations of tribal law. The internal affairs of the tribe remained exclusively within the jurisdiction of whatever tribal government existed, if not withdrawn or altered by Congress. Thus, the quasi-sovereign status of the Indian tribe is preserved only with respect to internal affairs of the Indian tribe.

Indian tribal sovereignty does not extend, however, to the relations between an Indian tribe and non-members of the tribe. In *Wheeler*, this Court held that there was an implicit divestiture of sovereignty in those areas involving the relations between an Indian tribe and non-members of the tribe. .... U.S. ...., 98 S. Ct. at 1087. This Court went on to state that the necessary limitations on tribal sovereignty:

> . . . rest on the fact that the *dependent status* of Indian tribes within our territorial jurisdiction *is necessarily inconsistent with their freedom independently to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws are of a different type. They involve only the relations among members of a tribe.

.... U.S. ...., 98 S. Ct. at 1088. (Emphasis supplied)

There are only two sovereigns within the United States: the United States and the various states. *United States v. Kagama, supra*. Each acts within its own realm consistent with the powers retained on the one hand and given on the

other by the Constitution. Where the federal government acts in an area inconsistent with state power, then the state is precluded from acting. Where, however, the reach of federal power does not extend, a vacuum is not thereby created, but rather the state's inherent powers are preserved. By executing treaties with Indian tribes and by providing for *exclusive* federal control, as to certain relations, the federal government necessarily set a limit on the exercise of the state's governmental powers. On the other hand, where the federal government, through a treaty, does not act so as to vest exclusive control of a particular subject matter in a treaty tribe, then necessarily the state's governmental powers are left unaffected.

In the present case, when the federal government executed the treaties with the Indian tribes, it preserved exclusive control to the reservations in itself, save and except for those powers retained in the tribe.[16] On the other hand, in the same treaties, the Indians gave up or were divested of their quasi-sovereign powers off reservation; and by entering into relations with non-Indians through the "in common with" provision of their treaties, admitted, in the first instance, the federal government, and, later, the State of Washington, to the full exercise of their respective governmental powers over these relations.

While at times the intricate web of federally related Indian law and the limited, residual "quasi-sovereign" status of Indian Tribes, may serve as a limitation on state action or exclude state jurisdiction altogether, its absence in any given situation, necessarily requires that jurisdiction

16. "Indian tribes 'hold and occupy [the reservations] with the assent of the United States and under their authority' ". *Oliphant v. Suquamish Indian Tribe*, 435 U.S. . ., 55 L. Ed. 2d at 221.

over a particular activity be vested in the state. Since, in the present case, the Indians can exercise no quasi-sovereign power over off-reservation fishing because it was not only withdrawn in their treaties, but is necessarily inconsistent with their freedom independently to determine their external relations, *United States v. Wheeler*, ... U.S. ...., 98 S. Ct. at 1088, the state possesses full governmental power. And the state, in exercising these governmental powers, must do so consistent with the mandates of the Constitution.

At the time that the subject treaties were executed by the United States and the various Indian tribes, what is now the State of Washington was a territory. It has long been the settled law in this country that the United States, upon succession to any territory, held the same in absolute fee. *Johnson v. McIntosh*, 8 Wheat. 543 (1823). The aboriginal Indian title, although not one in fee, has been held to be one of exclusive right of occupancy. *Johnson v. McIntosh, supra*. Outside of the territory of the original thirteen colonies, the ultimate fee is located in the United States and may be granted to the individual states upon their admission to the union subject to whatever rights of Indian occupancy were then extant, *Missouri v. Iowa*, 7 How. 616 (1849) and not altered by Statehood Acts.

In the present case, the treaty Indians retained their aboriginal rights of exclusive use and occupancy only to those lands set apart in the treaties as reservations. As to all other lands, the Indians' exclusive rights were extinguished. With respect to fishing, and consistent with the title of all land being in the United States, certain lands were encumbered with an easement of non-exclusive

use so that the Indians might fish in common with the other citizens of the territory.

Although, with respect to those lands upon which the Indian tribes retained their right to exclusive use and occupancy, they could exercise sovereignty consistent with their dependent status, their sovereignty was necessarily divested in their relations with non-Indians.

At the same time that tribal sovereignty over areas outside of their exclusive use and occupancy was divested, the governmental power of, first, the United States and, then, the state, came into existence.

This Court, in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. ...., 55 L. Ed. 2d 209, took note of the fact that within the political boundaries of the United States and thus, within the United States' ability to exercise its governmental authority, the United States "has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." 435 U.S. ...., 55 L. Ed. 2d at 222. As the State's opening brief makes clear, one of the personal liberties possessed by all persons within the confines of the territorial limits of the United States is the right to participate in the common fishery.[17] The Federal District Court and the Court of Appeals, in *United States v. Washington State, supra*, have sanctioned an unwarranted intrusion upon the personal liberty of many of the citizens of the United States, by restricting or eliminating their right to participate in the fishery.

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17. In *Martin v. Lessee of Waddell*, 16 Pet. 367, 412 (1842), this court stated ". . . [a] liberty of fishing in the sea or creeks or arms thereof as a public common of piscary and (might) not, without injury to their rights, be restrained of it. . ."

5. *Application of the Equal Protection Clause of the Fourteenth Amendment*

The basic concern of the Equal Protection Clause of the Fourteenth Amendment[18] is with state legislation, whose purpose or effect is to "create discrete and objectively identifiable classes." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 60 (1973). Equality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated.

In the present case, the State of Washington, pursuant to the mandate of the Federal District Court, deemed itself obligated to distinguish between two classes of fishermen; treaty fishermen and non-treaty fishermen, this based solely upon the District Court's ruling as a matter of law that the "in common with" provision compelled a fifty percent plus allocation of the fishery resource to the treaty Indians.

The relevant state policy regarding regulation of the fisheries, and as found by the Washington State Supreme Court, has been to manage the resource in the same manner for the purpose of conservation. RCW 75.08.012 (App. A-7, Pet. 77-983); *Puget Sound Gillnetters Association v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977) (App.D. Pet. 77-983). This is the same purpose which this Court, in *Department of Game v. Puyallup Tribe Inc.*, 414 U.S. 44 (1973) (*Puyallup II*) found with respect to the off-reservation fishing rights of the various treaty Indians: "That the state can only regulate where reasonable and necessary for conservation." Regulation of both treaty and non-treaty

18. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."

persons for purposes of conservation on a non-discriminatory basis is a matter completely different, however, from an affirmative mandate to the state that it allocate numbers of fish between these two parties, without regard to conservation.

The usual reasons given by those supporting the District Court's allocation principles and mandate to the state to enact regulations to allocate is that the treaties have established two distinct classes of fishermen in the State of Washington.[19] (*See* Dissent of Utter, *Fishing Vessel Association v. Tollefson*, 89 Wn.2d 276 at 298.) This conclusion, however, begs the question.

With respect to off-reservation fishery, there is no express federal law that has established two distinct classes of fishermen. As the above discussion in Parts 3 and 4 illustrates, the State of Washington has the ability to exercise full governmental power for purposes of conservation over all persons including treaty Indians because of the very *absence* of any federal law precluding that exercise. The inability of treaty Indians to exercise their quasi-sovereign powers outside of their own internal relations does not mean that a void in regulation is thereby created. Rather, the State has full powers of regulation save and except for those areas where it has been displaced either by an express Congressional enactment or by the residual sovereignty otherwise not limited either by the Indians themselves or by Congress. Thus, with respect to the

19. This conclusion ignores the distinction between on and off-reservation rights as well as, at the very least, the granting by the treaty tribes in the treaties, rights to the other citizens of the territory at least on par with those reserved to themselves through the "in common" language. It also confuses those instances of legislation dealing *solely* with Indians and other non-exclusive legislation dealing with both Indians and non-Indians. See also n.20, *infra*.

common fishery, the State has the power to regulate for conservation purposes; but, in doing so, it must not create special rights in any one group of fishermen unrelated to the purpose of conservation.[20]

Where all fishermen, whether Indian or non-Indian, have the opportunity to participate in the common fishery on a non-discriminatory basis, in areas outside of the reservations, and where the inherent police powers of the state can be extended only to conservation of the resource, then there is no rational basis for distinguishing between fishermen based upon whether they are participants in a treaty or not. The State can, for conservation purposes, regulate the manner of fishing, the size of the take, or otherwise restrict commercial fishing, *Puyallup Tribe v. Department of Game*, 391 U.S. 398 (1968) (*Puyallup I*), in a manner which does not discriminate against either treaty or non-treaty fishermen. *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*). Since both treaty and non-treaty fishermen use the same implements for fishing commercially for salmon outside of reservation lands, regulations when applied on a non-discriminatory basis to all classes of fishermen are rationally related to the State's purpose in conserving the resource.

Under the rulings of the federal district court in *United States v. Washington, supra*, the burden of conservation

20. *Morton v. Mancari*, 14 U.S. 535 (1974) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) are clearly distinguishable from the State's obligation in the present case. In each of these two cases, the court was concerned *solely* with congressional legislation dealing *solely* and *exclusively* with internal Indian Affairs and designed to promote Indian interest in self-government. cf *United States v. Antelope*, 430 U.S. 641 (1977) wherein the court noted at 649, n. 11: "It should be noted, however, that this court has consistently upheld the

of the resource is placed upon the non-treaty fishermen.[21] The conclusion that the State of Washington must restrict all non-treaty fishing for purposes of conservation before seeking to restrict treaty fishing for the same purpose, amounts to the imposition of a disability upon non-treaty fishermen not sanctioned by the extent of the State's powers over off-reservation fishing, and is inconsistent with the divestiture of tribal sovereignty outside its own internal relations, and, by necessary implication, the equal protection clause of the Fourteenth Amendment. The equal protection clause of the Fourteenth Amendment is a shield to protect an individual from State discrimination; it is not a sword to promote disentitlement.[22]

6. *There Is No Equitable Basis For the Fifty Percent Plus Allocation*

In *United States v. Washington*, 384 F. Supp. 312 (1974), the District Court held, *as a matter of law*, that the treaty provision preserving to the treaty tribes the right

federal regulations aimed *solely* at tribal Indians as opposed to *all* persons subject to federal jurisdiction." (Emphasis in original) And at n.12: "If state courts would have had no jurisdiction over respondent's case, then state law does not constitute a meaningful point of reference for establishing a claim of equal protection." Since, in the present case, the state has jurisdiction over the off-reservation fishing activities of both Indians and non-Indians, it is mandated to apply non-discriminatory regulations so as to provide all persons within its jurisdiction an opportunity to participate in a non-discriminatory fashion in the common fishery.

21. "If alternative means and methods of reasonable and necessary conservation regulation are available, the State cannot lawfully restrict the exercise of off-reservation treaty right fishing even if the only alternatives are restriction of fishing by non-treaty fishermen." *Rulings on Major Issues in This Case*: No. 6 (Jt. App. 87.)

22. The affront to the Equal Protection Clause is even more pervasive when it is considered that the great majority of fish caught in Washington waters are hatchery produced and paid for by non-treaty citizens of the State of Washington. cf. The concurring opinion of Justice White in *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*).

to fish in common with other citizens of the territory off reservation required, as a matter of law, the division of the resource between treaty and non-treaty persons. In implementing this legal ruling, the District Court then came up with the fifty percent plus allocation.

In the Ninth Circuit, the Circuit Court transformed this ruling of law into an exercise of the District Court's equitable discretion. The Circuit Court held that the allocation was not an abuse of the District Court's discretion.

Where all persons have the opportunity to fish in the common fishery on a non-discriminatory basis, there is neither room nor necessity for the imposition of any allocation formula. As an exercise of discretion in insuring non-discriminatory treatment, it is only where one party effectively preempts the resource, thereby precluding another party from an equal opportunity to enjoy its fruits, that an allocation is proper.

The three cases which have come before this Court involving the Puyallup tribe and the Department of Game provide the underlying rationale governing the necessity for any allocation of a fish resource.

The genesis of the Puyallup cases was the ban by the State of Washington on the use of set nets in fresh water streams or at their mouths. The State only allowed fishing for steelhead by hook and line. In *Puyallup I*, 391 U.S. 392 (1968) this court recognized that net fishing by the Puyallup Indians was covered by their treaty. 391 U.S. 398-399. In *Puyallup II*, this Court recognized that the ban on all net fishing in the Puyallup River for steelhead had the effect of granting the entire run to the sports fisherman. This Court stated: "There is discrimination here because

all Indian net fishing is barred and only hook and line fishing, entirely preempted by non-Indians, is allowed." 94 S. Ct. 330, 333.

In *Puyallup II*, this Court also recognized, however, that net fishing by treaty Indians could preempt the resource. Thus, as of *Puyallup II*, this Court recognized that the ban on net fishing allowed the non-Indians to preempt the resource, whereas the allowance of a net fishery could result in the preemption of the non-Indian fishery. There was, therefore, irreconcilable rights which had to be accommodated in order to allow both parties to fish with the gear they saw fit while at the same time preserving the resource. In this regard, the Court suggested an allocation formula.

In *Puyallup III*, 433 U.S. 165 (1977), the case was back on appeal to this Court at the behest of the tribe supported by the United States. In *Puyallup III*, the tribe asserted an exclusive right to the fish in the Puyallup River. In rejecting this argument, the court first held that the right to fish was not an exclusive one. More importantly, however, this court held that if Puyallup Treaty fishermen were allowed untrammeled, on-reservation fishing rights, they could preempt the resource completely.

> In this manner the treaty fishermen could totally frustrate the jurisdiction of Washington Courts and the rights of the non-Indian citizens of Washington recognized in the Treaty of Medicine Creek.

433 U.S. 176.

The Court then upheld the allocation formula promulgated by the Superior Court and affirmed by the Washington Supreme Court.

The conclusion to be drawn from the three Puyallup cases is clear. Where treaty rights and the rights of non-treaty citizens are in conflict, the exercise of either right of which would completely preempt the resource so as to deny the other party its availability, nondiscriminatory treatment of either party requires that each be allocated a share of the resource. In this limited circumstance, allocation is a *remedy* to necessarily accommodate the rights of Indians under the treaty and the rights of other people, *Puyallup II*, 94 S. Ct. 333. But, the allocation itself springs not from either the treaty fishermen or the non-treaty fishermen having, as a matter of law, proprietary interest in the fish,[23] but rather from a recognition that they each have an equal opportunity to catch the fish without that opportunity being preempted by the other.

The situation described in the three Puyallup cases contrasts markedly from that present in the appeals now before the Court. Prior to the District Court's ruling in *United States v. Washington*, both treaty fishermen and non-treaty fishermen had an equal opportunity to fish and neither party preempted the other from the resource. Unlike the Puyallup case, therefore, there was no denial of the resource which could even remotely compel the District Court, in the exercise of its "discretion", to create such a drastic remedy.

Even though the Ninth Circuit held the allocation by

23. The effect of the District Court's ruling on the "in common" issue has created a proprietary interest in the fish by both treaty and non-treaty fishermen. This Court has consistently rejected any assertion of a property interest in fish or game. cf. *Missouri v. Holland*, 252 U.S. 416, 434 (1920). In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) this Court found such an assertion no defense to an Equal Protection claim. *Takahashi* is indistinguishable from the effect of the District Court's rulings in *United States v. Washington* and the State's attempts to comply with it here.

the District Court to be an exercise in discretion, that exercise of discretion in fashioning a remedy must be consistent with the alleged abuse *sought* to be remedied.[24] Where Indians and non-Indians have the right to participate in the fishery for Salmon on a nondiscriminatory basis, with neither group preempting the other's exercise of its rights, there is nothing upon which the District Court could exercise its discretion.

Even a relative inequality in the capacity of Indian and non-Indian fishermen to capture the fishery resource would not be justification for a district court to order the drastic remedy it did in *United States v. Washington*. This was made clear in *San Antonio Independent School District v. Rodriques*, 411 U.S. 1 (1973), wherein this Court, in denying an equal protection challenge to the Texas system of financing its public schools, found, at best, only a relative deprivation of educational opportunity as a result of the school funding system. Only where a defined class has sustained an absolute deprivation of a meaningful opportunity to enjoy a particular benefit would the equal protection of the laws be denied. 411 U.S. at 20.[25] The reasoning of this Court in *Rodriques* is applicable in the present case. It is consistent with this court's analysis of the three Puyallup cases.

24. "The scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974). *See also, Puyallup III*, 433 U.S. 165, 177 n. 18.

25. "Whatever merit appellees' argument might have if a State's financing system occasion an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 411 U.S. 1, at 36-37.

C. The District Court's Assumption of Management Authority Over the Salmon Fishery and Its Ordering State Agencies To Perform Activities Not Authorized By State Statute Is Unlawful

1. *Introduction*

From the innocuous appearing determination of the District Court in *United States v. Washington* that the treaty tribes had a right to fifty percent plus of the harvestable salmon, the District Court embarked on an unprecedented course, arrogating complete power over the fishery resource in Washington waters and promulgating, as if it was a legislature, rules and regulations for the management of the Washington fishery resource. In so doing, the court created the concept of self-regulating tribes: entities that could fish at all places beyond the reach of the State's governmental powers. The court also prohibited the State of Washington from exercising its inherent police powers with respect to all off-reservation Indian fishing, while at the same time requiring the State to promulgate regulations restricting and limiting non-treaty fishermen from participating in the resource for purposes other than conservation.

In usurping the State's police powers and embarking upon management of the fishery resource, the court completely misapprehended the limited nature of tribal sovereignty on the one hand, and the inherent police powers of a State on the other. The result was that the District Court turned the Constitution on its head, creating autonomous states among the Indian tribes and emasculating the sovereignty of the State of Washington.

2. *The State of Washington Is Not Preempted From Exercising Its Police Powers Over Off-Reservation Fishing*

The asserted basis of the District Court and the Court of Appeals in prohibiting the State of Washington from regulating, for conservation purposes, the off-reservation activities of the treaty Indians was that the treaties themselves preempted the field of regulation by the State.

In light of the many cases that have come before this Court and in which this Court has held that the states have the ability to regulate off-reservation treaty authorized fishing by Indians,[26] it is difficult to perceive how the two lower courts could hold that the State regulatory power has been preempted. Even from a more contemporary perspective, the "quasi-sovereign" status of the Indian tribes is not such as would be consistent with their ability to determine their own external relations. *United States v. Wheeler,* .... U.S. ...., 98 S. Ct. 1079-1088 (1978).

Federal regulation is not the *sine qua non* of complete preemption.

> Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject permits no other conclusion, or that Congress has unmistakeably so ordained.

DeCanas v. Bica, 424 U.S. 351, 361 (1976), Quoting *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963).

Federal regulation preempts state power either where it

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26. *United States v. Winans,* 198 U.S. 371 (1905); *New York ex rel. Kennedy v. Becker,* 241 U.S. 556 (1916); *Tulee v. Washington,* 315 U.S. 681 (1942); *Puyallup Tribes v. Department of Game,* 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe,* 414 U.S. 44 (1973); *Department of Game v. Puyallup Tribe,* 433 U.S. 165 (1977).

occupies the field, or federal and state regulations are in conflict. The "in common" with provision in the treaties as off-reservation fishing rights belies any notion of occupation of the field. Similarly, the limitations on tribal sovereignty so as to allow tribes independently to determine their external relations belies any conflict with the underlying state's police power to conserve the resource through regulation.[27]

The absence of any authority upon which to ground preemption of the state's inherent police powers to regulate the fishery for conservation purposes repudiates the District Court's arrogation of power over the resource and likewise repudiates the District Court's creation of self- regulating tribes to the status of autonomous states on par with the State of Washington. This cannot be countenanced.[28]

3. *The Concept of Federalism Is Opposed to the District Court's Usurption of Power*

Although the supremacy of the central government has long been accepted,[29] it would be unwise to assume that the

27. The District Court's notion of preemption and the ascendance of the self-regulating tribes in an area otherwise within the state's police power, appears to be an attempt to resurrect the "federal instrumentality" doctrine long since repudiated by this court. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 at 150. The additional apparent reliance by the District Court on the "quasi-sovereign" status of Indian tribes as a basis for preemption was similarly cut to the bone in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

28. "Indian tribes are proscribed from exercising both those powers of autonomous states . . ." *Oliphant v. Suquamish Tribe, supra*, 435 U.S. . . ., 55 L. Ed. 2d at 221; Indians being within the geographical limits of the United States are under the political control of either the government of the United States or of the State. They may have limited legislative functions consistent with their dependent status, but they exist in subordination to either the United States or the States of the Union. *United States v. Kagama*, 118 U.S. 375, 379 (1886).

29. See *McCulloch v. Maryland*, 4 Wheat 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816).

Constitution does not suppose the existence of states as independent entities. This supposition is most clearly expressed in the language of the Tenth Amendment.[30]

As Professor Tribe has noted:

> Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions of the Constitution as a whole.

Tribe, *American Constitutional Law*, p. 301 (1978).[31]

This Court has recently recognized the underlying importance of the federalism concept:

> That is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. This, perhaps, for lack of a better and clearer way to describe it, is referred to by many as 'our federalism" and one familiar with the profound debates that ushered our Constitution into existence is bound to respect those who remain loyal to the ideas and ideals and dreams of our federalism. The concept does not mean blind deference to states' rights any more than it means centralization of control over every important issue in our national government and its courts. The framers repected both these courses.

30. "The (Tenth) Amendment expressly declares the constitutional policy that Congress may not exercise in a fashion that impairs the states' integrity, or their ability to funtion effectively in the federal system . . ." *Fry v. United States*, 421 U.S. 542, 547, n. (1975).

31. *Texas v. White*, 74 U.S. (7 Wall.) 700 725 (1869): "The Constitution, in all its provisions, looks to an indestructable union, composed of indestructable states."; *The Federalist*, No. 46 at 330 (J. Madison), (B. Wright ed., 1951).

> What the concept does represent is a system in which there is a sensitivity to the interests of both the state and national governments and in which the national government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interefere with the legitimate activities of the states. It should be forgotten that the slogan 'our federalism' born in the early struggling days of our union of states, occupied a highly important place in our nation's history and its future. . .

Younger v. Harris, 401 U.S. 37 (1971).

Of course, the Association is not advocating a return to the days of unqualified "states' rights", a concept that reached its nadir at a time when the preservation of an "indestructable union" was at its ebb. Nonetheless, it is believed that the proper balance between the central and state governments has been lost in the present case by the actions of the District Court in pursuing its own notion of the supremacy clause, particularly in light of the District Court's own doubt concerning the nature and extent of this Court's holding on Indian treaty rights vis a vis the reach of the state's police power.

By advocating "federalism", the Association is not attempting a talismatic approach to the resolution of the very complex issues presented in these consolidated cases. Nonetheless, this Court has recognized that notwithstanding the apparent reach of the central government's powers under the Constitution, there are limits upon the exercise of federal power independent of the express limitations of the Constitution and inherent in the necessity of recognizing the separate and independent existence of the states.[32]

32. *See e.g., National League of Cities v. Usery*, 426 U.S. 823 (1976); Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in National League of Cities v. Usery*, 86 Yale Law Journal, 1165 (1977).

It would also seem to follow as a subsidiary element of federalism that it is beyond the ken of the federal government to usurp or direct the legislative process of the state government,[33] particularly where this Court has, on numerous occasions, assumed the existence of the state's regulatory power for conservation purposes over off-reservation fishing by treaty Indians.[34]

In pursuing its own notions of the supremacy clause in connection with its own view as to the power of the judiciary to effect remedial measures, the District Court has effected a curious meld of the legislative and judicial function.[35]

This melding of the legislative and judicial function in the context of fishery resource management within the jurisdictional boundaries of the State of Washington has become even more pervasive given the conscription of the State's resources to aid the District Court in implementa-

33. cf. *Maryland v. EPA*, 530 F.2d 215, 224-28 (4th Cir. 1975), *vacated and remanded per curiam sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971, 990-94 (D.C. Cir. 1975), *vacated and remanded per curiam sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Brown v. EPA*, 421 F.2d 827, 837-42 (9th Cir. 1975), *vacated and remanded per curiam*, 431 U.S. 99 (1977).

34. "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the nation and of the state in which they reside. It is quite another to uphold the similar exercise of congressional authority directed, not to private citizens, but to the states as states." *National League of Cities v. Usery*, 426 U.S. at 845.

35. "The Judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them . . . the judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society. . ." *The Federalist*, No. 78 at 522-23 (A. Hamilton) (J. Cooke Ed. 1961); "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." *The Federalist*, No. 47 at 324 (J. Madison) (J. Cooke Ed. 1961).

tion of its directives. The decisions of this Court and the overriding requirements of federalism clearly prohibit the invocation by the District Court of its equitable jurisdiction as a means of transforming the state into a federal puppet.[36]

CONCLUSION

In Petition 77-983, the Supreme Court of the State of Washington has held that the creation of a special Indian fishery and the granting of a proprietary interest in the salmon to treaty Indians by the federal district court, violated the equal protection clause of the Fourteenth Amendment.

An analysis of the nature of treaties and the "quasi-sovereign" status of Indian tribes, juxtaposed with the indisputable sovereignty of the individaul states, refutes the underlying rationale of the district court in promulgating a division of a resource previously available to all on a non-discriminatory basis. The analysis similarly refutes the creation by the district court of self-regulating tribes free to exercise their court-defined treaty rights apart from all state regulation predicated on conservation.

While the Association does not necessarily agree with the state court that the touchstone of the denial of equal protection is based upon race or ancestry, it does believe that one of the undeniable predicates of the transgression of the Equal Protection Clause is the placement of the burdens of both propagation and conservation of the resource on only one segment of the population. At the same time, that segment of the population being burdened with the responsibilities of propagation and con-

36. *See e.g., Nagel, Separation of Powers and the Scope of Federal Equitable Remedies*, 30 Stanford Law Review, 661 (1978).

servation has, through judicial fiat, suffered a disentitlement, indefensible, both as a matter of law and of equity.

The Association believes that as a matter of equity, the allocation of a resource is defensible for purposes of providing treaty Indians with a share of the resource for subsistence and religious and ceremonial purposes, purposes which otherwise might be preempted by both Indian and non-Indian commercial fishing. Relating the scope of any remedy to the scope of any alleged violation, however, cannot, in light of the off-reservation fishing rights of both Indians and non-Indians, sanction judicial usurpation of the state's inherent management powers of the resource, nor the creation of a proprietary interest in the resource between treaty and non-treaty fishermen.

DATED this 18th day of December, 1978.

Respectfully submitted,

THOM, NAVONI, HOFF, PIERSON & RYDER
Richard W. Pierson
Dale L. Kingman
Counsel for Washington State Passenger Fishing Vessel Association

FOR ARGUMENT

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IN THE
Supreme Court of the United States
October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents,

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT INDIAN TRIBES

208 Pioneer Building
600 First Avenue
Seattle, WA 98104
(206) 623-1255

ZIONTZ, PIRTLE, MORISSET, ERNSTOFF & CHESTNUT
Mason D. Morisset, Steven S. Anderson
Counsel for Lummi, Makah, Tulalip, and Quileute Tribes

520 Smith Tower
Seattle, WA 98104
(206) 464-5888

EVERGREEN LEGAL SERVICES
Thomas P. Schlosser, Alan C. Stay
Counsel for Certain Intervenor Tribes

1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

NATIVE AMERICAN RIGHTS FUND
Robert Pelcyger
Counsel for Certain Intervenor Tribes

Office of the Reservation
Attorney—2616 Kwina Rd.
Bellingham, WA 98225
(206) 734-8180

Daniel A. Raas
Counsel for Lummi Tribe

Georgetown U. Law Center
600 New Jersey Ave. N.W.
Washington, D.C. 20006
(202) 624-8328

William H. Rogers, Jr.
Counsel for Puyallup Tribe

Of Counsel:

Jane Cantor
P.O. Box 146
Kingston, WA 98346
(206) 297-3422

John Clinebell
2215 E. 32nd Street
Tacoma, WA 98404
(206) 572-6376

Joanne E. Foster
P.O. Box 1118
Taholah, WA 98587
(206) 276-8211

Moshe Genauer
208 Pioneer Building, 600 First Avenue
Seattle, WA 98104
(206) 623-1255

Alexandra Harmon
520 Smith Tower
Seattle, WA 98104
(206) 464-5888

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Garrigan v. United States, 163 F. 16 (7th Cir. 1908), *cert. denied*, 214 U.S. 514 (1909) 199

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Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1946) 209, 210

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Havner v. Hegnes, 269 F. 537 (8th Cir. 1920) 200

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Hinderlider v. La Plata Co., 304 U.S. 92 (1938) 190

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Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973) 81, 82, 83

Hutto v. Finney, ___ U.S. ___, 98 S. Ct. 2565 (1978) 77, 183

In re Curtis' Petition, 240 F. Supp. 475 (E.D. Mo. 1965) *aff'd*, 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967) 198

In re Debs, 158 U.S. 564 (1895) 199

In re Portland Electric Power Co., 97 F. Supp. 903 (D. Or, 1947) 200

Jackson County Board of Commissioners v. United States, 308 U.S. 343 (1939) 213

Jensen v. National Marine Fisheries Services, 512 F.2d 1189 (9th Cir. 1975) 252

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) 251

Jones v. Meinan, 175 U.S. 1 (1899) 115, 116-117

Journeycake v. Cherokee Nation, 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196 (1894) 163

Kansas v. Colorado, 206 U.S. 230 (1907) 187

Kasper v. Brittain, 245 F.2d 92 (6th Cir. 1957), *cert. denied*, 335 U.S. 834 (1957) 198

Lamb v. Cramer, 385 U.S. 217 (1932) 200

Leach Lake Area Citizens Committee v. Leach Lake Band of Chippewas, 486 F.2d 888 (8th Cir. 1973).. 195

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Lee v. Macon County Board of Education, 267 F. Supp. 458 (D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967) 212

Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975) 217

Lord v. Veazie, 49 U.S. (8 How.) 251 (1850) 215

Lucy v. Adams, 224 F. Supp. 79 (N.D. Ala. 1963), *aff'd sub nom. McCorvey v. Lucy*, 328 F.2d 892 (5th Cir. 1964) 198

Ma Chuck Moon v. Dulles, 237 F.2d 241 (9th Cir. 1956), *cert. denied*, 352 U.S. 1002 (1957) 80

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McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1974) 118, 122, 152, 161, 162, 246

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Milliken v. Bradley, 433 U.S. 267 (1977) ..77, 181, 182, 185

Mims v. Duvall County School Board, 338 F. Supp. 1208 (M.D. Fla. 1971) 199

Minerich v. United States, 29 F.2d 565 (6th Cir. 1929), *cert. denied*, 279 U.S. 843 (1929) 198-199

Minnesota v. Forge, 262 N.W.2d 341, *dismissed*, 435 U.S. 919 (1978) 247

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Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942)	163
Montgomery County Board of Education v. Shelton, 327 F. Supp. 811 (N.D. Miss. 1971)	199
Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971)	215
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National Indian Youth Council v. Bruce, 485 F.2d 97 (10th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974)	252
National Labor Relations Board v. Sunshine Mining Co., 125 F.2d 757 (9th Cir. 1942)	198
Nebraska v. Wyoming, 295 U.S. 40 (1935)	190
Newburg Area Council, Inc. v. Board of Education, Nos. 7045 and 7291 (W.D. Ky. 1975)	198
New Jersey v. New York, 345 U.S. 369 (1953)	78, 91
New York v. New Jersey, 256 U.S. 296 (1921)	187
New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916)	176
North Carolina Board of Education v. Swann, 402 U.S. 43 (1971)	211-212
Oliphant v. Suquamish Indian Tribe, 435 U.S. 91 (1978)	119, 120, 121

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Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	187
People of Saipan v. United States Department of the Interior, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975)	252
Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 71 (1968)	212
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Puyallup Tribe v. Department of Game (Puyallup III), 433 U.S. 165 (1977)	7, 52, 94, 98, 99, 109, *et seq.*
Reece v. Georgia, 350 U.S. 85 (1955)	83
Regal Knitwear v. N.L.R.B., 324 U.S. 9 (1945)	194
Rivera v. Lawton, 35 F.2d 823 (1st Cir. 1929)	200
Rizzo v. Goode, 423 U.S. 362 (1976)	185
Robertson v. General Electric Co., 32 F.2d 495 (4th Cir.), *cert. denied*, 280 U.S. 571 (1929)	252
Russell v. United States, 86 F.2d 389 (8th Cir. 1936)	198
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State ex rel. O'Connell v. Dubuque, 68 Wn.2d 553, 413 P.2d 972 (1966) 216

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Turner v. United States, 248 U.S. 354 (1919) 216

United States v. Alaska Packers Ass'n, 79 F. 152 (W.D. Wash. 1897) 28

United States v. Antelope, 430 U.S. 641 (1977) 246

United States v. Barnett, 376 U.S. 681 (1964) 199

United States v. Carver, 260 U.S. 482 (1923) 81

United States v. Crookshanks, No. CR-77-168 (D. Or. 1977) 199

United States v. Dean Rubber Mfg. Co., 71 F. Supp. 96 (W.D. Mo. 1946) 200

United States v. DeSoto Parish School Bd., 574 F.2d 804 (5th Cir. 1798), *cert. pending* No. 78-458 184

United States ex rel. Johnston Co. v. County Court of Clark County, 95 U.S. (5 Otto.) 769 (1878) 185

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United States v. Wheeler, 435 U.S. 313 (1978).....162, 177

United States v. Winans, 198 U.S. 371 (1905).....6, 28, 31, 32, 75, 94, *et seq.*

Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 253 F.2d 29 (2d Cir. 1958)..... 80

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Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).....114, 115, 140, 141

Wright v. County School Board, 309 F. Supp. 671 (E.D. Va. 1970), *rev'd other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972)..... 185

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Z and F Assets v. Hall, 114 F.2d 464 (D.C.Cir. 1940), *aff'd* 311 U.S. 470 (1941) 252

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U.S. Const. art. II, §2 246

U.S. Const. art. VI 207

U.S. Const. amend. V 245

U.S. Const. amend. X 184

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4 Stat. 730 (1934) codified as 25 U.S.C. §177	15
9 Stat. 323 (Act of August 14, 1848)	15, 128
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43 Stat. 253 (Act of June 2, 1924)	31
61 Stat. 512, 16 U.S.C. §766 *et seq.* (Sockeye Salmon Act)	233
84 Stat. 2090	234
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16 U.S.C.A. §§776c, 776d	233, 234
25 U.S.C. §§2, 9	239
25 U.S.C. §177 (4 Stat. 730)	163, 251
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28 U.S.C. §1651	186, 197
28 U.S.C. §2201	79
28 U.S.C. §2202	79
42 U.S.C. §3121, *et seq.*	222
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Wash. Sess. Laws, Ch. IX (1893)	29
Wash. Sess. Laws, Ch. 31, §72 (1915)	29
Wash. Laws, Ex. Sess. 178 (1925)	39
Wash. Sess. Laws, Ch. 112, §31 (1949)	41

Other Authority

J. Q. Adams, *The Fisheries and the Mississippi,* 184 (1822)	144
American Friends Service Committee, *Uncommon Controversy* 200 (1970)	47
2 American Law of Property §6.5	147, 167
5 Am. State Papers (For. Rel.) 528-29	144
J. Angell, *A Treatise On Water Courses* (6th ed. 1869)	139
Annual Bulletin, Wash. Dept. of Fisheries, No. 40 (Dec. 1940)	38
R. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique,* 13 (University of Washington, monograph series, 1977)	27, 31, 36, 37, 40, 46
Black's Law Dictionary (Revised 4th ed. 1968)	108
2 W. Blackstone, Commentaries §34 (14th ed. 1803)	137
E. Bochard, *Declaratory Judgments,* 10-11 (2d Ed. 1941)	80
Buchanan, *Rights of Puget Sound Indians to Game Fish,* VI Wash. Hist. Quart. 109 (April, 1915)	33
Christy, *The Fishery Conservation and Management Acts of 1976,* 52 Wash. L. Rev. 657 (1977)	31
F. Cohen, *Federal Indian Law,* 750 (1966)	164
"Columbia River Salmon and Steelhead—Proceedings of a Symposium" March 5-6, 1976, Ernest Schwiebert, ed., special publication #10, Am. Fisheries Society, Washington, D.C., 1977, Lib. of Cong. Catalogue No. 77-88465	225, 227
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28-29 *Commissioner's Report* (1917-1919)	36, 40
30-31 *Commissioner's Report* (1919-1921)	36
3 *Corbin on Contracts*, §554 (1960)	113
Crocker, *Usefulness of the Optimum Yield Concept*, American Fisheries Society, Special Publication No. 9 (1975)	31
Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317 (1978)	88
Developments in the Law – Res Judicata, 65 Harv. L. Rev. 818 (1952)	80, 88
Dictionary of the Chinook Jargon	17
W. B. Edwards, A Compendium of the Law of Property In Land and of Conveyancing Relating to Such Property, 231 (5th ed. 1922)	139
2 H. Farnham, *Waters and Water Rights*, 379 (1904)	137, 138
42 Fed. Reg. 30841	239
42 Fed. Reg. 31450	239
Fed. R. Civ. P. 19(b)	217, 218
Fed. R. Civ. P. 60(b)	91, 92
Fed. R. Civ. P. 65(d)	194
First Commissioner's Report (1890)	29
Fisheries Advisory Board Report, Nov. 17, 1976	65
Fox Island Council Proceedings, Executive Order of January 20, 1857, Executive Order File 1850-92, Records of Bureau of Indian Affairs, Record Group 75, National Archives, Washington, D.C.	21, 134
Franklin's Work (Sparks ed.)	146
J. Gould, *On A Treatise On the Laws of Waters*, (3d ed. 1900)	137, 138, 139, 140
Hearings on S.J. Res. 170 and S.J. Res. 171, Sub. Comm. on Indian Affairs of the Senate Com. on Interior and Insular Affairs, 88 Cong., 2d Sess. 50-61; 76-84; 100, 104	43

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H. Ex. Doc. No. 84, 46th Cong., 2d Sess. 1881	145
39 Ind. Cl. Comm. 88	23
40 Ind. Cl. Comm. 131	23
F. James, Jr., Civil Procedure, §11.1 (1965)	88
3 J. Kent, *Commentaries on American Law*, Part VI (5th ed. 1844)	137, 138, 139, 141, 142, 161, *et seq.*
1 C. Kinney, A Treatise on the Law of Irrigation and Water Rights (2d ed. 1912)	138
B. Lane, *Political and Economic Aspects of White-Indian Culture Contact in Western Washington in the Mid-19th Century*	10
Larkin, *An Epitaph For The Concept of Maximum Sustained Yield*, 106 Transactions of the American Fisheries Society (1977)	31
1A Pt. 2 Moore's Federal Practice ¶0.214 (1978)	199
1B Moore's Federal Practice ¶0.404(1) (1947)	82
1B Moore's Federal Practice ¶0.405	88
1B Moore's Federal Practice ¶0.405(11) (1974)	87
S.A. Moore, *The History and Law of Fisheries*, 34-36 (1903)	136, 137
J. Mundt, *Report to the Regional Task Force Concerning Catch, Licensing, Gear Reduction and Allowable Fishing Time History for Washington Salmon Fisheries*, 1965-77 (1978)	46
Ninth Annual Report of the Washington State Fish Commissioner (1898)	28
Office of Program Research, House of Representatives, *The Legal Relationship Between Washington State and Its Reservation Based Indian Tribes* (Olympia, Washington 1977)	229
R. Rathburn, "A Review of the Fisheries in the Contiguous Waters of the State of Washington and British Columbia", Part XXV of *Report of the Commissioner*, U.S. Comm. of Fish and Fisheries, Year Ending 1899	28

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Regional Team of Federal Task Force on Washington State Fisheries, *Settlement Plan for Washington State Salmon and Steelhead Fisheries* (June 1978) 59, 223, 232

40-41 Report of the Washington State Department of Fisheries (1929-31) 30

Restatement, Contracts §235(c) (1932) 107

Restatement (Second) Contracts §228(2) 107

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Restatement (Second) Judgments §76 80

Restatement (Second) Foreign Relation Law of the United States §141 (1965) 251

Restatement (Second) Law §101 (1959) 165

Restatement (Second) Law §115 (1965) 165

E. Root, *North Atlantic Fisheries Arbitration*, 126 (1917) 166

S. Doc. No. 870, 61st Cong., 2d Sess., Vol. 8 ..... 147-148, 149

E. Salo and W. Bayliff, *Artificial and Natural Production of Silver Salmon, Onchorhynchus kisutch, at Minter Creek*, Wash. Dept. of Fisheries Research Bulletin No. 4 (1958) 28

Seattle Post-Intelligencer, Nov. 21, 1978 110

State R. Civ. P. 19(b) 217, 218

State of Wash., *1973 Annual Report, Natural Resources and Recreational Agencies* 20 37

State of Washington, Department of Fisheries, *A Catalogue of Washington, Streams and Salmon Utilization, Vol. I, Puget Sound Introduction* -01 (1975) 37

R. Stern and Gressman, Supreme Court Practice (5th ed. 1978) 81, 89

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Third Commissioner's Report (1892) 29

3 H. Tiffany, Real Property (3d ed. 1939) 139, 147, 167

8 U.S.T. 1057 ..... 233, 239

Vestal, *Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 Mich. L. Rev. 1723 (1968) 88

Wash. Department of Fisheries News Release 78/074, Apr. 26, 1978 104

Wash. Dept. of Fisheries, *1977 Puget Sound Summer-Fall Chinook Methodology: Escapement and Goals, Run Size Forecast, and In-Season Run Size Updates*, Technical Report 29 (1977) 227

Wash. Dept. Fisheries, *Technical Report* 40 (1978) 55, 173, 175

R. Whitebrook, *Coastal Exploration of Washington* 56-61 (1959) 14

3 *Wharton, International Law Digest* (1886) 146, 147, 149

4 Williston on Contracts §601 113

§602 114

§616 113

H. W. Woolrych, A Treatist of the Law of Rights of Common, (2d ed. 1850) 139

Wright and Miller, *Federal Practice and Procedure* §1909 (1972) 195

Wright, *Law of Federal Courts*, §13 (3d ed. 1976) 215

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents,

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT INDIAN TRIBES

OPINIONS BELOW

By order dated November 13, 1978, the Court consolidated three cases involving related decisions of the Supreme Court of the State of Washington, the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington. In No. 77-983, the State of Washington seeks review of the decisions of the Washington Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association* and *Washington v. Puget Sound Gillnetters Association*. In No. 78-119, the

State of Washington challenges the decision of the Ninth Circuit in the consolidated cases of *Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington* and *United States v. Washington*, and also challenges the separate decision of the court of appeals in *United States v. Washington* (the "International Fishery case"). In No. 78-139, the Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association seek review of the decision of the Court of Appeals in the Washington Fishery case, *supra*, and also seek review, pursuant to Rule 20 of the Rules of this Court, of the decision entered by the District Court on June 6, 1978, in *United States v. Washington*, Civ. No. 9213 (W.D. Wash).

Respondent Indian Tribes submit this single brief in all three cases.*

JURISDICTION

Respondent Indian Tribes concur in the Jurisdiction section contained in the Brief for the United States.

QUESTIONS PRESENTED

1. Whether the doctrine of *res judicata* bars the State of Washington and its non-treaty fishermen from relitigating in this Court issues previously determined in *United States*

*This brief is filed specifically on behalf of the Jamestown Clallam, Lower Elwa Clallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble Klallam, Puyallup, Quileute, Quinault Samish, Sauk-Suiattle, Skokomish, Snohomish, Snoqualmie, Squaxin Island, Steilacoom, Stillaguamish, Suquamish, Swinomish, Tulalip, and Upper Skagit Tribes. The Hoh Tribe is currently represented by the United States. The Quinault and Yakima Tribes are each filing separate briefs.

v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

2. If relitigation of the underlying issues is not barred by *res judicata*, whether treaties reserved to Indian tribes in the State of Washington an opportunity to take up to one-half of the harvestable numbers of any run of fish that normally would pass through the tribes' usual and accustomed off-reservation fishing places.

3. Whether, in light of the State of Washington's failure to adopt regulations permitting Indian fishermen their opportunity to fish, the District Court properly exercised its discretion by allocating the salmon harvesting opportunity for the 1977-1978 fishing season in accordance with the court's prior decisions.

4. Whether, in light of the State of Washington's unwillingness and inability to prevent its non-treaty fishermen from encroaching on the fishing rights of treaty Indians and, in light of substantial illegal fishing by such fishermen, the District Court properly enjoined state-licensed non-treaty fishermen from harvesting salmon in excess of their allocated opportunity.

5. Whether the State of Washington must manage and regulate its fisheries in compliance with federal court orders which implement federally-guaranteed treaty fishing rights, notwithstanding state statutes which allegedly bar implementation of such rights.

6. Whether the Court of Appeals correctly concluded that the matters at issue in the International Fishery case are now moot.

TREATIES INVOLVED

The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (12 Stat. 927):

> ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows . . .
>
> ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of lands, . . . All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; . . .
>
> ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing. . . .*

NOTE ON CITATION FORM

Materials in the Joint Appendix are cited as Joint App. Materials in appendices to the petitions for certiorari are cited as App....., Petition in No..... The clerk's pleadings are not contained in a single, consecutively paginated record. Citations herein to pre-trial pleadings and 1973 trial transcripts are referred to as Record in 9th Circuit Cause No. 74-2414. All post-trial transcripts are referred to by

*The full text of the treaty is set out in the appendix to this brief.

date alone. Pleadings, particularly those related to the "International Fishery" case are referred to as Record in 9th Circuit Cause No. 76-1042. Six volumes of clerk's pleadings, between September 1974 and December 1977, are contained in Record in 9th Circuit Cause No. 77-3654. Other District Court pleadings are referred to by District Court Docket Numbers alone, since the record was not available when this brief was filed. E.g. Docket No.....

The tribes will refer to the Petitioner State of Washington's Brief as State Br.; the Brief for Petitioners Puget Sound Gillnetters Association, Purse Seine Vessel Owners Association, et al. is referred to as Associations' or Gillnetters' Br.

STATEMENT OF THE CASE

INTRODUCTION

On January 31, 1855, at the close of the treaty negotiations, Issac Stevens, Governor of the Territory of Washington, met with the chiefs and headmen of the Makah Tribe at Neah Bay. The signing ceremony is recorded as follows:

> Tse-Kaw-Wootl (a chief of the Makahs) brought up a white flag and presented it saying, 'look at this flag, see if there are any spots on it. There are none, and there are none on our hearts.'
>
> Kalchote (another chief) presented another flag. 'What you have said was good, and what you have written is good.'
>
> The Indians gave three cheers or shouts as each concluded. The Governor then signed the treaty, and was followed by the Indian chiefs and principal men.

Ex. PL-16b at 4-5.

In similar scenes repeated throughout Western Washington, the Indian tribes and bands ceded title to vast areas of land and reserved for themselves in turn certain rights, including "the right of taking fish at usual and accustomed places in common with the citizens of the Territory." The presentation of white flags symbolized to the tribes their feeling that the United States had dealt fairly with them and that their right to fish, the nucleus of their culture, had been preserved.

The actual realization of that guarantee, however, has proved to be difficult.

These appeals, brought by the State of Washington and several associations of non-treaty fishermen and fishing interests, challenge the implementation by the federal court of its final declaratory judgment regarding Indian treaty fishing rights in the State of Washington, *United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975); *cert. denied,* 423 U.S. 1086 (1976), *rehearing denied,* 424 U.S. 978 (1976). They represent the culmination of an effort by the State and various citizens spanning seven decades of this century to prevent tribes from exercising certain treaty rights guaranteed to them by six treaties executed with the United States in 1855. Various aspects of this controversy have been before this Court on numerous occasions. *See United States v. Winans,* 198 U.S. 371 (1905); *Tulee v. Washington,* 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game* (*Puyallup I*), 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe* (*Puyallup II*), 414 U.S. 44

(1973); *Puyallup Tribe v. Department of Game* (*Puyallup III*), 433 U.S. 165 (1977). *See also Antoine v. Washington,* 420 U.S. 194 (1975).

In the proceedings below before the Ninth Circuit Court of Appeals, the State of Washington and two of the non-treaty fishing assocations jointly attacked the efforts of the District Court to implement its 1974 final judgment interpreting the treaties. The Court of Appeals confirmed its 1975 affirmance of the District Court's judgment and held that the judgment was not subject to collateral attack in these post-decision enforcement proceedings. *Puget Sound Gillnetters Association v. United States District Court,* 573 F.2d 1123 (9th Cir. 1978).

Puget Sound Gillnetters Association v. Moos, 88 Wn.2d 677, 565 P.2d 1151 (1977) and *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wn.2d 276, 571, P.2d 1373 (1977), No. 77-983, arose when several non-treaty fishing associations sued the State of Washington in state court and challenged the State's ability to implement treaty rights consistent with state law. They also argued that the District Court's determination of the meaning of the treaties was incorrect and should be reexamined. These efforts, basically uncontested by the State, resulted in two state Supreme Court decisions interpreting the treaties at variance with the federal judgments and holding that the State of Washington lacked power to give recognition to the treaty rights or comply with the federal court orders.

United States v. Washington, itself, was filed by the

United States, joined by a number of tribes, in 1970, to determine the scope and meaning of the off-reservation treaty rights reserved to the Washington tribes.

After a lengthy trial, the District Court entered its decision. The court, noting that the tribal usual and accustomed grounds were often located in terminal areas at the tail end of the salmon migration routes, found that the Indian fishing opportunity guaranteed by the treaties had been interfered with and in certain instances effectively preempted by state regulations.

In order to prevent State and non-treaty preemption of the treaty opportunity, and to "accommodate the rights of Indians under the Treaty and the rights of other people," consistent with this Court's requirement in *Puyallup II*, 414 U.S. 44, 49 (1973), the District Court decreed an allocation of fishing opportunity between the tribes and the non-treaty fishermen. The decision of the District Court reflects a comprehensive investigation into the anthropological and historical evidence regarding the role of fishing in the tribal economies and culture at the time of the treaties, the documentary and anthropological evidence regarding the negotiation of the treaties themselves and the understanding of the parties, (the tribes and the United States), the biological factors concerning the character of the resource and the management practices governing it, and the rules of law governing interpretation of Indian treaties. The Court concluded:

> The right secured by the treaties to the plaintiff tribes is a reserved right, which is linked to the marine and fresh water areas where the Indians fished during

> treaty times, and which exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.

Conclusion of Law 20, 384 F.Supp. at 401, Joint App. 195. In order to implement these principles, the court determined that the Indians were entitled to take 50% of the runs passing through their usual and accustomed fishing grounds.

Fundamentally, the State's brief represents an attack on the District Court's interpretation of the treaties, and on the factual underpinnings of the District Court's decision. It must be emphasized, however, that the District Court's decision was reached only after a comprehensive investigation of the facts and is strongly supported by expert testimony which the District Court found to be established by a preponderance of the evidence. The Ninth Circuit Court of Appeals affirmed these challenged findings of fact in 1975. A fair reading of the evidence establishes without doubt the depth of the District Court's scholarship and the methodical nature of its examination of the evidence. Unfortunately, in the briefs of the State and the Associations, even the actual findings of fact have been misstated. Since the original decision of the District Court is so largely grounded on the court's findings of fact concerning the circumstances surrounding the execution of the treaties, the understanding of the parties as to the meaning of the treaties, and the anthropological evidence

in general, it is critical that this Court be apprised of the actual facts as demonstrated by the extensive record in this case.

The District Court's thorough inquiry into these matters would not have been possible without expert testimony. The 253 annotated findings of fact and 48 conclusions of law reveal the court's extensive use of the testimony and reports of two anthropologists, Dr. Barbara Lane[1] and Dr. Carroll Riley. The anthropologists analyzed documents describing the setting and negotiation of the treaties at issue. Their testimony occupied five trial days consuming some nine hundred (900) pages of transcript in the record, in addition to written direct testimony. The court's decisions relied heavily on Dr. Lane's 534-page report[2], *Political and Economic Aspects of White-Indian Culture Contact in Western Washington in the Mid-19th Century*, Exhibits USA-20 to 30. The court stated:

> [T]he reports of Dr. Barbara Lane, Exhibits USA-20 to 30 and USA-53, have been exceptionally well researched and reported and are established by a preponderance of the evidence. *They are found to be authoritative and reliable summaries of relevant aspects of Indian life in the case area at and prior to the time of the treaties, including the treaty councils, Indian groups covered by the treaties, the purposes of the treaties and the Indians' understanding of treaty provisions. In these particulars, nothing in Dr. Lane's report and testimony was controverted by any credible evidence* in the case. Dr. Lane's opinions, inferences, and conclusions based upon the information stated in detail and well documented in her reports, appeared to the Court to be well taken, sound and reasonable.[3]

1. Dr. Lane's extensive qualifications are set forth in the appendix. Joint App. 351-53.

2. This report has been supplemented by additional anthropological reports covering additional Indian tribal intervenors, *see* Ex. USA-53, 72a, 73, 74, 75, 91, 92, 102, 103, 104 and 105.

Dr. Lane's ethnohistorical information is critical to an understanding of the treaties and is discussed in detail in Sections A and B below. The testimony of fisheries biologists and economists is discussed in Section C.

A. The Role of Fish in the Pre-Treaty Economy

It would be difficult to overemphasize the importance of anadromous fish to the large and complex native culture the eighteenth century European explorers discovered in the Pacific Northwest. The Indian population density was higher than almost anywhere else in native North America, north of Mexico[4]. The salient feature of the native economy was an abundance of anadromous fish which were available for harvest at predictable times and could be preserved for later use[5]. Although various cultural and political differences existed, a common cultural characteristic of all the Indian groups was the paramount dependence on the products of an aquatic environment, especially anadromous fish[6].

3. FF 2, 384 F. Supp. at 350, Joint App. 99 (emphasis added). The District Court noted that its evaluation of Dr. Lane's credibility was based upon the following factors:

> The anthropological reports and testimony of both Dr. Barbara Lane and Dr. Carroll Riley have been thoroughly studied and considered by the Court. In so doing, the Court has noted the nature, extent and duration of field work in the case area and academic research. During trial, constant observation was made of the attitude and demeanor of both witnesses while on the stand as witnesses, and the substance of their testimony has been carefully evaluated. Allowance for the criticism by defendants that some of Dr. Lane's conclusions are "over formulated" has been made in evaluating her testimony in every instance where the criticism might be applicable.

Id.

4. Ex. USA-20, Joint App. 363.

5. *Id.*

6. FF 3, 384 F. Supp. at 350, Joint App. 100.

Five species of Pacific salmon and the steelhead trout are indigenous to the Pacific Northwest. These anadromous fish are born in fresh water, spend their adult lives in the Pacific Ocean, then return to the precise location of their nativity to reproduce and die.[7] The Indians' lives in general were tied to this migratory cycle, and each tribe was tied to the distinct spawning units which invariably returned to its traditional tribal harvest areas.[8]

Anadromous fish were revered and respected by the tribes. Nearly all of the tribes performed a First Salmon Ceremony, designed to insure that the fish would perpetually return.[9] Other procedures insured that salmon were not wasted and that water pollution was not permitted. Refuse was never deposited in streams during the salmon season and the Skokomish even beached their canoes to bail them.[10] So central to the Indian culture were these fish that the Nisqually, for example, projected their preoccupation with fisheries in their perception of the stars. The constellation Orion was identified as three Indians catching small fish in schools. The Pleiades were described as a species of fish with large heads and small tails. The northern lights were viewed as schools of herring turning up the whites of their bellies.[11]

Fish were vital to the Indian diet. They were also a major element of Indian trade and economies.[12] Indian harvest and use of salmon and steelhead therefore re-

7. Steelhead can survive to spawn again.
8. *See* Ex. USA-20, Joint App. 367-68.
9. FF 6, 384 F. Supp. at 351, Joint App. 101; *See e.g.* Ex. USA-25, Joint App. 354-56.
10. Ex. USA-20, Joint App. 369.
11. Ex. USA-25, Joint App. 356-57.
12. FF 3, 384 F. Supp. at 350, Joint App. 100.

quired not only sophisticated fishing equipment, food preservation techniques and storage facilities, but also an exchange system.[13] Through trade, surplus fish could be converted into wealth. As Dr. Lane reported:

> Extensive trade was carried on among Indian groups in western Washington in order to acquire food stuffs, raw materials, and manufactured goods not available locally. The trade involved both basic necessities and luxuries of native life. The trade existed because different localities had different resources. The variation in local habitats is an important factor in understanding the native economy.[14]

Tribes in Eastern Washington traded across the mountains with tribes on Puget Sound.[15] The Makah Tribe, at the mouth of the Strait of Juan de Fuca, acted as middleman in the trade from the west coast of Vancouver Island down to the trading posts on the Columbia River. They traded ocean-going canoes, lumber, ceremonial masks, vermilion, slaves, blankets, and other items with tribes up and down the coast. They imported blankets, guns and kettles from the Europeans which they paid for with dried halibut, smoked salmon, processed oil and other items.[16]

For trade over long distances, the salmon were preserved by sun drying, wind drying, or smoking. The Indians also found markets for fresh fish among other tribal groups who desired fish of different runs (or fish from the same run caught in a different location), for variety in diet or for differences in keeping qualities.[17]

By treaty times the growing number of white settlers

13. Final Pre-Trial Order, docket No. 535, (hereinafter FPTO) §3-32, 3-33, Record in Cause No. 74-2414, R. 787-90.
14. Ex. USA-20, Joint App. 364.
15. George Gibbs, quoted in Ex. USA-20, Joint App. 370-71.
16. Ex. USA 21, Joint App. 399-404.
17. Ex. USA-20, Joint App. 367, 370.

created a substantial market for fish. Salmon were exported as well as traded for local consumption. All of these fish markets were supplied by tribal fisheries.[18]

The State of Washington incorrectly asserts that the volume of Indian trade in salmon was "inconsequential". State Brief at 28, citing FF 7 and 8.[19] In fact, the trade of salmon had wide geographic distribution and high volume. Indians captured millions of pounds of salmon annually.[20] Commerce in salmon was "the crux of the Indian economy in Western Washington.[21]

B. The Stevens' Treaties Protect Indian Fisheries

1. *The Europeans' Arrival Increased Demands for Indian-Caught Fish.*

In 1790, Manuel Quimper commanded the first European expedition to venture into and explore the inland salt waters of Western Washington. Vancouver, sailing for Great Britain, conducted further exploration of the Strait of Juan de Fuca and Puget Sound in 1792. Both Quimper and Vancouver reported trade with Indians for fish.[22]

By treaty with Spain in 1819, the United States began the process of extinguishing the claims of other sovereigns to the wealth of the Pacific Northwest. An agreement was reached with Russia in 1824, followed by a treaty with Great Britain in 1846 under which these nations essen-

18. FF 7, 384 F. Supp. at 351, Joint App. 102; Er. USA-20, Joint App. 371; Ex. MLQ-1 at 13.

19. The testimony cited in FF 7, 384 F. Supp. at 351-53, Joint App. 102 shows that the witness, in the absence of catch statistics for the times in question could not make a comparison and described the situation as therefore "not comparable" not "inconsequential." FF 8, *Id.* at 352, Joint App. 102-03, deals with then undeveloped *non* Indian fisheries.

20. Ex. MLQ-1, Joint App. 335.

21. Ex. JX-2a, Joint App. 341-42.

22. R. Whitebrook, *Coastal Exploration of Washington* 56-61 (1959).

tially quit-claimed the region to the United States. By United States law, the United States Government alone could obtain clear title from the Indian tribes,[23] and this the United States was anxious to do. The Federal Government, anticipating settlement of the area by white settlers, wished to avoid friction between Indians and settlers over use of property rights.

White settlers began to reach the Western Washington area by land in the 1840's. In 1848 the United States created the Oregon Territory, of which the Puget Sound country was a part.[24] The Territorial Act explicitly preserved "rights of person or property now pertaining to the Indians,"[25] and extended the application of the Northwest Ordinance provisions calling for "good faith" dealings with the Indians.[26] However, the influx of white settlers brought strong demands for prime agricultural lands. Congress and the Executive, therefore, authorized Isaac Stevens to negotiate treaties with the tribes in order to avoid hostilities and the possibility of a prolonged and distant war.[27] The Federal government hoped to thereby consolidate and protect the Indians on residential reservations, thus freeing land for settlement and enclosure by the white settlers.[28]

The treaty negotiators did not wish to interfere with Indian commercial fishing; to do so would have been

23. "No . . . conveyance of lands . . . from any Indian nation or tribe . . . shall be of any validity . . . unless . . . made by treaty . . . pursuant to the Constitution" 4 Stat. 730 (1934) codified as 25 U.S.C. §177.

24. Act of August 14, 1848, 9 Stat. 323.

25. FF 15, 384 F. Supp. at 353-4, Joint App. 106-7.

26. *See Id.*

27. Act of June 5, 1850, 9 Stat. 437.

28. Lane testimony, Joint App. 263-65; FF 19, 384 F. Supp. at 355, Joint App. 108.

highly inconvenient since Indian fishermen caught most of the fish used by the whites.[29] Early non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful so the settlers relied on Indians for fish.[30] In addition to their traditional trade with other Indian groups, the Puget Sound tribes supplied the growing market for fresh fish, and sold large quantities of salted salmon to the Hudson Bay Company for shipping to markets in New York, San Francisco, China, South America, Hawaii, and Great Britain.[31] As Dr. Lane reported:

> Available evidence suggests that Indian fishing increased in the pre-treaty decade for three major reasons: (1) to accommodate increased demands for local non-Indian consumption and for export; (2) to provide money for the purchase of introduced commodities like calico, flour, and molasses; and (3) to obtain substitute non-Indian goods for native products no longer available because of non-Indian movement into the area.[32]

Non-Indians did not engage in fishing as competitors on any scale until the late 1870s.[33] Instead the settlers concentrated on agriculture, mining and logging. Thus, for many reasons, by the time the Stevens treaties were negotiated, Indians were deeply engaged with non-Indians in commerce in fish.[34] When the United States asked the tribes to cede their land, therefore, the tribes asked for a guaranteed right to their fisheries.

29. FF 7, 384 F. Supp. at 351, Joint App. 102.
30. FF 8, 384 F. Supp. at 352, Joint App. 102-103; Ex. USA-20, Joint App. 371.
31. FF 8, 384 F. Supp. at 352, Joint App. 102-103; Ex. USA-20, Joint App. 371-72.
32. Ex. USA-20, Joint App. 372.
33. *Id.*; FF 8, 384 F. Supp. at 352, Joint App. 102-03. In 1853 an Olympia, Washington magazine exhorted the settlers to greater efforts saying "what little has been done in the business of securing the salmon, has been done solely by the Indians." Ex. USA-20, Joint App. 372.
34. Record in 9th Circuit Cause No. 74-2414, Tr. 1778-84.

2. *The Intent of the Treaty Negotiators.*

The treaties negotiated by Governor Stevens and the Indian tribes were clearly designed to protect both Indians and settlers.[35] They extinguished tribal title to the lands so that the settlers could obtain United States land patents for their claims, and the tribes received assurance of federal protection of their reserved lands and fisheries. As Dr. Lane observed:

> [T]he reservations were to be residential bases from which *the Indians were to continue to utilize* the total environment, including specifically *all of their fishing locations, in order to maintain themselves and to contribute to the economy of the entire population.* . . . The treaty commission clearly undertook to provide the Indians the means of participating and prospering in the economy of the Territory. *The contribution was seen to be primarily in the fisheries."*[36]

Communication between the parties during the negotiations was obstructed by both language and cultural barriers. The vast majority of Indians at the treaty councils did not speak or understand English so the treaty provisions and the remarks of the commissioners were interpreted by Colonel Shaw in Chinook jargon. Chinook was then translated into native language by Indian interpreters, since many of those present did not understand Chinook jargon.[37] The evidence indicates that there were no words in the Chinook jargon for "common", "usual", "accustomed", "citizens", "steelhead", and other phrases which have become controversial in interpretation of the treaties.[38] The treaties themselves are written in English; the clauses were essentially drafted before any formal meeting at a

35. Lane testimony, Joint App. 265.
36. Ex. USA-20, Joint App. 396 (emphasis added).
37. FF 22, 384 F. Supp. at 355, Joint App. 110.
38. *See*, Dictionary of the Chinook Jargon, Ex. G-29(a) and Ex. Y-21.

treaty ground.[39] With some exceptions the treaty signatories representing the tribal units were important men of the winter villages who had some prior contact with non-Indians or spoke some Chinook jargon.[40]

A more serious problem was that the system of Indian tenure and ownership rights in fish asserted by some tribes was foreign or unknown to the whites. This is clearly illustrated in the negotiations with the Makah.[41] Nootkan culture, of which the Makah were a part, recognized ownership rights to anything that the tides or waves deposited on a member's section of beach. It also recognized ownership of ocean tracts. As Dr. Lane reported:

> In the official record of the treaty proceedings, one entry reads:
>
> *Tse-Kaw-Wooth* – he wanted the sea – that was his country.
>
> Tse-Kaw-Wooth was the leading man of the Ozette Village and was chosen by Stevens as head chief for the Makah at the time of the treaty. From later reports we know that the Ozette owned important fishing rights on the halibut banks northwest of Tatoosh Island. It seems likely that these were what Tse-Kaw-Wooth was asserting rights to at the treaty.[42]

The Nootkans recognized ownership not only of rivers and fishing places close at hand, but of the waters of the sea for miles off shore, all of which were privately owned

39. Lane Testimony, Joint App. 273-75.

40. Ex. USA-20, Joint App. 384, 368. The State incorrectly indicates that the United States Commissioners "created tribes and bands" State Br. at 31. Stevens, as instructed, simply amalgamated pre-existing bands and village units into larger tribes for the convenience of both sides. It eliminated the necessity of traveling to meet with, and record the agreements of, each of the tribal units. Dr. Lane's reports clearly reveal that Stevens did not "create" the tribes and bands, *see* Ex. USA-20, Joint App. 385-93.

41. Ex. USA-21, Joint App. 410.

42. *Id.* at 413.

property.[43] These were foreign concepts, not comprehended by the United States negotiators at the treaty talks.[44]

Despite these problems, some key concepts were capable of communication. Dr. Lane reported that the essence of the phrase, "the right of taking fish, at all usual and accustomed grounds and stations, is further secured" could have been conveyed in Chinook jargon.

> The English word fish is "pish" in Chinook jargon. Presumably this generic term was used in the treaty talks and it is likely that it would have been understood by the Indians in the same sense as the whites.[45]

The promise to preserve and protect the signatory tribes' opportunity to harvest anadromous fish, was quite explicit during the negotiations. "This paper," said Isaac Stevens to the tribes gathered at Point-No-Point, "secures your fish."[46]

The fish harvesting right secured by the treaty was not qualified or restricted. Dr. Lane concluded:

> It is my opinion that no such restrictions were indicated by the commissioners or contemplated by the Indians. The treaty Commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture, but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue—the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the Territory. I believe that both parties intended the Indians to continue full use of their fishing places. . . .[47]

43. *Id.*, at 413-14.

44. *Id.; See e.g.*, Ex. USA-20, Joint App. 376-77; Lane Testimony, Joint App. 272.

45. Ex. USA-20, Joint App. 382.

46. Ex. PL-15, Joint App. 331.

47. Ex. USA-20, Joint App. 382. The State's repeated assertion that the negotiators protected only "the limited purpose of seeking food" State Br. 44, 32 or the Indians "a means of subsistence" State Br. 48, is simply contradicted by the facts. *See* Joint App. 396; 384 F. Supp. at 343 n. 29, Joint App. 89.

The additional phrase in the treaties, "in common with all citizens of the Territory" at first appears to create an ambiguity. George Gibbs himself used the term "common" as applied to fisheries, in more than one sense.[48]

Nevertheless, there is substantial evidence from which the parties' intent regarding the manner in which the resource was to be shared can be confidentially inferred.

Dr. Lane found no direct evidence whether "in-common" was intended to connote fishing at the same place, or on the same run, or something else.[49] Dr. Lane testified further, for example, that the Indians were plainly agreeing to share the waters of Puget Sound with the non-Indians.[50] That was completely consistent with the established system of Indian property rights which, Dr. Lane testified included "notions of free extension of use rights to friends, neighbors, visitors and so on in no way impeding ownership or title to these right."[51] Dr. Lane testified:

> Concepts of ownership were highly developed and rather precisely formulated, not only in Twana culture, but in most, if not all, cultures of the Northwest Coast. While use rights were freely extended, it was necessary for the borrower to request permission to use the privately owned site, gear or privilege and for the owner to accede to the request. Alternatively, the owner could initiate the extension of use rights by offering them.[52]

Similarly, Dr. Lane testified:

> The "in-common with" language must have been understood and intended by both parties to assure non-Indians an opportunity to engage in fishing, but not at the expense of existing Indian claims and rights. . . . [It] was intended to allow non-Indians to fish subject to prior Indian rights specifically assured by treaty.[53]

48. For example, the records of the treaty Commission show that George Gibbs' outline draft of the treaty referred to fishing thus, "The right of fishing at common and accustomed places is further secured to them: Proviso against staked or fenced claims." Ex. PL-10(b).
49. Ex. USA-20, Joint App. 383.
50. Lane Testimony, Joint App. 284.
51. Lane Testimony, Joint App. 276.
52. Lane Testimony, Joint App. 260.

Dr. Lane's conclusion regarding the parties' intent was not "controverted by any credible evidence".[54] In addition, the concept of relinquishing one-half their rights was not unknown to the tribal negotiators. This notion was espoused at the treaty of Neah Bay:

> *Ka-bach-sat of Tso-yess* – My heart is not bad but I do not wish to leave all my land. *I am willing you should have half, but I want the other half myself.* You know my country, I want part for my village. It is very good. I want the place where the stream comes in.
>
> *It-an-da-ha of Waatch* – "My Father! My Father. I now give you my heart. . . . *My wish is like the rest.* I do not wish to leave the salt water. *I want to fish in common with the whites.* I don't want to sell all the land. *I want a part in common with the whites* to plant potatoes on. I want the place where my house is. We do not want to say much, we are all of one mind.[55]

To these tribal negotiators using the fisheries and the lands "in common with" the whites was consistent with the idea that each could take up to one-half.[56] The bountiful fish

53. Ex. USA-20, Joint App. 396-97.
54. FF 2, 384 F. Supp. at 350, Joint App. 99.
55. Ex. PL-16(b) at 3.
56. There is also evidence outside the record that the understanding of at least some of the United States negotiators was similar. At another council between the tribes and Isaac Stevens shortly after the treaties, S. S. Ford, a participant in the negotiations, referred to the fishing provisions of the Medicine Creek Treaty as, "Offering you for fishing privileges *one-half of the waters of the rivers and Sound*, offering to protect you in your rights. . . ." Fox Island Council Proceedings, Executive Order of January 20, 1857, Executive Order File 1850-92, Records of Bureau of Indian Affairs, Record Group 75, National Archives, Washington, D.C. (emphasis added).

resources of the era implied that there would be no limitation of the tribes' existing uses of the fisheries, particularly since the Indians did not expect the non-Indians to use the tribal fishing locations at the same time.[57] As Dr. Lane concluded:

> [T]he Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but that as owners of these rights, in the native way of looking at things they were extending use rights to the non-Indians to share in the resources, but I don't think . . . they thought they were giving up anything.[58]

The Indian concern with permanently retaining "their ownership over the fishery resource"[59] is to be contrasted with their lesser concern with off-reservation areas for pasturing their horses. The treaty clauses secure the "right of taking fish" and go on to say,

> together with the *privilege* of hunting, gathering roots and berries, and pasturing their horses *on open and unclaimed lands;*[60]

The United States representatives, at least, understood that the land was going to be heavily populated and that game would be reduced,[61] and the availability of public grounds diminished as settlers came to use more of the open areas. This prospective diminishment of their hunting, gathering and pasturing privileges contrasted with the outright ownership language describing their right in fisheries. As Dr. Lane stated:

> [T]here is a distinction clearly made here between this kind of ground and then the privilege of using

57. Lane Testimony, Joint App. 271.
58. *Id.* at 271-72.
59. *Id.* at 273.
60. Medicine Creek Treaty, Ex. PL-31 (emphasis added).
61. Lane Testimony, Joint App. 268-69.

> these—the right of taking their fish at all their usual and accustomed places. To me the two are being separated quite clearly in this clause.[62]

It must also be emphasized that the United States delegation was clearly cognizant of the Indians' domination of the fishery trade. A December 30, 1854, letter from Isaac Stevens notes:

> The Indians on Puget Sound have been for a considerable time in contact with the whites . . . *They form a very considerable proportion of the trade of the Sound.* . . . They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it.[63]

The government negotiators indicated that the Indians should be self-sufficient, able to continue the trade of fish with non-Indians and other tribes.[64] For example, members of the commission at the Treaty with the Makah (Stevens, Gibbs, Shaw, and Simmons) were aware of the commercial nature and the value of the Makah marine economy,[65] and they promised the Makah that the United States would

62. *Id.* at 269.
63. Ex. PL-11, Joint App. 329. Stevens went on, however, to make certain hasty observations that Indians did not use the same fishing methods, i.e. seines and nets, as whites. These observations were erroneous. As Dr. Lane reported, "The Puyallup Indians . . . were using both seines and weirs extensively at the time that Stevens wrote and had been doing so for some years previous . . . . The other members of the treaty commission were certainly aware of Indian methods of taking fish . . ." Ex. USA-20, Joint App. 383. The State regretably chose to emphasize the erroneous statement without acknowledging the error. State Br. 47.
64. Ex. USA-20, Joint App. 382.
65. Washington's reliance, State Br. 48 n. 26, on a finding of the Indian Claims Commission that the treaty with the Makah was not a guarantee of future commercial fishing rights, is misplaced. The Commission specifically overturned that finding in 1976 and found that the intent of the Makah treaty *was* to provide for continuation of the extensive Makah maritime trade, 39 Ind. Cl. Comm. 88, 100. By a later order the Commission adopted the United States District Court's findings regarding the United States' intention to maintain, by the treaty, the thriving pre-treaty Makah commercial fisheries. 40 Ind. Cl. Comm. 131, 132-33.

assist them in developing their maritime industry. By his promise of kettles and fishing apparatus to the Makah, Governor Stevens clearly indicated that he did not intend by the treaty to restrict the Indians to aboriginal equipment or techniques.[66]

Both anthropologists testified that the treaty negotiators sought to protect continued Indian fish harvests from possible future restriction. Dr. Riley testified that the treaty commissioners had no thought that the Indians ever would be restricted in their fishing.[67] Dr. Lane testified that the Indians believed that they would never be controlled in their fishing by any non-Indian government and could go on fishing as they did before.[68] Evidently both the United States representatives and the Indians themselves intended that Indian fishing would continue as it had before the treaties: non-Indian settlers would also have access to the Indian fisheries but without interfering with the continued pursuit of traditional Indian fishing.[69] The District Court in *United States v. Washington* expressly found that "[t]here is no indication that the Indians intended or understood the language 'in common with all citizens of the Territory' to limit their right to fish in any way;" the Court of Appeals upheld this finding.[70]

The United States acted in good faith in providing for protection of tribal fisheries.[71] This was consistent with the Northwest Ordinance of 1787, 1 Stat. 51, Note a, which

66. FF 62, 384 F. Supp. 363-64, Joint App. 124-25.
67. Record in 9th Circuit Cause No. 74-2414, Tr. 2381.
68. Record in 9th Circuit Cause No. 74-2414, Tr. 1863, 1875, Joint App. 271; *see* FF 20, 21, 384 F. Supp. 355, Joint App. 109.
69. Ex. USA-20, Joint App. 383; *see* FF 26, 20, 384 F. Supp. 357, 355, Joint App. 112, 109.
70. 384 F. Supp. 312, 333, Joint App. 71-72; *see* 520 F.2d 685, Joint App. 46.
71. *See* Ex. USA-20, Joint App. 396-97.

requires that "good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent."[72] As George Gibbs reported:

> What is necessary for them, and just in itself, is, that small tracts of good land should be set apart as permanent abodes. . . .
>
> In like manner, *the use of their customary fisheries* . . . should be secured.[73]

There was no intention of creating a class society with the Indians on the bottom economic rung. There was no intent to prevent the Indians from using the fisheries for economic gain. Rather, the treaty commission clearly undertook to provide the Indians the means of participating and profiting in the economy of the territory.[74] Isaac Stevens transmitted the treaties to Washington, D.C. for ratification saying,

> The provisions as to reserves and as to taking fish, . . . *had strict reference* to their condition as above, to their actual wants and *to the part they play and ought hereafter to play in the labor and prosperity of the territory.*[75]

In conclusion, the repeated assertion of the State of Washington in its brief that the treaties were designed only to reserve to the tribes a right of access to their traditional fishing grounds has no support in the evidence. Based on the actual documentary evidence presented and the testimony of the expert witnesses as outlined above, the District Court rejected the State's interpretation of the treaties and the 9th Circuit Court of Appeals affirmed his conclusion.

72. FF 15, 384 F. Supp. 353-54, Joint App. 106.
73. Ex. PL-9, Joint App. 326 (emphasis added).
74. Ex. USA-20, Joint App. 396; *see* FF 21, Joint App. 109.
75. Ex. PL-11, Joint App. 329, *cf.* n. 63 *supra*.

C. Preemption of Indian Fisheries and Overfishing by Settlers

Initially, at least, the intent of the treaty parties was generally followed. During the 1850's, 1860's and 1870's Indian fishing and Indian trade in fish was an integral part of the pioneer economy.[76] Before Washington was admitted to the Union in 1889, most interference with treaty Indian fishing stemmed not from acts of the legislature but from settlers' attempts to monopolize traditional Indian fishing spots. Such interference gave rise to the first reported litigation regarding the treaties' effect. In *United States v. Taylor,* 3 Wash. Terr. 88 (1887), the United States and Yakima Indians complained that they were prevented from reaching a traditional site on the Columbia River by a land owner's fences. The Supreme Court of the Territory construed the treaty in favor of the Indians:

> [I]t seems to us that the Indians in making the treaty would have been more likely to have intended to grant only such rights as they were to part with, rather than to have conveyed all, with the understanding that certain rights were to be at once reconveyed to them. . . .
>
> It will be seen by the statement of facts above set out that *at the time this treaty was made there existed within the territory* which was the subject-matter of the treaty, *certain ancient fisheries* which had for generations been used as such by said Indians, who had certain well-defined habits and methods connected with such use.[77]

Preemption of Western Washington Indian fisheries by non-Indians was infrequent during the two decades following the treaties. Heavy white settlement came later to

76. Ex. USA-20, Joint App. 393.

77. *United States v. Taylor,* 3 Wash. Terr. 88, 96-97, (1887) (emphasis added).

that region and early settlers in the Puget Sound area concentrated on agriculture.[78] Development of the canning process, however, greatly increased the interest of investors and non-Indian fishermen in the commercial potential of Washington's anadromous fish runs. The first cannery was built on Puget Sound in 1887 although production was minimal until the middle 1890's.[79]

Responding to the new market created by the canneries, settlers adopted a traditional efficient Indian fishing technique, the fish trap;[80] and non-Indian commercial fisheries grew by leaps and bounds. From three canneries in 1894, the Puget Sound industry expanded to 24 canneries in 1905. Investment syndicates formed companies to operate both canneries and huge new traps.[81] Efficient trap fishing requires that the trap be located so as to intercept salmon traveling along the shoreline toward their natal rivers. Because some locations were better than others, conflicts developed between Indians and settlers.[82] In 1898 settlers frustrated the Lummi Indian's traditional use of Semiahmoo Spit and their practice of going to Point Roberts to catch and dry fish during the bountiful runs of Fraser River salmon. Settlers claimed the shores beside the Indian fishing site and drove away at gun-point native reefnetters who tried to erect temporary fish-drying houses

78. Ex. MLQ-1, at 18.

79. FF 8, 384 F. Supp. at 352, Joint App. 103.

80. A discussion of traps and examples are found at Ex. JX-2a, §3.1.3 at 112 and Fig. 46. *See also* Ex. PL-88.

81. Ex. MLQ-1 at 3, 19, Chart 6. Some of the trap sites became extremely valuable. In 1899, the Pacific American Fish Company of Chicago spent one million dollars to acquire control of inner Sound trap sites. Individual sites sold for between $5,000 and $55,000 with an average of almost $20,000; by 1917, many sites were valued at over $100,000. R. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique,* 13 (University of Washington, monograph series, 1977).

82. Ex. MLQ-1 at 19, 18.

on the shore.[83] The tribes' fear that they would be pushed out of their usual and accustomed sites, voiced in the treaty negotiations[84] had been realized.

Heavy harvests by non-Indian trap and cannery crews also brought about the need to restrict fishing for conservation's sake.[85] As Dr. Lane testified, it is likely that the United States treaty commissioners foresaw the need for such restrictions, although they did not contemplate that the Indian fisheries would be restricted.[86] Forty years later, the consequences of an unrestricted non-treaty fishery were clear. "In the history of the salmon fisheries of the Atlantic Coast", said one Washington Fish Commissioner, "there is a warning against the extravagant manner in which our Pacific Coast salmon fisheries have been carried on for many years past."[87]

Increased settlement and the introduction of canneries created the economic incentive for non-Indians to exclude Indian tribes from the commercial salmon fishery. Statehood provided the political means to accomplish this. Legislative restriction of Indian commercial fishing began almost as soon as Washington was admitted to the Union on November 11, 1889. State enactments took widely varying

83. *See* Ex. PL-94(u). A suit to halt the interference was unsuccessful, *United States v. Alaska Packers Ass'n.*, 79 F. 152 (D. Wash. 1897). The District Judge in *Alaska Packers* relied on a theory of treaty interpretation later rejected by the Court in *United States v. Winans,* 198 U.S. 371 (1905).

Regarding the Point Roberts trap fishery, *see generally,* R. Rathburn, "A Review of the Fisheries in the Contiguous Waters of the State of Washington and British Columbia", Part XXV of *Report of the Commissioner,* U.S. Comm. of Fish and Fisheries, Year Ending 1899, 300-303.

84. Riley testimony, Joint App. 295.

85. FF 8, 384 F. Supp. at 352, Joint App. 102-03.

86. Lane testimony, Joint App. 262-63, *see* n. 69 and accompanying text, *supra.*

87. *Ninth Annual Report of the Washington State Fish Commissioner,* 25, *see also* 26, 33-40 (1898), series hereinafter *Commissioner's Report.*

forms, since there was no technical staff to guide the legislature.[88]

In the 1890 session, all salmon fishing was outlawed for three months each year.[89] In the early 1890's, the State began licensing and prescribing permissible types of fish traps and times of operation.[90] Later, the legislature specifically prohibited spearing, gaffing, snagging and snaring fish.[91] Each of these enactments effectively curtailed treaty Indian fishing.[92]

Restriction of treaty Indian commercial fishing resulted also from the non-Indian view that conservation required curtailment of fishing in rivers and streams but not in the salt water areas of Puget Sound.[93] In 1897 and 1899 the legislature halted fishing in all Puget Sound tributaries and nearby bays.[94] Such freshwater closures varying in extent, have been enacted repeatedly by nearly every Washington State legislature from 1897 to the present.[95] They have drastically curtailed fishing at the most lucrative Indian fishing places—forks in rivers, outlets of rivers into lakes, and saltwater estuaries.[96] Each of the areas closed was a usual and accustomed fishing place of one or more tribes.[97]

88. Ex. JX-2a at 60. Regulations could not be changed between legislative sessions to accomodate salmon run conditions. Regulation by statutory enactment was used until establishment of a Department of Fisheries with regulatory authority in 1921. *See* Wash. Sess. Laws, Ch. 7, §116 *et. seq.* (1921).

89. *Wash. Sess. Laws,* 107 (1890); *see* Ex. JX-2a, Table 25.

90. *Wash. Sess. Laws,* 233 (1890); *Wash. Sess. Laws* Ch. IX at 15-18 (1893); Ex. JX-2a, Table 25; *First Commissioner's Report* 18-22 (1890).

91. *Wash. Sess. Laws,* Ch. 31, §72 (1915).

92. *Cf.* FF 10, 384 F. Supp. at 352, Joint App. 103-04.

93. *See e.g.,* Fish Commissioner Crawford's view, *Third Commissioner's Report* 18-21 (1892).

94. Ex. JX-2a, Table 25.

95. *Id.,* Tables 25, 26, 27, 28.

96. E. USA-20, Joint App. 375.

97. *See* FF 10, 12-13, 384 F. Supp. at 352-53, Joint App. 103-05; *and* FF 35-163, 384 F. Supp. at 359-82, Joint App. 115-60.

In later years, the Department of Fisheries expanded the freshwater closures to saltwater areas of Puget Sound it called "salmon preserves." The effect was to outlaw fishing in most of the remaining usual and accustomed grounds of the Makah, Lower Elwha, Skokomish, Squaxin Island, Nisqually, Puyallup, Tulalip, Stillaguamish, Swinomish, Upper Skagit and Sauk-Suiattle Indian Tribes.[98] This effect is graphically illustrated by a map in the Joint Appendix.[99] Most importantly, harvest of the same anadromous fish runs elsewhere on their migration route was *not* restricted. Non-treaty fishermen could and often did capture the entire harvest before the fish returned to tribal fisheries near their natal streams.[100] Furthermore, despite official concern that the non-treaty recreational fisheries were overharvesting some runs and cropping fish before they could mature, fishing area closures were generally inapplicable to that group of fishermen.[101]

Over the years, before 1974, State regulations designed to restrict the harvest of anadromous fish were "apparently based more on political realities than on economic considerations."[102] As another economist has said, the "dis-

98. *See* Ex. JX-2a at 64, Fig. 18, and Appendix III; *cf.* n. 97.

99. Joint App. 348, *see also* Ex. JX-2a, Figure 18.

100. FF 217-18, 384 F. Supp. at 393, Joint App. 179-80.

101. Ex. JX-2a at 63, *and* Tables 26-28. The 1931 Annual Report of the Washington Department of Fisheries, for example, identified the growth of sport fisheries as a serious management problem:

> Sport fishing activities in saltwater areas, growing by leaps and bounds through the natural call of the outdoors, easy access to fishing grounds, and goaded on by advertising propaganda, have developed to the point where it is conservatively estimated for one instance, that the total number of young chinook salmon, each one pound or under, taken every year exceed the total number of mature chinooks, weighing twenty pounds or more when caught by commercial fishermen. . . . The enormous difference in commercial value to the State as a whole from the catch of mature salmon as compared to the value of the immature fish taken is very obvious. 40-41 *Report of the Washington State Department of Fisheries* (1929-31), series hereinafter *Fisheries Report*.

102. Ex. MLQ-1 at 4.

tribution of the salmon [harvest] is best understood as the product of a balance of power."[103] The treaty tribes, of course, had little role in this political process since their members were not made United States citizens until 1924.[104]

Issues raised by the state-authorized non-Indian preemption of the fish runs came before the United States Supreme Court in *United States v. Winans*, 198 U.S. 371 (1905). The case concerned a settler along the Columbia River who had placed four fish wheels along 1½ miles of the river bank and sought to exclude tribal fishermen from their usual and accustomed fishing place. The Court noted that the Yakima tribe's right to resort to traditional fishing places was "not much less necessary to the existence of the Indians than the atmosphere they breathed."[105] Winans argued that white men had greater capacity than Indians to devise and use fishing gear to take advantage of the common right. The Court replied:

103. R. Barsh, *The Washington Fishing Rights Controversy: An Economic Critique*, 24 (University of Washington, monograph series, 1977).

The State opines that in addition to regulating for conservation there must be regulation for "optimum yield." *See*, State Br. at 19-20. This, of course, is just another term for political allocation:

"To say the least, the concept (of optimum yield) is potentially subject to abuse, and would almost certainly be used primarily as a way of justifying a political course of action." Larkin, *An Epitaph For The Concept of Maximum Sustained Yield*, 106 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY at 8 (1977).

"The best thing about the term optimum yield is that it leaves all sorts of options open for everyone. . . . [E]ach one of us can define the optimum yield of any fishery to suit ourself." Crocker, *Usefulness of the Optimum Yield Concept*, AMERICAN FISHERIES SOCIETY, SPECIAL PUBLICATION NO. 9 (1975), at 75-76.

"The nebulous nature of this standard, however, renders it ineffective in providing a basis for decision making. 'Optimum yield' becomes merely a 'best' yield, to be defined on an ad hoc basis by decision makers." Christy, *The Fishery Conservation and Management Act of 1976*, 52 Wash. L. Rev. 657, 658 (1977).

104. Act of June 2, 1924, c. 233, 43 Stat. 253.

105. 198 U.S. at 381.

> It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common.[106]

The attempt to monopolize the fishery was struck down.

In *Seufert Brothers v. United States,* 249 U.S. 194 (1918), this Court extended its ruling to areas outside those ceded by the Yakima treaty, quoting with approval its ruling in *Winans:*

> We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules'.[107]

Despite the Supreme Court's rulings in *Winans,* it was not long before Washington state courts joined the attack on Indian fishing rights. Two state court decisions *State v. Towessnute,* 89 Wash. 478, 154 P. 805 (1916) and *State v. Alexis,* 89 Wash. 492, 154 P. 810 (1916), suggested that Indians no longer had a lawful right to fish outside of reservations except as permitted by state law. The state court's attitude is revealed in the *Towessnute* opinion.

> The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aboriginies as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. . . . Only that title was esteemed that came from white men, . . .

106. *Id.* at 382.

107. *Seufert,* 249 U.S. 194, 198 quoting, *United States v. Winans,* 198 U.S. 371, 380-81 (1905), and cases cited therein.

> The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence.
>
> These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailities, has been continuously displayed. Neither Rome nor sagagious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

89 Wash. at 481-82, 154 P. at 807.[108]

Far more damaging to Indian fisheries than state-encouraged obstructed access to usual and accustomed places however, was the development of a new saltwater fishing technology which included powerful purse seine and gillnet boats.[109] Indian fisheries are largely place oriented, emphasizing anchored or staked fishing appliances.[110] By fishing earlier in the salmon migration path than traps and other fixed gear, purse seines reduced the number of fish reaching the trap sites and thus robbed Indians of their locational advantage.

108. Even on Indian reservations, where the federal government retained exclusive control, (*See* FF 16, 384 F. Supp. at 354, Joint App. 107) the State made early efforts to control Indian fishing. The agent for the Tulalip Reservation reported that in 1913 two Lummi Indians were arrested while fishing within the boundaries of their reservation. When the case resulted in an acquittal, the State Fish Commissioner threatened to arrest Indians again and again for the same offense. Buchanan, *Rights of Puget Sound Indians to Game Fish,* VI Wash. Hist. Quart. 109 (April, 1915).

109. Pictorial representations of modern gear are shown in Figure 48, Ex. JX-2a.

110. Ex. JX-2a, Joint App. 340, 342.

As early as 1903, American purse seiners became a significant factor in the profitable sockeye fishery when the advent of gasoline-powered boats greatly increased their mobility. By 1910, the three major types of fishing gear used today were well established in Puget Sound, each in its area of most efficient use: (1) gillnets in streams and murky estuaries in the day, at night spread throughout the Sound; (2) traps in shallow water, especially in estuaries; and (3) purse seines in deep water on the approaches to river mouths and the Strait of Juan de Fuca.[111]

As non-Indian marine fishermen intercepted increasing numbers of fish before they reached the rivers, the Indians found their livelihood dwindling. Dr. Lane summed up these developments:

> As non-Indians began to compete in the fisheries, laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen. As they have been forced out of the fisheries, fewer Indians and smaller quantities of fish are involved.[112]

On this point, the State in its brief misrepresents a finding of fact of the District Court in order to obscure the responsibility of the State of Washington for the decline in the treaty fisheries. The State argues:

> During this period there was a drastic decline in the number of Indians whose principal occupation was fishing. (FF 33, Joint App. 114.) *The* major cause for this decline was the employment acculturation of the Indians. (FF 33, Joint App. 114.)

State Br. at 29 (emphasis added).

111. Ex. MLQ-1 at 21-22.

112. Ex. USA-20, Joint App. 393; *cf.* FF 217-18, 384 F. Supp. at 393, Joint App. 179-80.

What the District Court actually found was:

> Employment acculturation of Indians has been *a* major cause of the drastic decline from treaty times of the number of Indians engaged in fishing. [citations to record omitted] *Additionally, many years of state enforcement actions against Indians exercising their claimed treaty right to fish have caused many members of Plaintiff tribes to discontinue such fishing activities at several of their usual and accustomed fishing places.* [citations to record omitted.]

384 F.Supp. 358 Joint App. 115 (emphasis added).[113]

113. Numerous other inferences and implications in the State's brief misconstrue or go beyond actual findings of the Court. Compare Washington's implication that fish "had been" a major food supply for Indians (State Br. 28) with the actual wording of FF 4 to the effect that the major food sources for the Indians "were" fish, etc. (FF 4, 384 F. Supp. at 350, Joint App. 100).

Compare the State's assertion that food preservation techniques were inadequate, (State Br. 28) citing FF 8 which deals with *non-Indian* preservation techniques, with FF 5, 384 F. Supp. at 351, Joint App. 101, where the Court held that "adequate Indian food preservation techniques had been developed by the time of the treaties and fish were able to be stored for use throughout the year and transported over great distances."

Compare the State's assertion (State Br. 32) citing FF 20 that "*The* Indians' primary concern was that they have freedom to move about to gather food, particularly fish, at their usual and accustomed fishing places" with the actual text of FF 20 that ". . . [A] primary concern of the Indians whose way of life was so heavily dependent upon harvesting of anadromous fish, was that they have freedom to move about to gather food, particularly salmon . . . at their usual and accustomed places." 384 F. Supp. at 355, Joint App. 109 (emphasis added). Note in addition to changing "a" to "the" the State in its argument has changed the whole emphasis from "harvesting fish" to "moving about".

Compare the State's language that Chinook jargon was "a trade medium used by the tribes" (State's Br. p. 34) and implying that it was widely understood by the tribes with the text of FF 22 which makes it clear that Chinook jargon was a "trade medium of limited vocabulary and simple grammar, . . . inadequate to express precisely the legal effects of the treaties, ..." and that "Many of those present, however, did not understand Chinook jargon." FF 22, 384 F. Supp. at 355, Joint App., 110.

Compare the State's assertion (State Br. 35) that "At treaty times Indians and settlers shared common fishing grounds, ..." citing FF 13 with the text of FF 13 which makes no mention of sharing grounds with settlers, but discusses the difficulty of compiling a complete inventory of usual and accustomed grounds and stations at this time because of subsequent events. (FF 13, 384 F. Supp. at 353, Joint App. 104.)

In addition to frustrating Indian livelihood, the shift to a marine fishery reduced the efficiency of the non-Indian fishing effort. As early as 1915, the Fish Commissioner recognized that purse seine fishing resulted in a harvest of small, immature fish at higher cost per fish than other methods. During the First World War, motorized trolling boats began operating on the high seas in front of both purse seines and other nets; these were even less efficient than purse seiners.[114] High salmon prices during and following World War I attracted even more boats into the marine fishery, and the harvest at trap sites decreased further as a result.[115]

Troll boats catch significant numbers of Puget Sound origin salmon in the ocean, which is "a vast mixing area for salmon from literally hundreds of diverse streams."[116] Harvest of an abundant run there has incidental effects on other runs which are present and may need protection.[117] Furthermore, trolling is expensive because the fisherman searches for and pursues the fish. He can protect his investment only by capturing all fish possible, regardless of their size or conservation requirements.[118]

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114. 24-25 *Commissioner's Report* 14-15, 35 (1914-1915); 28-29 *Commissioner's Report* 3-6, 9-10 (1917-1919); 30-31 *Commissioner's Report* 38-76 (1919-1921).

115. R. Barsh, note 81, *supra* at 14. The Washington Fish Commissioner reported, "It is safe to say that the capacity of the appliances for the taking of fish in 1913 was at least twice, if not four times, as great as 12 years previous." 24-25 *Commissioner's Report* 7-9 (1913-1915). The rapid growth of fishing effort, spurred on by high prices, also persistently threatened preservation of the fish runs. Fish Commissioner Darwin noted that the growing number of motorized purse seines and trollers "will materially assist in the depletion or complete destruction of the industry within a comparatively few years." 28-29 *Commissioner's Report* 10 (1917-1919).

116. Ex. JX-2a, Joint App. 343, 346.

117. *See* State's Br. 17-18, *cf.* FF 202, 384 F. Supp. 390, Joint App. 173.

118. R. Barsh, note 81 *supra* at 2-4.

The traditional Indian tribal fisheries, on the other hand, were highly efficient ones.[119] The bays, channels, and falls where Indians trapped and netted were not only highly productive locations, they also yielded fish which were at the end of their life cycle and therefore at maximum size. When they reach their natal streams, distinct salmon runs usually separate from one another. The Indian harvest methods therefore had the additional virtue of allowing easy identification and conservation of weak runs.[120]

Throughout the 1920's the Washington fishery suffered setbacks. Some people pointed to the increasing man-made damage to fish migration and spawning areas.[121] Environmental damage, in the form of contamination of rivers, erection of dams, excessive water diversion and state-permitted gravel removal and logging operations, was then, and is now, a very serious problem.[122] Many Indian tribal

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119. Ex. USA-20, Joint App. 394.

120. Washington's statement, State Br. 23, that major freshwater harvests as fish "approach spawning" diminish potential market values is not to the contrary, although it is a gross generalization. Fall chinook salmon, for example, deteriorate within a few weeks after they reach rivers. Coho and spring chinook salmon remain in highly marketable condition through long migrations up rivers. Transcript April 5, 1978, at 261-62. As the Court found, maximum profit is obtained "when the available 'crop' has obtained maximum bulk and quality. . . . when the fish are full grown and returning to or entering their natal stream." FF 172, 384 F. Supp. at 384, Joint App. 163. The tribal fisheries harvest at this point of maximum profitability and more than offset any loss of quality on highly perishable runs by minimizing search and capture costs. R. Barsh, *supra*, at 9-10. Price per pound is, of course, a product of supply and demand laws at any point in time.

121. Ex. MLQ-1 at 24-25.

122. The Washington Department of Fisheries has reported that extensive loss of salmon spawning habitat caused by contamination or destruction of spawning beds has resulted in a serious decline or elimination of many stocks of fish in the State. State of Wash., *1973 Annual Report, Natural Resources and Recreational Agencies* 20, *See*, State of Washington, Department of Fisheries, *A Catalogue of Washington Streams and Salmon Utilization*, Vol I, Puget Sound Introduction–01 (1975).

fishing places were destroyed in such fashion.[123]

During the mid-1920's, the number of fishermen increased faster than both the catch of salmon and salmon prices. Per capita income among commercial fishermen decreased. Thus began political battles among gillnetters, trollers, purse seiners, trap owners and sport fishermen, trying to secure for themselves a larger pieces of a shrinking pie.[124] Such problems were exacerbated by the State's then very limited knowledge of salmon biology and limited statistical base. It is now recognized that reliable fisheries statistics for Washington State date from about 1935.[125]

Before the 1930's, State officials probably had only a dim idea of how damaging the growing marine fishery was. The State Fisheries Board knew little of salmon biology and lacked funds for scientific work. (Ex. MLQ-1 at 25.) Serious research only became possible during the Great Depression. Under the administration of Fisheries Director B. N. Brennan, the Minter Creek biological station was built. Research done there quickly proved the inefficiency of the State's existing hatchery systems and convinced experts that artificially-propagated fish must be reared in hatchery ponds for a much longer period than it had been formerly believed necessary.[126] The belief that hatcheries

123. For example, the Duwamish River system in Western Washington, was largely destroyed. A canal was constructed linking Lake Washington to Puget Sound, lowering the level of the lake nine feet. The Black River dried up as the salmon returned to spawn in 1916. The White River was changed from a tributary of the Duwamish River to that of the Puyallup River in 1906. A large number of productive Muckleshoot, Duwamish, and Snoqualmie fishing sites were eliminated. Ex. USA-27(b) at 9-12, 13-16; *see* Ex. USA 102, 103.

124. Ex. MLQ-1 at 26.

125. *Annual Bulletin*, Wash. Dept. of Fisheries, No. 40 (Dec. 1940).

126. E. Salo and W. Bayliff, *Artificial and Natural Production of Silver Salmon, Onchorhynchus kisutch, at Minter Creek, Wash.*, Wash. Dept. of Fisheries Research Bulletin No. 4 (1958).

were a panacea for the fisheries was undermined, although it retained its currency.

In 1925 the state legislature declared that steelhead trout, upon reaching fresh waters, were "game" fish and could not be captured with nets.[127] Prior to that time, steelhead had not been distinguished from other salmonids.[128] For two years the law contained an exception for steelhead caught in streams within or bordering Indian reservations, but this narrow exception for Indian fisheries was eliminated in 1927. In 1929 the legislature prohibited the sale of steelhead trout in fresh fish markets.[129] This allocation of an entire species to hook and line fisheries, a response to political pressure from sports groups, imposed a particular hardship upon Indian tribes and their members. Steelhead are available for harvest primarily during the winter months, and have traditionally been a crucial source of winter food and income for Indians.

To make matters worse, in 1933 sport fishing interests successfully sponsored Initiative 62, which established a separate Game Department vested with regulatory authority over the steelhead trout. This department was structured to serve a single group, the sportsmen. Funded primarily by license fees and federal grants, it has functioned as an almost autonomous agency. The Game Department soon became the most aggressive opponent of Indian fishing.

In 1935, Washington voters adopted an initiative measure prohibiting the use of all "fixed gear."[130] Initiative 77

127. *Wash. Laws*, Ex. Sess. Ch. 178 (1925).

128. *See* FF 168, 384 F. Supp. at 383, Joint App. 161-62.

129. Ex. JX-2a at 63.

130. The Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association [hereinafter Association] advert to this, Associa-

described a line inside of which Puget Sound was closed to commercial fishing except gillnetting and trolling during most of the year and during certain portions of the week.

Catch data show that Initiative 77 reallocated the previous harvest of the trap fishery to trollers, gillnetters, and purse seiners, in that order of priority.[131] In effect, each non-trap user group was rewarded in direct proportion to its relative inefficiency.[132] Initiative 77 thus reflects a regulatory philosophy of legally enforced inefficiency, accompanied by displacement of Indian tribes from a dominant position in the industry.

Passage of Initiative 77 solved little. The reallocation of salmon catches simply atracted new fishermen. Capital freed by the elimination of fish traps was promptly reinvested in marine gear.[133] "Because of their greater ability to take fish," Commissioner Darwin explained of the trapmen, "prejudice has naturally been aroused against them. But the use of the purse seine . . . stole upon us like a thief in the night."[134]

By its terms, Initiative 77 did not apply to Indians fish-

tions' Br. at 46, n. 32, and castigate the District Court because of a tribe's use of a fish trap in Puget Sound. They fail to point out that the trap in issue is only a research device. Fish are impounded, weighed, tagged and released by professional biologists. Transcript April 5, 1978 at 306. There is no evidence that a properly regulated trap fishery is inconsistent with conservation of fish runs.

131. R. Barsh, n. 81 *supra*, at 25.

132. *Id.* Professor Barsh demonstrates that the total fishing income, divided in this fashion, is far less than the maximum realizable on the resource. Harvesting the fish with motorized trollers and purse seines imposes on the consumer the higher costs of operating that fishing gear, the increased administrative cost of regulation, the losses due to killing the fish before they reach maximum size, and the indirect effects due to overharvesting weak runs which are mixed, in marine areas, with harvestable runs of other streams. *Id.* at 10.

133. R. Barsh, *supra*, at 15-16.

134. 28-29 *Commissioner's Report* 10 (1917-1919).

ing "under federal regulations," but from the very first there was uncertainty whether Indians could continue to use traditional fish weirs, traps and set nets. Both the State and white citizens attempted to prevent Indian trapping and netting. Finally, when the fisheries laws were recodified in 1949, the exemption for Indians was eliminated.[135]

D. The Struggle for Recognition of Indian Fisheries

Despite their long exclusion from meaningful participation in Washington commercial fisheries, members of the treaty Indian tribes have continued to fish in the contemporary era. Fishing "still provides an important part of their livelihood, subsistence and cultural identity."[136] It provides "a cohesive force in Indian society."[137] Thus the State of Washington's continued closure of rivers and streams posed a very heavy restraint on the Indian way of life. Many Indians fought these restraints.

In 1939 State officers, believing that Indian fishing was subject to their control, arrested a Yakima Indian named Sampson Tulee. Tulee was tried and convicted of netting and selling salmon without having obtained a license to fish as required by a 1937 law. He unsuccessfully sought habeas corpus relief from the federal courts, was retried, and his conviction was upheld by the state Supreme Court.[138] The Supreme Court of the United States reversed, stating:

> [W]e are impressed by the strong desire the Indians

135. *Wash. Sess. Laws*, Ch. 112, Sec. 31 (1949). There is no legislative history for this change and it appears to have originated with the code reviser rather than with the legislature.

136. FF 31, 384 F. Supp. at 357-58, Joint App. 113-14.

137. Ex. USA-20, Joint App. 394.

138. *State v. Tulee*, 7 Wn.2d 124, 109 P.2d 280 (1941). The Court relied on *State v. Towessnute*, *supra*, and two later cases which rejected

> had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in the spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.[139]

In 1950 the Makah Tribe sued Washington's Director of Fisheries over the State ban on Indian net fisheries during the Hoko River coho salmon run.[140] The District Court dismissed the Tribe's complaint, but the Court of Appeals reversed because the State had not shown that closure of the river was necessary for conservation. Although sport fisheries on the river were permitted, the State had refused to permit Indian net fisheries on the ground that the cost of patrolling to enforce closures was too great. The Court of Appeals labeled the State's contention "absurd" and went on to hold

> that where a treaty gives the Indians a right to fish, the state cannot deny that right because of the cost of preventing their taking of fish in excess of that right.[141]

Similar litigation began in Oregon, but this time the state's "conservation" arguments were more carefully advanced. The Ninth Circuit Court of Appeals ruled that the State had not shown that its regulations prohibiting commercial salmon fishing on Columbia and Snake River tributaries were necessary for conservation.[142] Testimony of

the Indian treaty right defense. *State v. Meninock*, 115 Wash. 526, 197 P. 641 (1921) and *State v. Wallahee*, 143 Wash. 117, 255 P. 94 (1927).

139. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

140. *Makah Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

141. *Id.* at 225.

142. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir.) *cert. denied*, 375 U.S. 829 (1963); *see also Holcomb v. Confederated Tribes of the Umatilla Reservation*, 382 F.2d 1013 (9th Cir. 1967).

Oregon Game Commission officials showed that "conservation" was only a label for regulations which sought to protect commercial and sports fisheries. The regulations were promulgated with "no regard for the welfare of Indians," the Court found, since they allowed all the harvest to be taken by non-treaty commercial fisheries in the lower part of the river or by sportsmen on the tributaries. Conservation measures needed to protect the runs could have been taken without restricting the Indian fisheries. In *Maison* for the first time, a court had examined the overall pattern of state regulation of anadromous fisheries and found that in practice by "conservation" the State meant reserving catches for non-Indian sport and commercial fisheries.

Controversy over fishing rights continued to generate tension between sportsmen and treaty tribes during the 1960's. There was violent unrest among non-Indians which prompted the Department of Game to reinstitute enforcement of regulations prohibiting Indian net fishing for steelhead on the Puyallup River, notwithstanding the decision of the state Supreme Court in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957). More Indian tribal fishermen were arrested.[143] Later, the state court flatly rejected the treaty right defense.[144] Numerous prosecutions of Indian fishermen followed.[145]

In December 1966, the Washington Supreme Court

143. FPTO, Sec. 3-480, Record in 9th Circuit Cause No. 74-2414, R. 830.

144. *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 943 (1963).

145. In the 1960's, Indians engaged in "fish in" civil disobedience on the Nisqually River. In 1964, the Washington Congressional delegation introduced S.J.Res. 170 (to apply state regulation to off-reservation fishing) and S.J.Res. 171 (to extinguish, by purchase, off-reservation rights). After extensive hearings (*see, e.g.*, Hearings on S.J.Res. 170 and S.J.Res. 171, Sub. Comm. on Indian Affairs of the Senate Com. on Interior and Insular Affairs, 88 Cong., 2d Sess. 50-61; 76-84; 100, 104), the bills died in Committee.

decided *Department of Game v. Puyallup Tribe*.[146] The State had urged that the tribe was defunct, that its members were without rights under a treaty, and that the treaty itself was but a scrap of paper entered into without consideration from "a conquered people without right or title to anything."[147] The court chastised the Game and Fisheries Departments for arguing what has been called the "menagerie" theory of Indian title

> that Indians are less than human and that their relation to their lands is not the human relation of ownership, but rather something similar to the relation that animals bear to areas in which they may be temporarily confined.[148]

Nevertheless, the state Supreme Court concluded that regulations reasonable and necessary to conservation of fish could be applied to treaty fisheries.[149]

Sohappy v. Smith, 302 F.Supp. 899 (D.Or. 1969), greatly illuminated the crucial question whether State regulations which allocate all the harvest to non-treaty fisheries, and thereby create a conservation problem once fish get to the rivers, are "necessary for conservation." The court there examined the conflict between Indian tribal fisheries and the State of Oregon which had resulted from Oregon's 1901 closure of most of the Columbia River to fishing except by hook-and-line. The State argued that the "in common" language of the treaties required only that each

146. *Dept. of Game v. Puyallup Tribe*, 70 Wn.2d 245, 422 P.2d 754 (1967).
147. *Id.*, at 249, 422 P.2d at 756.
148. *Id.*, at 249, n. 3, 422 P.2d at 757.
149. This conclusion was affirmed by the United States Supreme Court, *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968). The Court ruled that the power of the State was to be measured by whether state action was "necessary for the conservation of fish," citing *Tulee v. Washington*, 315 U.S. 681, 684 (1942). The Court also pointed out that the right to fish outside the reservation was a treaty right that could not be qualified or conditioned by the State and that the treaty imposed greater restriction on state power than did the United States Constitution. *Puyallup I*, 391 U.S. at 401, n. 14.

regulation be equally applicable to Indian and non-Indian fishermen. This argument, the court concluded, would only be plausible "if all history, anthropology, biology, prior case law, and the intention of the parties to the treaty were to be ignored."[150]

The court found that Oregon's so-called "conservation" policies were concerned with allocation and use of the fish resources as well as with their perpetuation. State authority had been divided between two agencies, one concerned with the protection and promotion of fisheries for sportsmen and the other with protection and promotion of commercial fisheries. The testimony of the State's witnesses showed that by use of definitions, licensing, regulation of gear, and agreements, the State was allocating salmon and steelhead between commercial and sport fishermen. The State had given no consideration to the treaty rights of Indians as an interest to be recognized or a fishery to be promoted in the State's regulatory and developmental program. Its harvest plan effectively zoned the Indians out of the fishery; for all the fish harvest was taken before the runs reached most Indian usual and accustomed fishing places. Application of the regulatory scheme to treaty fisheries was not, therefore, necessary for the conservation of fish. Judge Belloni reasoned that the United States Supreme Court in *Puyallup I*,

> was undoubtedly speaking of conservation in the sense of perpetuation or improvement of the size and reliability of the fish runs. It was not endorsing any particular state management program which is based not only upon that factor but also on allocation of fish among particular user groups or harvest areas or classification of fish to particular uses or modes of taking.[151]

150. 302 F. Supp. at 905.
151. *Id.* at 908.

The Court concluded:

> If Oregon intends to maintain a separate status of commercial and sport fisheries, it is obvious a third must be added, the Indian fishery. The treaty Indians, having an absolute right to that fishery are entitled to a fair share of the fish produced by the Columbia River system.[152]

In Puget Sound, the overall management problems and the difficulties associated with the dispute between the tribes and the State were complicated by a dramatic increase in the number of non-treaty fishermen. Between 1965 and 1974, the State-licensed gillnet fleet in Puget Sound more than doubled; in Grays Harbor it more than tripled; and 1665 new troll fishermen joined the chase for Washington salmon.[153] Washington took no steps to limit the number of commercial fishermen until 1974.[154]

152. *Id.* at 911.

153.

Gillnet licenses	*Puget Sound*	*Grays Harbor*	*Troll*
1965	907	105	1833
1974	1989	338	3487

J. Mundt, *Report to the Regional Task Force Concerning Catch, Licensing, Gear Reduction and Allocable Fishing Time History for Washington Salmon Fisheries*, 1965-77, Ex. 13 (1978). In light of the huge increase in licenses, the State's report of the average experience of non-Indian fishermen, State Brief at 8, is difficult to believe. Scholars had already pointed out that State regulations had actually *attracted more fishermen* into the industry, which resulted in a vicious cycle of increasing numbers of fishermen, increasingly restrictive gear limitations, and increasing prices. R. Barsh, note 103, *supra*, at 5. Professor Brown's analysis of the industry created under State regulation is similar. He concludes:

> The most striking fact is that during the decade of the 1960's, only purse seining made any money in an economic sense. After expenditures for repairs, gear and labor, etc., there was no money left over to pay a return on capital invested in boats for the troll and gillnet fishermen and only $38,000 was available to the estimated 116 purse seining units as a return on investment, despite the fact that their total revenue was about 3.5 million dollars. : : :
>
> The net revenue per pound of all non-Indian gear is *zero*. : : :
>
> In short, the Puget Sound fishery, as it has been managed for the past 10 years, is an uneconomic enterprise producing an overall economic loss to the economy of the State of Washington.

Ex. MS-1 at 6-15.

154. RCW 75.28.150, *et seq.*

E. Filing and Trial of United States v. Washington

The decision in *Sohappy v. Smith*, marked significant progress in accommodating the interests of treaty and non-treaty fisheries. No party appealed the decision. The Columbia River example gave hope to Indian tribes and responsible government officials alike that a solution to the Washington fishing rights controversy could be reached.[155] Unfortunately, members of the thirty treaty Indian tribes of Western Washington continued to suffer arrests and seizures of property for alleged violations of State regulations. The most serious conflicts involved the Washington Department of Game and steelhead trout.[156]

The Game Department asserted that the treaties did not grant Indian tribes any privileges or immunities greater than those held by non-Indian citizens.[157] The Director of Game testified at trial that it would be an abdication of his responsibilities to allow any off-reservation Indian net fishing for steelhead absent court compulsion.[158] In addition, the Game Department successfully lobbied the Wash-

155. The administrative assistant to Washington Governor Dan Evans declared:

> I can state categorically that the state of Washington will be guided by the wording and spirit of the Belloni decision. Governor Evans, the director of game, and director of fisheries have met together and this is to be the policy of the state.

James Dolliver, quoted in American Friends Service Committee, *Uncommon Controversy* 200 (1970).

156. Steelhead, a species indigenous to the Pacific Northwest, had traditionally been harvested and relied upon by tribes as a major part of their diet and trade during the winter months. Until 1925, steelhead were not distinguished from other salmonid species, but since that time, they have been set aside entirely for the hook and line sport fishery. See note 127-29 and accompanying text, *supra*.

157. FF 333, 384 F. Supp. at 394, Joint App. 181.

158. FF 319, 384 F. Supp. at 393, Joint App. 180.

ington Legislature and the public to maintain sport sanctuaries for steelhead.[159] In short, the Game Department gave no consideration to treaty fishing rights in its regulatory, management, and propagation program.[160]

Although the Game Department was party to some of the civil and criminal litigation in the State courts, it paid little regard to the decisions. After the decision of the United States Supreme Court in *Puyallup I*[161] the Department's suit against the Puyallup Tribe was remanded for trial in state Superior Court. On appeal in 1972, the Washington state Supreme Court held:

> [I]t is incumbent upon the Department of Game to provide, annually, regulations for a Puyallup Indian net fishery of steelhead when it is determined by the department, upon supporting facts and data, that an Indian net fishery would not be inconsistent with the necessary conservation of the steelhead fishery.[162]

Nevertheless the Department of Game continued to take the position that State enactments prohibiting commercial and net fisheries for steelhead were binding on treaty Indians at usual and accustomed places without a showing that the regulations were reasonable and necessary for conservation.[163]

In light of the pattern of State regulatory discrimination and non-treaty preemption of the resource which had developed, the United States, on behalf of itself and seven

159. FPTO, ¶3-428, 3-431, 3-436, Record in 9th Circuit Cause No. 74-2414, R. 812-13, 815; Ex. USA-42; Ex. G-14 at 10; Record in 9th Circuit Cause No. 74-2414, Tr. 313, 331-332, 263, 288-89, 304-05.

160. FPTO ¶3-486, Record in 9th Circuit Cause No. 74-2414, R. 831.

161. *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968).

162. *Department of Game v. Puyallup Tribe*, 80 Wn.2d 561, 571, 497 P.2d 171, 178 (1972).

163. FPTO, ¶3-485, Record in 9th Circuit Cause No. 74-2414, R. 831; FF 225, 226, 229-232, 384 F. Supp. at 395-96, Joint App. 183-86.

Indian tribal governments, filed an action against the State in September, 1970. This was *United States v. Washington*, Civil No. 9213.

Three years of pretrial proceedings followed the filing. Detailed anthropological reports were prepared covering the identity, treaty status, usual and accustomed fishing places, and governments of each of the affected Indian tribes. On August 24, 1973, an extensive Final Pre-Trial Order was filed.[164] Shortly thereafter trial commenced before the Honorable George H. Boldt.

None of the petitioner non-Indian fishing associations sought intervention before or during the trial.[165] However, the Departments of Fisheries and Game intervened and participated as separate parties from the State of Washington.

The District Court found that at the time of trial only a few tribes were still active in saltwater fisheries at their usual and accustomed places, explaining that:

> Enforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians.[166]

Testimony of many Indian witnesses described the effects

164. Docket No. 353, Record in 9th Circuit Cause No. 74-2414, R. 759.

165. The Purse Seine Vessel Ass'n. filed a memorandum in support of the State's motion for summary judgment *amicus curiae*, Docket No. 172, Record in 9th Circuit Cause No. 74-2414, R. 291, and, much later in the litigation, moved to intervene, Docket No. 495. Shortly afterwards, on May 31, 1974, the petitioner Commercial Passenger Vessel Ass'n. also moved to intervene, Docket No. 571-72. These motions were denied, and neither party appealed.

166. FF 193, 384 F. Supp. at 388, Joint App. 170.

of severe state enforcement and harassment. These witnesses recounted not only the bitter experiences of their elders, but also their own personal treatment in derogation of their treaty rights. One tribal witness stated, "the Indian fisherman has been driven out of the economy" and the State of Washington has undertaken to close down the entire Indian fishing business.[167] Mrs. Lena Smith, a Stillaguamish, recounted how members of her tribe stopped fishing because they were afraid of imprisonment and that, as a consequence, they lost their ambition to fish.[168]

Mr. Bill Frank, Jr., a Nisqually, testified that his fishing gear had been confiscated several years ago and was still being held by the Department of Game.[169] He also recalled that the Department of Game tore nets out of the river with grappling hooks and used knives to cut nets to remove them.[170] In addition, the State had taken boats and motors from him.[171] Mr. Frank explained that he had never been notified of any judicial proceedings in which any of the seized property had been declared confiscated or forfeited.[172]

Mr. Forrest Kinley, unqualifiedly told of how the State has dealt with Indians claiming treaty fishing rights:

> I think that the State of Washington has deprived our people of a livelihood through harassment and restrictions in our accustomed fishing grounds to where that we could not compete with non-Indians in commercial fisheries.
>
> There was no financing, no nothing for us. I think that our way of fishing in the rivers—you just take a good look at the State of Washington. On every river that we tried to reserve these rivers for our people, we have been harassed. We have been fished out in front.
>
> There has been overfisheries in front of every one of these rivers. This type of harassment has gone on all through my life.[173]

Simply stated, the evidence showed that state fishing regulations had been catastrophic to Indian well-being; they had seriously hampered pursuit of the traditional Indian way of life.[174] As Dr. Lane indicated in her anthropological report, "laws and regulations were promulgated which made it increasingly difficult for Indians to participate as entrepreneurs or even as fishermen."[175]

The State agencies took positions different from each other and different from the present position of the State. The continuing purpose of the Department of Game was to maximize recreational experience for sport fishermen only.[176] The Game Department claimed inability to authorize the Indian off-reservation net fishing because of a lack of information with which to predict harvest effort and run size. Yet evidence revealed that the Department of Game contacted neither the Bureau of Indian Affairs nor more than two of the Indian tribes for such information.[177] Furthermore, the Department failed to advise the Washington State Game Commission and the legislature of the

167. Record in 9th Circuit Cause No. 74-2414, Tr. 3053, 3066-67; *see* Ex. MS-7, at 3; Ex. MS-3, at 2; Ex. MS-8, at 2; Tr. 2522; Mr. Calvin Peters, a Squaxin, told how the State has harassed his people and said, "I think it would be fair to say that a lot of Indians feel now that rather than have to go through this type of harassment, they don't ever go fishing in what we consider our usual and accustomed way." Ex. MS-2, at 4.

168. Record in 9th Circuit Cause No. 74-2414, Tr. 2704.

169. *Id.* at Tr. 2629.

170. *Id.* at Tr. 2630.

171. *Id.* at Tr. 2631.

172. *Id.* at Tr. 2628. Indeed the Game Department admitted at trial that no court action to declare a forfeiture had ever been initiated. Joint App. 258.

173. *Id.* at Tr. 3068-69.

174. *See e.g. Id.* at Tr. 3194, 3198, 3252, 3269, Ex. MS-10 at 3.

175. Ex. USA-20, Joint App. 393.

176. FPTO §3-428, Record in 9th Circuit Cause No. 74-2414, R. 812.

177. Ex. USA-14, Record in 9th Circuit Cause No. 74-2414, Tr. 430-38.

information which it had in its files. Instead, the Department simply estimated what it thought the tribes would want and recommended that such a fishery be barred because of lack of information.[178]

The Department of Fisheries was somewhat more accommodating. It believed that the best standard for achieving equitable regulation of treaty Indian fishing was to provide an opportunity for the tribes to take a "fair percentage of the harvestable fish."[179] Fisheries acknowledged that the *Puyallup* decisions required the State to give treaty Indians an equitable opportunity to take a portion of the salmon runs at usual and accustomed places, since the treaty right would be an empty one if there were no fish for the Indians to harvest at those places, consistent with preservation of the resource.[180] The Department of Fisheries promulgated several special regulations which permitted Indian fishing at some usual and accustomed places.[181] Those regulations, however, benefitted only seven of the tribes in Western Washington.[182]

Prior to trial, the Department of Fisheries concluded that the practicalities of regulation required a more specific allocation. The Department requested the court to "quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon

178. FPTO, §3-440, Record in 9th Circuit Cause No. 74-2414, R. 816-17; *Id.*, Tr. 538-39, 553-56; Ex. JX-2(a) 238; PL-37; PL-78; G-18.

179. FPTO, §3-586, Record in 9th Circuit Cause No. 74-2414, R. 836.

180. *Id.*, FPTO, §3-598, R. 840.

181. FF 209, 384 F. Supp. at 391, Joint App. 175-76. As a member of the International Pacific Salmon Fisheries Commission, the Director of Fisheries also attempted to obtain Canadian agreement to a greater number of fishing days for the Makah Tribe, and when the Canadians refused, the Director took unilateral action to provide more days. FF 216, 384 F. Supp. at 393, Joint App. 179.

182. FF 209, 384 F. Supp. at 391, Joint App. 175-76.

which originate in and return to waters of the State of Washington in the case area."[183] In its Post Trial Brief[184] and in argument in the District Court, Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the tribes.[185]

After hearing the evidence and considering proposed finding of facts and conclusions of law submitted by all parties, the District Court rendered Final Decision No. 1 on February 12, 1974, *United States v. Washington*, 384 F. Supp. 312, Joint App. 63. The court found there was no "equal opportunity fishery"[186] but that Washington's regulatory scheme discriminated against the treaty fishing right:

> The application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the reasons that, a) they have not been established to be necessary to preserve and maintain the resource; b) they operate to discriminate against the tribes' treaty right to fish; c) they have been adopted and enforced in violation of appropriate standards; and, d) they have been adopted and enforced in derogation of the meaning and purposes of the treaty provision at issue in this case.[187]

Washington statutes and regulations, the court found, had *totally closed* many of the tribal usual and accustomed fishing areas to all net fishing, "while permitting commer-

183. Fisheries Pretrial Brief (Docket No. 348) at 8, 22, Record in 9th Circuit Cause No. 74-2414, R. 734, 748; *see also id.* at 2, R. 728.

184. *Post-trial Brief of Fisheries* (Docket No. 399) at 36, *Id.* at R. 1375.

185. *Id.*, Tr. 4384. It is remarkable that the State's Brief entirely omits the pre-trial order and trial proceedings in its latest discussion of whether an allocation is necessary. Washington's views on fishery management objectives seem to have changed as well, compare FF 198, 384 F. Supp. at 389, Joint App. 172 with State Br. at 100.

186. Washington's statement that state regulations "are inherently nondiscriminatory" (State Br. 61) is incorrect. *Cf.* State Br. 81, 90, 101, 29, 35.

187. CL 38, 384 F. Supp. at 403, Joint App. 199.

cial net fishing for salmon elsewhere on the same runs of fish".[188] Even where tribal fishing was still permitted, the right was severely limited. Department of Fisheries regulations often allowed

> all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places.[189]

Evidence at trial showed that of the total salmon harvested in areas shown to be included in the tribes' usual and accustomed off-reservation fishing places, Indian fisheries took only 5% of the harvest.[190] The State admitted that it had authority to regulate non-treaty fisheries in order to increase the size of salmon runs through the usual and accustomed fishing places of the tribes.[191]

The Court also found that, in violation of their regulations, both the Department of Game and the Department of Fisheries had seized nets, confiscated fish, and retained valuable Indian property for long periods of time without notice, and without judicial proceedings.[192] Finally, despite the long history of State attacks on Indian fisheries under the guise of conservation, the court found no significant evidence that the charges were true:

> With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.
>
> Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.[193]

188. FF 218, 384 F. Supp. at 393 Joint App. 180.

189. FF 217, 384 F. Supp. at 393, Joint App. 179-180.

190. Ex. PL-74. Even on isolated rivers all Indian fisheries (both on and off reservation) took at most only 24% of the harvest, (according to State technicians.) Ex. PL-74; F-6; F-26; Record in 9th Circuit Cause No. 74-2414, Tr. 4082-83.

191. FF 204, 384 F. Supp. at 390, Joint App. 174.

192. FF 194-95, 384 F. Supp. at 388, Joint App. 170-71.

193. 384 F. Supp. at 338-39 n. 26, Joint App. 81. Since the decision, the tribes admit that despite their best efforts, they have occasionally erred on fisheries management questions. On occasion tribes have refused to accept State representations as to the need for a conservation closure only to be proven wrong. For example: during the 1975 chum run, on motions by the tribes, the Court found that substantial non-treaty fishing had denied the tribes an opportunity to take their share of preceding runs. Joint App. 450-51. On October 27, 1975 the Court enjoined further non-treaty fishing until the tribal harvest reached 60,000 fish. Two days later the State exercised emergency conservation authority and halted all fishing. *See* Docket No. 1562. This obviously appeared to be a ploy by the State to stop treaty fishing and in the confusion which followed several tribal fisheries continued until tribal biologists could be assured that the State was not simply trying to deprive the tribes of the fishing opportunity just awarded them. There have been other instances where the State has sought and obtained closures of tribal fisheries because of tribal refusal to accept State representations concerning conservation or disputes over preemptive interceptions or allocations. (*See, e.g.,* Joint App. 471-74, Closure of Nooksack River to Lummi tribal fishing.) It should be noted that in all cases the Court has held prompt hearings on these matters.

These refusals to accept state representations understandably arise because of the well-documented history of State discrimination in the case and continuing questionable practices of the State. *See,* for example, the 1977 episode in which the State unilaterally began enforcing laws against treaty fishing in Lake Washington and had to be "corrected" by the Court. (Joint App. 476-78) Such actions in the past did not engender tribal confidence in the State Department of Fisheries and have led to continuing disputes over the true need for closures of tribal fisheries.

Additionally, tribal fisheries departments have sometimes failed to completely comply with technical requirements of Court orders calling for timely filing of tribal regulations, etc. (*See* Wash. Dept. Fisheries, *Technical Report* 40, 1978.) As tribal governments are able to secure more staff support and as working relations improve between State and tribal technical staffs, these instances appear to be declining. *Id.* at 4; *see* discussion of cooperation through the Fisheries Advisory Board in §IV, *infra.*

The evidence clearly established that the salmon available for harvest by Washington fisheries are not sufficient to meet all demands. Therefore, fishing activities of Indians and non-Indians have to be regulated in order to assure perpetuation of the fishery resource.[194] The District Court saw its task to be to devise a remedy which would accommodate the rights of the parties within the limitation of conservation requirements. The Department of Game urged that no harvest allocation be made. The Department of Fisheries, as previously mentioned, asked that the tribes be allocated a fixed percentage of the harvest. The tribes, on the other hand, argued that the treaties were intended to preserve the Indian livelihood in an amount sufficient to satisfy their needs, an analogy to reserved water rights in *Arizona v. California*, 373 U.S. 546 (1962).[195] Evidence presented showed that the profits of an 80% share of the harvest of major Puget Sound and Washington coastal river systems would support only 831 Indian families under ideal circumstances.[196] A 40% allocation could support only 390 families at a level of five thousand dollars ($5,000) per family per year.[197]

Faced with these arguments, the District Court declared that non-treaty fishermen and treaty Indian fishermen, should each collectively be given an opportunity to harvest up to 50% of the resource which normally would return to tribal fishing grounds (after deducting fish actually caught on Indian reservations or used in the Indian diet

194. FF 181, 384 F. Supp. at 386, Joint App. 166.

195. *See e.g.*, Muckleshoot, et al., Pretrial Brief, (Docket No. 327), at 8-11, Record in 9th Circuit Cause No. 74-2414, R. 653-56.

196. Ex. MS-1, 30-32, Table 13. This computation assumes use of a highly efficient trap fishery.

197. *Id.*

or tribal ceremonies).[198] However, what appeared to be an equal sharing of fishing opportunity at tribal usual and accustomed fishing places turned out to be far less than 50% of the total Washington fisheries for the tribes.

The Court of Appeals' affirmance[199] and the District Court's post-decision rulings[200] excluded many of the fish runs from the equal sharing principle. First, of course, fish needed for conservation are not subject to sharing.[201] The allocation applies only to "harvestable" fish. Second, fish runs which do not originate from, or pass through the usual and accustomed fishing grounds of a treaty Indian tribe, are excluded.[202] Third, portions of a run which would not migrate back to tribal fishing grounds at maturity because of disease, injury or other causes, are excluded. This applies particularly to troll and sport fisheries because many of the fish caught by these groups are immature. Thus those fisheries catch "more" fish than are actually counted. The Court's apportionment only provides the tribes with an opportunity to take a share of fish "which, *absent harvest enroute, would be available* for harvest at the treaty tribes' usual and accustomed fishing places."[203] Fourth,

198. This is consistent with Dr. Riley's testimony that the United States negotiators "were trying to make sure that the citizens received their fair share of the fisheries. . . . In common with, if it means nothing else, must be taken to mean that." Record in 9th Circuit Cause No. 74-2414, Tr. 2385, Joint App. 299.

199. 520 F.2d 676, 688-90, Joint App. 52-53.

200. Order on Certain Questions, 1, 4, 5, 6, 7, 8, 10, Joint App. 457-60.

201. 384 F. Supp. at 343, Joint App. 88. "Adequate production escapement" is liberally defined, *see* 384 F. Supp. at 405, Joint App. 202. There is no substance to Washington's assertion, State Br. 104, that a disproportionate share of the burdens of conservation requirements is placed on non-treaty fisheries. *See* 384 F. Supp. at 411, Joint App. 213.

202. "The opportunity to harvest shall . . . be based upon the system of origin . . ." Order on Certain Questions 1, 4, April 13, 1976, Joint App. 457.

203. 384 F. Supp. at 344, Joint App. 90 (emphasis added).

fish harvested by United States citizens, but sold outside the State of Washington, are excluded.[204] Fifth, fish harvested by foreign fishermen in United States or other waters, are excluded.[205] Sixth, fish taken by the State of Washington at hatchery facilities for sales to processors or donations, are excluded.[206] These fish are subtracted from the total salmon production of Washington before the court's sharing formula comes into play. Three other small adjustments are made, to exclude fish harvested on Indian reservations[207] and fish used in tribal ceremonies or to feed tribal families.[208] Finally, treaty and non-treaty fisheries are each afforded the *opportunity* to take one-half of the remaining surplus of each fish run.

This is a matter of some importance in this appeal because of the prominence given by the State and the association in their briefs to the argument that the tribes have been allocated "50 plus" of the total catch of approximately eight million salmon. The actual workings of the District Court's allocation order as discussed briefly above, are discussed in more detail in Part III A of this brief. In addition, the brief of the United States contains a detailed description of the workings of the allocation order. In

204. Order on Certain Questions, 6, April 13, 1976, Joint App. 458.

205. *Id.*, 5, Joint App. 458.

206. *Id.*, 10(b), Joint App. 460.

207. Dr. Lane testified that Indian reservations referred to in the treaties often included some of the tribal traditional fishing grounds. As to those, "the understanding of all parties concerned was that no whites could go onto the reservation and use those facilities." Joint App. 270-71. In other words, the tribes granted the settlers no shared use rights at those locations. *Id.*

208. Non-treaty commercial fishermen are not required to record the fish they reserve from sale for gifts or home use, so these harvests are also deducted from the equal sharing process in practice. Preliminary Injunction Re Salmon Allocation for 1978, at 7 (August 11, 1978, Docket No. 4798).

1977, the tribes, for the first time obtained close to their treaty share—approximately 43% of the combined Puget Sound origin runs. This figure is calculated by comparing the combined tribal catches[209] shown on the tables at Joint App. 593, with the total non-treaty catch, composed of the commercial net catch, the Puget Sound sport catch, the ocean troll and ocean sport catch shown in the table at Joint App. 594. The total tribal catch, however, comprises only *18%* of the total Washington landings. This is demonstrated by an examination of Tables 1 through 5 of the Washington Salmon Harvest Statistics prepared by the Washington Department of Fisheries, Ex. PL-M-3, Joint App. 635-639. This result occurs because of the substantial non-treaty catch of stocks that do not originate in Puget Sound and because of the catch of immature fish which, as explained above, must be adjusted to adult equivalents in compliance with the District Court's allocation formula.

209. A related distortion, repeatedly mentioned by the State and the Associations, concerns the number of treaty fishermen. In FF 188, 384 F. Supp. at 387, Joint App. 169, the District Court found that the Department of Fisheries *estimated* that the total number of Indian sport and commercial fishermen *at the time the case was tried* was 794. The State and Associations repeatedly use this number to refer to the total number of treaty fishermen. However, as outlined above, the court made repeated findings that this number had been reduced because of State discrimination against treaty fishing. At the present time there are now well over 1,200 Indian commercial fishermen participating in the fishery. *See* Regional Team of Federal Task Force on Washington State Fisheries, *Settlement Plan for Washington State Salmon and Steelhead Fisheries*, at 284 (June 1978). (Note: On April 7, 1977, the President established an inter-agency "Task Force" to address problems associated with reactions to the District Court's decision. In June of 1978, the Regional Team of the Task Force proposed a "settlement plan". That plan has been essentially rejected by all parties.) The figures in the Task Force report indicate that the total number of units of Indian commercial gear is 1,217. However, the Report notes that some fishermen possess more than one unit of gear and that the total number of fishermen is correspondingly less. However, this is largely offset by the fact that the Task Force data does not include information from the following tribes concerning their fishermen: Duwamish, Snohomish, Snoqualmie and Samish. Nor does it mention that one piece of gear will often be fished by two or more related families. Accordingly, 1,200 is a *conservative* figure for the total number of Indian commercial fishermen now active in Western Washington.

Another very important distortion by the State in its brief concerns the impact of the decision on the State's conservation authority. The District Court carefully preserved State authority to regulate *all* fisheries for conservation. Notwithstanding some passages in its opinion which suggest that court or tribal approval is a prerequisite to State regulation of treaty fisheries, this applies only to State permanent regulations. Washington has never found it necessary to seek court approval of an off-reservation regulation because:

> Emergency regulations are enforceable by the State upon filing with the court and service upon the tribes affected. . . .[210]

The State had always governed the openings and closings of the fishery during the season essentially by emergency regulation. No judicial hearing or review is necessary before these conservation regulations can go into effect. This matter is discussed in some detail in Part IV of the Argument, *infra.*

F. Post Decision Remedies of the District Court

For a number of reasons, vindicating the tribal right to take a fair share of the fish has not been a simple task. Both the District Court and Court of Appeals found that Washington's regulations typically permit most, or all, available salmon to be harvested by non-treaty fishermen prior to their return to tribal fishing places, which are near the end of the salmon migration paths. Thus, a crucial part

210. 384 F. Supp. at 417, Joint App. 225. The Order for Program to Implement the Interim Plan, a key post-decision order, contains much the same language. October 8, 1974, Joint App. 439. These, perhaps the most important paragraphs of the lower court's rulings, directly contradict the State's (Br. 110) and the *amicus curiae* Institute of Fisheries Biologists' (Br. 24, 27) account of the effect of the court decision.

of the District Court's apportionment was the requirement that the State of Washington

> make significant reductions in the non-Indian fishery, as are necessary to achieve the ultimate objectives of the Court's decision without requiring mathematical precision, but . . . consistent with the concept of permitting the full harvest of fish.[211]

Tribes have no opportunity to catch one-half of the salmon runs which normally return to them unless one-half of the fish escape "downstream" fisheries. Or, as the Court of Appeals said, "preserving the tribal opportunity requires limiting the non-tribal opportunity."[212]

Within a few months of the District Court's decision, several non-Indian fishing associations attempted to intervene or brought lawsuits directly against the federal court.[213] The intervention motions were denied but all interested parties were invited to participate[214] as *amicus curiae,* and many did so.[215] Several Indian tribes intervened and presented evidence regarding their treaty status and

211. 384 F.Supp. at 420, §5, Joint App. 230.

212. 573 F.2d at 1130, App. A-13, Petition in No. 78-119.

213. *See Bergh v. Washington, et al.,* C74-524 S, *dismissed by memorandum order* (W.D.Wash. 1974), *aff'd.,* 535 F.2d 505 (9th Cir. 1976), *cert. denied,* 429 U.S. 921 (1976).

214. Interestingly the non-Indian fishing associations did not suggest then, nor do they now, the existence of any additional evidence relevant to the intent of the treaty parties or the nature of the tribal reserved harvesting right. The extravagant claims of economic injury, *see e.g.,* State Br. 7-8, were heavily discounted by the Governor's Fishing Gear Reduction Task Force. A lawyer on the Task Force said, "None of us presumed at any time that the sole source of the problem was the federal court decision, we all considered it a contributing force and I think the forces have been drawn up [sic] as early as 1962, in the economic condition of the fishery." Wilkerson deposition, at 56-57, Docket No. 2218; *see* Docket No. 2222 at 4.

215. *See e.g.* Docket No. 409, Record in 9th Circuit Cause No. 74-2414, R. 1484; Docket No. 862, Record in 9th Circuit Cause No. 77-3654, R. 733; Docket No. 1170, *Id.* R. 756; Docket No. 1396, *Id.,* R. 790; Docket No. 1585, *Id.,* R. 814; Docket No. 2276, *Id.,* R. 923, Docket No. 2312, *Id.,* R. 931.

usual and accustomed fishing places. After full consideration, the treaty status of these tribes was confirmed and they now participate in treaty fisheries pursuant to the court's orders.[216] The Order for Program to Implement Interim Plan also permitted members of other intervening tribes to fish pending final adjudication of treaty status, subject to state regulations or the terms of any special fishing rights order.[217] Only four tribes have obtained such an order pending the Court's decision on their treaty status.[218]

Washington and its non-treaty fishermen have adamantly resisted making reductions in non-treaty fishing. Washington itself stimulated this resistance in 1974 by decreasing the sport salmon catch limit from three to two fish, over the opposition of Indian tribes who pointed out that the change would not make more fish available to tribal fisheries.[219] The State's action led to *Commercial Passenger Fishing Vessel Ass'n. v. State,* which is now before

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216. See First Supplemental Treaty Status Order, December 31, 1974, Docket No. 935½; Second Supplemental Treaty Status Order, February 26, 1975, Docket No. 1021.

217. October 8, 1974, Joint App. 441-42.

218. Washington twice misstates the facts on this matter. State Br. at 6, n. 5 and 31. Neither the Order Re Conditional Fishing Rights, Docket No. 1269, nor the Order for Program to Implement Interim Plan, Joint App. 441-42, requires or suggests that the tribes "establish to the court's satisfaction their 'blood quantum' ". Br. 6, n. 5. The orders simply preserve the status quo, permitting all tribal members to fish without a license as they have since *Tulee v. Washington,* 315 U.S. 681 (1942). Much later in the litigation, the District Court required five tribes to produce data regarding individual's descendancy from treaty signatories. Order Re Samish . . . Tribe's Treaty Status, March 19, 1976. Joint App. 454-55. However, the Order had no bearing on the Order Re Conditional Fishing Rights which required only membership, not descendancy. Further, it is now unlikely that the District Court has power to review tribal decisions to grant or deny benefits. *Cf. Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Finally, whether these intervenor tribes are "recognized" by the United States is an open issue; it is clear, however, that each tribe signed one of the treaties.

219. Memorandum Decision, September 12, 1976, Joint App. 427, 432.

the Court in No. 77-983. In the state court litigation, Washington officials publicly described their "distasteful" duty of complying with the federal court decisions.[220]

At approximately the same time the Puget Sound Gillnetters Association obtained a state court injunction which interfered *directly* with the federal court's orders. Washington could offer no alternative means of complying with the federal decision.[221] Upon motion of the United States, the District Court then enjoined execution of the state court order. [222]

In early 1975 Washington unilaterally revised the steelhead run size available to Indian fisheries on the theory that some fish were hatchery propagated. In disregard of applicable federal procedural orders, the Game Department seized Muckleshoot Indian nets and fish.[223] Again the District Court was forced to intervene.[224]

A few months later the Purse Seine Vessel Association sued Washington to prevent compliance with certain District Court orders relating to the sockeye and pink salmon

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220. *See* Transcript, September 2, 1974, at 30-32.

221. Memorandum Decision, September 12, 1974, Joint App. 427, 428-29.

222. *Id.*, Joint App. 427, 434. The federal court noted that the state suit lacked the real parties in interest and involved no full-scale evidentiary hearing. Affidavits of the litigants provided the only evidence and these were not subjected to cross-examination. Joint App. 431. The Court further found that the treaty tribes had taken fewer fish both in terms of numbers, and in percentage of harvest, up to that point in the 1974 season than they had during the years preceding the judicial apportionment in Final Decision No. 1. Joint App. 430.

223. Memorandum Decision, January 20, 1975, Joint App. 444, 447.

224. *Id.* The Court did not interfere with the litigation between the Department of Game and the Puyallup Tribe. *Id.* at 449. However, since neither the federal court orders nor the parties had previously distinguished between hatchery propagated and other fish, the court refrained from making a ruling pending a request that it consider the matter. Since that time a pre-trial schedule has been stipulated, Docket No. 5139, 5197 and a trial is scheduled for June 4, 1979.

fishery.[225] On motion of the United States, the District Court stayed the state court proceedings.[226] This time the state superior court held that it had not been properly enjoined and proceeded to judgment against the Department of Fisheries.[227] The judgment was affirmed by the Washington Supreme Court, *Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977).

On June 4, 1975, the Court of Appeals affirmed the District Court's 1974 opinion and orders in a thorough opinion. A concurring opinion decried the need for the District Court to retain continuing jurisdiction but added:

> The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten.[228]

In the fall of 1975, Washington's reluctant compliance forced the District Court to enter a series of further remedial orders designed to give the treaty tribes a realistic opportunity to share in the coho and chum salmon runs.[229] In response, many of Washington's non-treaty fishermen engaged "in a substantial fishery on the 1975 coho salmon run in direct violation of regulations issued by the State

225. The facts of the 1975 International Fishing case are set forth in the brief for the United States; *see also* Part VII A, *infra*.

226. App. H in Petition 77-983, Docket No. 1240, Record in 9th Circuit Cause No. 77-3654, R. 772.

227. *See* Docket No. 1337, Copy of Notice of Trial in State Superior Court.

228. *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975), Burns, J., concurring, Joint App. 31, at 59-60.

229. Docket No. 1381, Record in 9th Circuit Cause No. 77-3654, R. 782; Docket No. 1417, *Id.*, R. 792; Docket No. 1421A, *Id.*, R. 799, Docket No. 1555, *Id.*, R. 812.

of Washington and orders of [the] court."[230] The State of Washington did little to prevent these recurring violations. Citations were ordered thrown out by county prosecutors and local judges[231] and out of 300 citations issued to non-treaty fishermen, only one led to a penalty.[232]

The 1976 fishing season was similar. In April the Department of Game abruptly terminated a co-management agreement with the Quinault Tribe and threatened to arrest tribal employees moving steelhead smolts from the tribal hatchery to a river.[233] The Department's action was based on its interpretation of the state court decision in *Department of Game v. Puyallup Tribe*, 86 Wn. 2d 665, 548 P.2d 1058 (1976).[234] It apparently determined that the treaty right did not even extend to tribally reared hatchery fish.

During the fall salmon runs Washington authorized non-treaty fishermen to take much of the catch prior to the fish reaching the major tribal fishing areas.[235] When the State announced additional non-treaty fisheries, the District Court again had to intervene.[236] Undaunted, the Puget Sound Gillnetters Association publicly encouraged non-treaty fishermen to disregard the court-ordered closures.[237] Within four nights some 247 non-treaty vessels

230. Preliminary Injunction, October 27, 1975, Joint App. 450, §2.

231. Sgt. Lyle Nelson testimony, Transcript March 28, 1978, Joint App. 521, 524-25.

232. Oral ruling of Honorable George H. Boldt, Transcript October 25, 1975, Joint App. 499-500.

233. Memorandum of Facts, Exhibits H, I, Docket No. 2077.

234. *Id.*, Exhibits A, G, Docket No. 2077.

235. Order Re 1976 Coho Fishery, September 6, 1976, §3-5, Joint App. 466, at 467-68.

236. *Id.*, Joint App. 469-70.

237. Fisheries Advisory Board Report, November 17, 1976, Joint App. 551; *see also* Joint App. 602-03.

were observed illegally fishing.[238] Washington announced that it was unable to *control* the illegal fishing, although the Assistant Fisheries Director admitted that in some areas state *policy* was to make no arrests.[239]

Washington's position throughout the litigation had been that the Department of Fisheries had authority to limit non-treaty fishing so as to increase the number of fish available for harvest at usual and accustomed places.[240] Accordingly, until 1977 the District Court relied on Washington to promulgate regulations appropriate to that purpose. In 1977, however, a successful state court collateral attack foreclosed that remedial tool.

In June 1977, the Washington Supreme Court decided *Puget Sound Gillnetters Association v. Moos*,[241] an original action filed directly in the Supreme Court. In this, and subsequent rulings,[242] the state court opined that neither state statutes nor the Equal Protection Clause permitted Washington to restrict non-treaty fishing in order to make fish available at "usual and accustomed grounds and stations." The State Supreme Court decisions effectively required Washington to disregard the Interim Plan, 384 F. Supp. at 420, Joint App. 230.[243]

238. Transcript October 11, 1976, Docket No. 2573; *see* Joint App. 602.

239. Request for Determination, Docket No. 2574, Record in 9th Circuit Cause No. 77-3654, R. 961; B. Gruett Testimony, October 11, 1976, at 193-97; L. Nelson Testimony, Transcript March 28, 1978, Joint App. 521, 523-24; *see* Joint App. 603.

240. FF 204, 384 F.Supp. at 390, Joint App. 174.

241. 88 Wn.2d 677, 565 P.2d 1151 (1977), App. C in Petition No. 77-983.

242. *Purse Seine Vessel Owners Ass'n v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977); *Washington Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977), App. B in Petition No. 77-983.

243. *See* G. Sandison Testimony, Transcript August 8, 1977, Joint App. 513.

In advance of the 1977 fishing season, Washington adopted regulations which "made no allowance [and] no exceptions for the Indian opportunity to harvest."[244] When harvestable fish reached Lake Washington, the Department of Fisheries authorized sports harvesting but refused to allow treaty Indian net fishing.[245] The Director of Fisheries admitted that no conservation needs justified the restriction of the Indian fishery.[246]

The new circumstances compelled the District Court to directly allocate the opportunity to take fish.[247] The court accepted the unanimous report of a joint technical committee listing the harvestable numbers of fish for each 1977 run and the number of fish which had already been caught by Washington troll and sport fishermen.[248] Since both the treaty and non-treaty fleets possessed the ability to harvest a full 50 percent of the chinook, coho and chum salmon runs expected to return to usual and accustomed fishing grounds in Puget Sound,[249] the allocation order simply expressed the fishing opportunity to be accorded

244. P. Mundy Testimony, *Id.*, Joint App. 507; *see* 500-10; *see* FF 13 in Memorandum Order, August 31, 1977, Petition in No. 78-119, App. A 41-42.

245. FF 10 in Memorandum Order, August 31, 1977, Petition in No. 78-119, App. A 40-41.

246. *See* G. Sandison testimony, *supra*, n. 243, Joint App. 512, and FF 11 in Memorandum Order, *supra*, App. A 41.

247. FF 2-3 in Memorandum Order, *supra*, at App. A 36-37; *see* 573 F.2d 1123, 1130, Petition in No. 78-119, App. A-13.

248. The State Chief of Harvest Management testified that Washington estimates the number of salmon caught by sport fishermen prior to the season and that emergency openings or closings of sport fishing are rarely used. State regulations of permissible gear, seasons and catch size limits largely determine what the sport catch will be. The non-treaty commercial net fisheries inside Puget Sound are based upon the run sizes that escape the ocean troll and sport fisheries. *See* Transcript April 6, 1978 at 171-72, 174-80. Thus the Associations' concern, Association Br. 15, that the court's allocation limits only commercial net fisheries is misplaced. State regulations alone determine how fishing opportunity is divided among non-treaty sport and commercial fisheries.

249. Joint App. 459-60; Transcript August 8, 1977 at 58.

to each side in terms of the number of fish of each species in each region.[250] On the basis of the order, fisheries biologists of the treaty tribes and the State of Washington could, and each did, design fishing regulations so that neither fishery would preempt the others fishing opportunities.

In the 1977 salmon season illegal non-treaty fishing reached unprecedented heights. Washington informed the District Court that there was little possibility of obtaining state prosecutions or convictions for offenders.[251] and the Department of Fisheries said it would issue no State or federal citations designed to stop incursions into the treaty share.[252] A state fishery biologist observed nearly 200 non-treaty gillnet boats fishing in a closed area.[253] The situation, the District Court found

> if permitted to continue, will lead to a breakdown of law and order, . . . the substantial denial of federally guaranteed treaty fishing rights and will endanger the preservation of the fishery resource.[254]

Accordingly the court enjoined the state-licensed fisher-

250. In many cases, the non-treaty fleet had already taken much of the returning runs. To equalize the opportunities, tribal fisheries were given the opportunity to take most of the run which *actually* returned to the usual and accustomed places. The percentage available to each side *inside* Puget Sound reflects this adjustment. *Cf.* Order re 1976 Coho Fishery, September 6, 1976, §5, Joint App. 466, 468. Compare State's Brief at 11. The percentages referred to in the State's Brief are not of the total run, but only of the actual numbers of fish which reached the usual and accustomed places. These percentages are reached only after the other reductions, outlined above, are made from the total run bound for the tribal fishing grounds.

251. G. Sandison testimony, Transcript August 8, 1977, Joint App. 510 at 514, J. Johnson argument, Transcript August 26, 1977, Joint App. 514-15, W. Miller testimony, Transcript April 5, 1978, Joint App. 530, 533.

252. W. Miller testimony, Transcript September 22, 1977, Joint App. 519; Transcript April 5, 1978, Joint App. 530-31.

253. *See* Joint App. 599-600.

254. Temporary Restraining Order Re Enforcement of 1977 Fisheries, Docket No. 3265G, Record in 9th Circuit Cause No. 77-3654, R. 230-31.

men from violating the state regulations which implemented the allocation order.[255]

A highly organized campaign to violate the court's injunction has ensued. The National Marine Fisheries Service reported that about one-fourth of the non-Indian fishermen contacted indicated that they planned to violate the court's orders.[256] Non-treaty fishermen unloaded tons of illegally caught fish in "a carnival atmosphere, laughing and joking."[257] Shooting threats were reported.[258] Non-treaty fishermen extensively used citizens band radio equipment to report contacts with federal enforcement officers.

255. A series of hearings followed to determine whether preliminary injunctions should be entered. The procedural details are set out in the brief of the United States. The 1977 hearings were uniformly boycotted by non-treaty fishermen and their trade associations despite abundant notice of the proceedings. Attorneys for the Puget Sound Gillnetters and Purse Seine Owners Associations were served with copies of the United States' pleadings seeking the allocation orders, Docket No. 3087, Record in 9th Circuit Cause No. 77-3654, R. 6; Docket No. 3088, *Id.*, R. 16; Docket No. 3089; Docket No. 3090, of the tribes' joinder in that motion, Docket No. 3107, and of the proposed order, Docket No. 3178. It is noteworthy how carefully the Associations explain the process in order to mislead the Court. "No prior notice" of the September 12, 1977 order "was given to petitioners." Association Br. 19. Yet an affidavit in the record shows that notice was served on Petitioners' *attorneys*, Docket No. 3467, Record in 9th Circuit Cause No. 77-3654, R. 1167, 1170. Similarly notice of the September 22, 1977 hearing, was served on petitioners attorneys, Docket No. 3403. The Gillnetters do not discuss the extensive notice, by personal service and otherwise, given of the September 27, 1977 hearing, nor the massive efforts of the United States Marshals to personally serve *all* fishermen with notice of the hearings which led to the current order, dated June 6, 1978. *See e.g.*, Docket No. 3467, Record in 9th Circuit Cause No. 77-3654, R. 1167, 1170; Docket No. 4151, 4153, 4157, 4170, 4186, 4200, 4214, 4230, 4246, 4251. The latter service was made necessary only when Washington refused to mail out copies of the proposed injunction with its routine license renewal applications. *See* Docket No. 4049. A careful analysis of the Docket shows that attorneys for both Petitioner Associations have been on the parties' mailing list for service of documents since August 4, 1976, Docket No. 2324.

256. W. Lewis Testimony, Transcript September 22, 1977, Joint App. 515, 516.

257. *Id.* at 517.

258. *Id.* at 518.

A shore-based transmitter also warned illegal fishermen of the Coast Guard's approach.[259] Consequently, when enforcement vessels stopped to issue a citation most of the violators would escape.[260] After the season, the State's technicians reported that over 183,000 salmon had been taken illegally by state licensees.[261]

In early 1978 the court heard testimony and argument from the parties and many non-treaty fishermen, regarding whether an injunction should restrain illegal non-treaty fishing for an additional season. Counsel for the Puget Sound Gillnetters and the Purse Seine Vessel Owners participated[262] in the hearings although they entered appearances on behalf of individual fishermen, not the trade associations. Washington indicated that its policy of not enforcing restrictions on the non-treaty fleet would continue.[263] Accordingly, the court issued the injunction of June 6, 1978 which is before this court on certiorari before judgment of the Court of Appeals.

At least twice during the 1978 fishing season, Washing-

259. D. Gibler testimony, Transcript April 5, 1978, Joint App. 527, 529.

260. *Id.* at 530.

261. FF 26, Joint App. 482; *see* Transcript April 6, 1978 at 325, l. 14.

262. At page 21 of their brief, the Associations' attempt to argue that their ability to cross-examine and subpoena witnesses was restricted. They fail to point out, however, that counsel for the fishermen and the Associations declined the United States' and the tribes' offers to provide the witnesses voluntarily. Transcript April 5, 1978 at 114; Transcript April 6, 1978 at 350; FF 12 and 13, Findings of Fact, June 6, 1978, Joint App. 479, 480. In addition, none of the fishermen or the Associations present through their attorneys attempted to intervene. Finally, it should be noted that an examination of the transcript of the hearing of April 6, 1978 reveals that Mr. Yates, the attorney for the Puget Sound Gillnetters cross-examined the various witnesses at length. However, he purportedly did so at the behest of the Reefnetters Association, a party to the case, not on behalf of the Puget Sound Gillnetters Association or his individual fishermen clients.

263. W. Miller testimony, Transcript April 5, 1978, Joint App. 530, 533-34.

ton adopted regulations, not required for conservation, curtailing treaty Indian fisheries. In the Strait of Juan de Fuca, the State adopted emergency regulations forbidding treaty fisheries on the grounds that the tribes might intercept a few fish from runs needing protection. However the State simultaneously authorized non-treaty harvest in nearby areas, which had a much larger effect on the same weak fish runs.[264] Again, the District Court was forced to intervene. The court found no evidence showing that a total closure of treaty fishing was reasonable or necessary for conservation.[265]

Washington also exercised its emergency conservation authority[266] to close Indian fisheries in the wake of a dispute over the way a telephone hotline message announced openings and closing of *non*-treaty fishing.[267] It was undisputed that there was no conservation need for terminating Indian fishing; the matter was resolved in the Fisheries Advisory Board.[268]

Illegal non-treaty fishing raged in 1978. The Coast Guard Commander testified:

> [T]he fishermen are better organized this year. They have tailed our boats, reported our positions from the shore, from the water, from bridges. . . We find. . . one boat. . . the rest of them, of course, scatter. They are warned that we are coming.[269]

264. Affidavits Docket No. 5167, 5200, 5252; Fisheries Advisory Board Report of October 9, 1978, Joint App. 617, 619. *See* Motion, § 1-2, Joint App. 491, 492. As to the State's historical policy of basing "mixed stock fisheries" on value judgments, *see* FF 202, 384 F.Supp. at 390, Joint App. 173.

265. FF 4, Preliminary Injunction, November 3, 1978, Joint App. 494, 495.

266. 384 F.Supp. at 416, §19, Joint App. 225.

267. *See* Docket No. 5162, 5163.

268. Transcript October 16, 1978 at 28-29, *see* Fisheries Advisory Board Report 78-83A, Docket No. 5313.

269. Larkin testimony, Transcript November 3, 1978 at 12.

A National Marine Fisheries Service officer recounted hearing non-treaty fishermen joking as they were being arraigned for federal contempt of court, discussing when they would fish again in violation of the orders and speculating on the amount of fines they would have to pay.[270] By November 3, 1978, 177 citations had been issued ordering fishermen to appear and show cause why they should not be held in contempt.[271] Non-treaty fishermen took 95.3% of the 1978 illegal catch.[272]

Despite the illegal fishing the treaty tribes have obtained increasingly significant opportunities to take fish at usual and accustomed areas. In 1977 treaty fisheries harvested nearly 43% of the Puget Sound origin runs combined.[273] Of course, in the areas most heavily impacted by illegal non-treaty fishing the tribes took far less than their share. In 1977 at least, the District Court's accommodation of the rights of the parties was largely successful, in spite of "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."[274]

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270. Marshall testimony, *Id.* at 21.

271. *Id.* at 14. Approximately 50 of these citations were given to treaty Indians. *Id.* at 24. Many of these involved federal confusion over fishing areas or compiling regulations or fishermen found outside tribal usual and accustomed places. *Id.* at 27-28.

272. *See* Whitney testimony, Transcript November 3, 1978 at 7; Technical Advisor's Report Re Illegal Fishing, Docket No. 5314.

273. *See* Attachment to Fisheries Advisory Board Report No. 78-51. Joint App. 593. Importantly, this catch of approximately 750,000 fish represents only 9.5% of the total Washington harvest of 7,914,000 salmon. The tribes harvested additional fish from non-Puget Sound origin runs bringing their total catch to approximately 18% of the Washington harvest. The tribes do not assert that their opportunity to harvest non-Puget Sound stocks was restricted. Even within Puget Sound, the adjustment needed to raise 43% to 50% is slight.

274. 573 F.2d at 1126, App. A-3, Petition in No. 78-119.

SUMMARY OF ARGUMENT

I.

The final judgment of the District Court as affirmed by the Court of Appeals became final for purposes of *res judicata* in 1976 when this Court denied certiorari. *Brown v. Allen*, 344 U.S. 443, 446 (1953); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940). These appeals represent an attempt by the State and the Associations to relitigate the issues originally determined by the District Court in a subsequent federal enforcement proceeding, made necessary only by Petitioners' refusal to comply with the District Court's rulings.

The State of Washington was, of course, a party to *United States v. Washington* and is barred from relitigating issues, in state *or* federal court, that were finally determined in that case. Similarly, licensees of the State of Washington are in privity with the State and likewise bound by the judgment. *E.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

This Court must not acquiesce in the principle that a state, which has been afforded a full and fair opportunity to litigate the meaning of a federal right, can relitigate the issue in a subsequent enforcement proceeding made necessary by its refusal to comply with the original judgment.

II.

Notwithstanding the State's repeated assertions that treaty fishermen have been afforded an equal opportunity to fish, the evidence clearly demonstrates that the State authorized a virtual preemption of the treaty fishing right

by enacting regulations which allowed non-treaty fishermen to harvest approximately 95% of the resource before the fish migrate back to the tribal usual and accustomed grounds. Consistent with this Court's decisions that prevent preemption of treaty fishing rights the District Court required an allocation to "accommodate the rights of Indians under the Treaty and the rights of other people." *Department of Game of Washington v. Puyallup Tribe* (*Puyallup II*), 414 U.S. 44, 49 (1973).

III.

The District Court's decision reflects a comprehensive investigation into the anthropological and historical evidence concerning the negotiation of the treaties and the understanding of the parties. Construing the evidence in light of the established rules of law governing interpretation of Indian treaties, the District Court concluded that the tribes held a reserved treaty right, linked to the marine and fresh-water areas where the tribes traditionally fished, which exists in part to provide a volume of fish sufficient to meet the fair needs of the tribes. The right was to be exercised in common with non-Indians, who, the District Court determined, were entitled to take a share of the resource fair in comparison with the share taken by the tribes.

The State and the non-treaty fishermen have become so obsessed with the mechanics of the allocation, however, that they have obscured its actual workings. Contrary to the assertions of the State and the Associations, the allocation formula *does not* apply to all the fish landed or caught in the State of Washington. The tribal opportunity extends only to those fish "which, absent harvest en route,

would be available for harvest at the treaty tribes' usual and accustomed fishing places." The District Court, therefore, did *not* allocate "50% plus" of the *total* Washington salmon catch to the tribes as the State asserts. In 1977, for example, in which the tribes took 43% of the Puget Sound catch returning to their usual and accustomed grounds, the total tribal catch in Washington amounted to only 18% of the total Washington landings. This Court, if it reviews the District Court's allocation on the merits, must review it in its actual operation, not as falsely hypothesized by the State and the Associations.

In their briefs, the Petitioners not only distort the evidence concerning the circumstances surrounding the execution of the treaties, particularly the Indian insistence upon preserving their well-established commercial fisheries, but they completely ignore the nature of the treaty interpretation process. They totally disregard both the canons of construction applicable to Indian treaties and the precedents of this Court concerning the very treaties now at issue. The State's position, that *no* allocation is permissible and that the treaties secured the tribes only the right to compete equally as individuals with non-treaty fishermen, is simply a resurrection of arguments rejected by this Court over 75 years ago in *United States v. Winans*, 198 U.S. 371 (1905) and consistently rejected since.

The allocation decreed by the District Court is the *minimal* allocation to the tribes which successfully accommodates the clear intention of the parties to provide for the fair needs of the tribe, and, at the same time, accomplishes a sharing of the resource with non-treaty citizens. The Court's allocation is strongly supported by the facts,

the canons of construction, and the decisions of this Court involving reserved treaty rights. *See Winters v. United States,* 207 U.S. 564 (1908); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Arizona v. California,* 373 U.S. 546 (1963). Further, as the Court of Appeals recognized, the District Court's conclusion that the tribes and the non-treaty State licensees would share equally the resource passing through the tribal usual and accustomed grounds flows naturally from the fact that the two parties to the treaties, the United States and the tribes, bargained as sovereigns on the basis of formal equality. It is also strongly supported by the language of the treaties themselves and from the evidence concerning the contemporaneous use of that language in common parlance.

IV.

Notwithstanding the State's allegations, the State has retained its traditional conservation authority over Indian fisheries and, consistent with the Court's orders, may still unilaterally shut down tribal fishing in situations where a conservation problem is presented. In addition, the State of Washington continues to perform its traditional management functions such as estimating run sizes and escapement goals, monitoring fish runs and fishing effort during the season, and making the necessary in-season adjustments as needed. The District Court has *not* taken over management of the fishery.

On the other hand, in terms of *enforcement* of the decision, substantial difficulties have been encountered because of massive illegal fishing by State licensees that has developed and because of the refusal of the State to enforce the

decision or take any action whatsoever to protect Indian treaty fishing rights. The Washington Supreme Court has immensely encouraged this resistance to the decision by its refusal to give *res judicata* effect to the federal judgment and by its statements that the decision is erroneous and unconstitutional. As the Ninth Circuit correctly concluded, "[W]e do not see how, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner." 573 F.2d 1130.

The District Court's remedial orders have been designed to protect the fishing opportunity as defined in the original decision; they have been aimed at rectifying, to the extent possible, the consequences of State non-compliance with the tribal treaty fishing right and they addressed, with extreme delicacy, the root of the problem—a conceded State inability or unwillingness to manage the resource consistent with federal law. The Court has consistently utilized the least intrusive remedy available short of abandoning enforcement of the treaty right altogether. The District Court's orders, therefore, easily meet the tests of constraint counseled by such cases as *Milliken v. Bradley,* 433 U.S. 267, 280-81 (1977) and *Hutto v. Finney,* ..... U.S. ....., 98 S.Ct. 2565, 2572 (1978).

The District Court also acted properly in directly enjoining the non-treaty fishermen who were violating its orders. The non-treaty fishermen, as licensees of the State of Washington, are in privity with and represented by the State in the litigation. In these circumstances, it is well-established that the judgment against the State affecting its sovereign interests binds both the State and its individ-

ual licensees. *See, e.g., City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *New Jersey v. New York,* 345 U.S. 369 (1953). Non-treaty fishermen, therefore, being bound by the judgment, may properly be directly enjoined by the Court from violating the District Court's orders and interfering with the Indian treaty fishing right.

V.

Puget Sound Gillnetters Association v. Moos, 88 Wn.2d 677, 565 P.2d 1151 (1977) and *Washington State Commercial Passenger Fishing Vessels Association v. Tollefson,* 89 Wn.2d 276, 571 P.2d 1373 (1977), No. 77-983, represent direct attempts by the state court to prevent implementation of the federal treaty right and cannot be sustained in the face of the Supremacy Clause.

However, the state cases are not reviewable here on the merits since they present no justiciable case or controversy. *United States v. Johnson,* 319 U.S. 302 (1943). The parties were unified for the purpose of defeating the prior federal adjudications of the rights, the records were contrived and the results preordained.

The State Supreme Court cases are also void because of the failure of the State to give *res judicata* to the prior judgment of the federal court to which the State was a party.

ARGUMENT

I. The State of Washington and Its Privies, the Non-Treaty Fishermen and Their Associations, Are Barred By the Doctrine of Res Judicata From Relitigating the Meaning of the Stevens Treaties and Other Issues That Were Finally Resolved By the Federal Courts in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd., 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

In 1974, after extensive pre-trial preparation and an eighteen day trial during which time the various issues were aggressively contested by the State of Washington, the District Court entered its Finding of Fact, Conclusions of Law, Declaratory Judgment and Injunction. The Court of Appeal affirmed the decision and this Court denied certiorari in 1976. Although further proceedings have been necessary to implement the decision, the status of the declaratory judgment itself as a final judgment for purposes of *res judicata* and appeal is made clear by statute and case law. 28 U.S.C. §2201, enacted in 1938 to empower federal courts to enter declaratory judgments, provides:

> In a case of actual controversy within its jurisdiction, except with respect to federal taxes, other than actions brought under §7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.*[275] (emphasis added)

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275. 28 U.S.C. §2202 allows the court to grant further necessary or proper relief "based on a declaratory judgment" against any adverse party whose rights have been determined by such judgment. Clearly, the "finality" of the judgment recognized by 28 U.S.C. §2201, is not undermined by the provision for implementation of the judgment. *Cf., Morgan v. McDonough,* 540 F.2d 527, 529 (1st Cir. 1976), *cert. denied,* 429 U.S. 1042 (1977).

It is well established that a declaratory judgment is entitled to *res judicata* effect in any subsequent civil proceeding. *See Aralleno-Flores v. Rosenberg,* 310 F.2d 118, 121 (9th Cir. 1962); *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.,* 253 F.2d 29, 30 (2d Cir. 1958); *Ma Chuck Moon v. Dulles,* 237 F.2d 241, 243 (9th Cir. 1956), *cert. denied,* 352 U.S. 1002 (1957); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123,* 137 F.2d 176, 179 (5th Cir. 1943), *aff'd.,* 321 U.S. 590 (1944). *See also* E. Bochard, *Declaratory Judgments,* 10-11 (2d ed. 1941); *see generally,* Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818 (1952). As §77 of the Restatement of Judgments puts it:

> Where an action is brought to obtain a declaration of the rights or other legal relations of the parties to the action, whether or not further relief is or could be prayed, a final and valid judgment declaring such rights or other relations is binding between the parties in subsequent actions.

See also Restatement (Second) Judgments §76 (Tentative Draft No. 3, April 15, 1976).

There being no reasonable doubt regarding the finality of a declaratory judgment for purposes of *res judicata,* the only question appears to be the effect of this Court's 1976 denial of certiorari. The State of Washington and the Fishing Associations in their briefs on the merits assume that they are free to relitigate the District Court's judgment, as affirmed by the Ninth Circuit Court of Appeals and for which this Court denied review in 1976. Similarly, the Washington Supreme Court apparently determined that it was not bound by the previous final judgment of the United States District Court even though the State of Washington was a party.

Although the State of Washington cites no authority in its brief regarding its ability to ignore ordinary principles of judicial finality, apparently it relies on the series of cases cited by the non-treaty fishermen's associations in their Reply Brief on Petition No. 78-139 at 9-13. These cases, however, simply do not support their position.

It is well established, of course, that the denial of a writ of certiorari by the Supreme Court imports no expression of opinion by the Court upon the merits of the case. *See e.g., United States v. Carver,* 260 U.S. 482, 490 (1923); *Brown v. Allen,* 344 U.S. 443, 451-52, 491-92 (1953); *Sunal v. Large,* 332 U.S. 174, 181 (1947); *House v. Mayo,* 324 U.S. 42, 48 (1945); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 366 n. 1 (1973). Hence a denial of certiorari is not a precedent for like action in a similar case and cannot be properly cited in support of any proposition at law; in short, denial of certiorari should, in ordinary circumstances, be accorded no *stare decisis* effect. *See generally,* R. Stern and E. Gressman, Supreme Court Practice, §5.7 (5th ed. 1978). *But see, United States v. Kras,* 409 U.S. 434, 442-43 (1973).

It is also well established that a denial of certiorari by the Supreme Court does not establish *law of the case,* at least for the Supreme Court itself. *See City of Indianapolis v. Chase National Bank,* 314 U.S. 63 (1941). Law of the case describes the effect to be given to a prior court ruling on a previous order in the same case; it plays an important role in stabilizing the law in situations where there are numerous lower court proceedings or appeals prior to a

final judgment.[276] However, after a case goes to final judgment, the doctrine of *res judicata* comes into play to prevent subsequent relitigation. *See generally* 1B MOORE'S FEDERAL PRACTICE, ¶0.404(1) (1947).

This Court has often held that a previous denial of certiorari to review some *non-final or interlocutory order* does not preclude the Supreme Court from later granting review and reaching all of the issues including those which the appellant originally sought to raise in the earlier petition for certiorari. As stated in *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916):

> It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the *interlocutory decision* may have been treated as setling the "law of the case" so as to furnish the rule for the guidance of the referee, the District Court and the Court of Appeals itself upon the second appeal, this court in now reviewing the *final decree* by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.

(emphasis added) *See also, City of Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973); *Mercer v.*

276. Law of the case is applied much more flexibly than *res judicata*, especially in the federal courts. As Mr. Justice Holmes explained in *Messenger v. Anderson*, 225 U.S. 436 (1912):

> In the absence of statute, the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

225 U.S. at 444. Similarly, as this Court stated in *Southern Railway Co. v. Clift*, 260 U.S. 316, 319 (1922):

> The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and *res judicata*. One directs discretion; the other supercedes it and compels judgment.

Theriot, 377 U.S. 152 (1964); *Reece v. Georgia*, 350 U.S. 85, 87 (1955). *Res judicata* has no application in this application in this situation since the doctrine applies only to final judgments. *G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916); *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 801 (1949). *See also, Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n. 1 (1973).

On the other hand, a denial of a petition for certiorari to review a *final judgment*, although obviously not an affirmance of a final judgment entitled to any *stare decisis* effect, does end the proceedings for purposes of *res judicata*. As this Court stated in *Brown v. Allen*, 344 U.S. 443, 456, "[D]enial of certiorari marks final action on State criminal proceedings. In fields other than habeas corpus with its unique opportunities for repetitious litigation . . . the denial would make the issues *res judicata*."

The distinction between the *stare decisis* and *res judicata* effect of the denial of a petition for certiorari to review a final judgment was cogently explained by Justice Jackson in his concurring opinion in *Brown v. Allen:*

> I can see order in the confusion as to its meaning [denial of a writ of certiorari] only by distinguishing its significance under the doctrine of *stare decisis*, from its effect under the doctrine of *res judicata*. I agree that, as *stare decisis*, denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But for the case in which certiorari is denied, its minimum meaning is that this court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata* as applied either by state or federal courts. A civil or criminal judgment usually becomes *res judicata* in the sense that it is binding and conclusive even if new facts are

> discovered, and even if a new theory of law were thought up, except for some provisions for granting of new trial which usually is discretionary with a trial court and limited in time.

344 U.S. at 543.

Other cases holding that a denial of a petition to review a final judgment makes the judgment *res judicata* include *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940); *Maggio v. Zeitz,* 333 U.S. 56 (1948); *Deane Hill Country Club Inc. v. City of Knoxville,* 379 F.2d 321, 326 (6th Cir. 1967), *cert. denied,* 389 U.S. 975 (1967); *Goss v. Illinois,* 312 F.2d 257, 259 (7th Cir. 1963); *Dairy Distributors, Inc. v. Western Conf. of Teamsters,* 294 F.2d 348 (10th Cir. 1961).[277]

The distinction between the effect of a denial of a petition for certiorari to review a non-final order as law of the case, and the effect of a denial to review a final judgment as *res judicata* is exemplified by comparing *City of Indianapolis v. Chase National Bank,* 314 U.S. 63 (1941) with *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940). In *Chase National Bank,* the District Court had held that no diversity of citizenship existed and dismissed the complaint. The Court of Appeals reversed and remanded the case to the District Court for further proceedings. A petition for certiorari to review the decision of the Court of Appeals was denied. Subsequently, the District Court rendered a decision on the merits, the Court of Appeals reversed on the merits and the Supreme Court

277. As the Tenth Circuit Court of Appeals explained:

> In the instant case certiorari was sought and denied by the Supreme Court of the United States of the judgment of the Supreme Court of Utah. Such denial does not establish the correctness of the particular judgment but serves only to establish the finality of the judgment as between the particular parties. The same issue cannot be renewed by initiation of an action in the United States District Court.

Id. at 352.

granted the petition for certiorari. On review, the Supreme Court reversed on the ground that no diversity of citizenship existed, the same issue raised by the original petition. Since no final judgment had been entered by the court below at the time of the original petition for certiorari, no *res judicata* issue was presented.

On the other hand, in *Sunshine Anthracite,* appellant had applied for an exemption from the Bituminous Coal Act on the ground that its coal was not "bituminous" within the meaning of the Act. The application for exemption was denied by the National Bituminous Coal Commission and the Court of Appeals affirmed on the merits. The Supreme Court denied certiorari, *Sunshine Anthracite Coal Co. v. Ickes,* 308 U.S. 604 (1939). Subsequently, consistent with the Act, the United States demanded payment of certain taxes. Appellant filed suit before a three-judge federal court to enjoin collection of the tax. The District Court upheld the constitutionality of the Bituminous Coal Act and dismissed on the merits. A direct appeal was taken to the United States Supreme Court in which the appellant challenged not only the constitutionality of the Act, but also the entitlement to the exemption based on the defination of bituminous coal under the Act. Regarding that issue, the Court stated:

> Further, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under §6(b) of the Commission's denial of its application for exemption.

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. at 400. The Supreme Court held that the original action, made final by the denial of certiorari, was *res judicata:*

> A judgment is *res judicata* in a second action upon the

> same claim between the same parties or those in privity with them.

310 U.S. at 402.

Similarly, in *Maggio v. Zeitz, supra,* the Court held that a bankruptcy turnover order, as affirmed by the Court of Appeals and for which the Supreme Court had denied certiorari, was a final judgment for *res judicata* purposes as to the issue actually litigated. Consequently, the judgment itself could not be collaterally attacked in a subsequent civil contempt proceeding. As the Court stated:

> We agree with the Court of Appeals that the turnover order may not be attacked in the contempt proceedings because it is *res judicata* on this issue of possession at the time as of which it speaks.[278]

333 U.S. at 75.

The United States, the tribes and the State of Washington fully litigated the treaty interpretation issues in Final Decision No. 1. The District Court's judgment, as affirmed by the Ninth Circuit Court of Appeals, became final upon the denial of certiorari by the United States Supreme Court in 1976. The judgment should be accorded *res judicata* effect. As summarized in §1 of the Restatement of Judgments (1942):

> Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties in the cause of action, and

278. The Court held, however, that the earlier denial of certiorari was not *res judicata* on the issue of possession at the time of the subsequent civil contempt proceedings, a different issue. *Id.*

Justice Frankfurter, in dissent, agreed that the denial of Petition for Certiorari rendered the turnover order final for *res judicata* puposes:

> To be sure, the denial of a petition for certiorari carries no substantive implications. Reference here is relevant as proof of the finality with which the turnover order, as affirmed by the Circuit Court of Appeals, was invested.

333 U.S. at 83.

> the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.

The tribes do not contend that this Court lacks *power* to reexamine the treaty interpretation issues for which it denied certiorari in 1976. The doctrine of *res judicata* is judicial in origin, *see Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948) and is founded on sound public policy; it is not the effect of the doctrine, however, to deny this Court *jurisdiction* to review issues of a final judgment after it has already declined review. Courts have, on occasion, held that application of the doctrine of *res judicata* was superceded by some strong overriding public policy consideration or to avoid manifest injustice to a party. *See generally* 1B *Moore's Federal Practice,* ¶0.405 [11] (1974).

In the instant case the policy considerations behind the rule lead to the inescapable conclusion that this is precisely the kind of situation where application of the rule is called for. In *Commissioner v. Sunnen,* 333 U.S. 591 (1948), the Court described the doctrine of *res judicata* and its public policy foundation as follows:

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and the privies are thereafter bound not only as to every matter which has been offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. *Cromwell v. County of Sac,* 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into

> litigation between the parties upon any ground whatsoever, absent fraud or some other factor invalidating the judgment.

333 U.S. at 597. *See also Blonder-Tongue v. University Foundation,* 402 U.S. 313 (1971) where the Court abolished the mutuality rule and gave collateral estoppel effect to a previously-litigated patent infringement issue, stating:

> The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.

402 U.S. at 328.

The public policy of putting an end to litigation lies at the foundation of the rule. If a party has been successful in obtaining a judgment in his favor, ordinarily he should not be subject to further litigation with respect to that issue; similarly, if a party has had an issue resolved against him it is not ordinarily unfair that he should be deprived of any privilege of litigating that issue. Further, if a fair opportunity has been provided to both parties to litigate the issues, it is in the public interest that relitigation of the judgment not be permitted. *See Restatement of Judgments,* §1 Comment a (1942). The doctrine helps prevent inconsistent and conflicting decisions, minimizes the harassment of litigants, and helps conserve public and judicial resources.[279]

The State has not advanced any justifications for overcoming these predominant and ordinarily triumphant principles in the instant case. There has been no showing that the decisions below contravene public policy, that any

279. *See generally* Currie, *Res Judicata: The Neglected Defense,* 45 U. Chi. L. Rev. 317 (1978); Vestal, *Judicata/Preclusion by Judgment: The Law Applied in Federal Courts,* 66 Mich. L. Rev. 1723 (1968); *Developments in the Law/Res Judicata,* 65 Harv. L. Rev. 818, 820 (1952); F. James Jr., Civil Procedure, §11.1 at 517-18 (1965); 1B MOORE'S FEDERAL PRACTICE, ¶0.405 at 624 (1974).

decision upon which they are based has been overruled, that the court was in any way lacking jurisdiction, or that any newly discovered evidence has been unearthed which would justify reopening these issues. From the perspective of the tribes, the United States, and the federal courts, on the other hand, there are strong reasons why the State's attempt to relitigate these issues should not be sanctioned. The District Court entered its final judgment in this case in February 1974. The pre-trial procedures and the trial itself were comprehensive. Since 1974, the tribes and the United States, as well as the District Court itself, have been engaged in an effort to implement the principles declared by the decision. In light of these good faith efforts, it would be highly unfair to allow these principles to be jeopardized by a collateral attack five years after the decision.

Moreover, as a matter of equity, it is highly relevant that this is but one of a series of attempts by the State of Washington to overturn the decision, one more ". . . extraordinary machination in resisting the decree. . ." 573 F.2d at 1126. It is hardly in the interest of sound public policy that a party who has generated a second series of appeals from a final judgment by its resistance to the implementation of the original federal District Court judgment should be allowed to use the secondary appeals to collaterally attack the original judgment.[280]

280. This consideration is particularly weighty in the context of a denial of certiorari to review the original final judgment. Since this Court denies approximately 90% of the petitions for certiorari presented to it, *see* R. Stern and E. Gressman, Supreme Court Practice, §4.2 at 260 (5th ed. 1978), it is critical that a denial of certiorari to review a final judgment be treated as ending the litigation for *res judicata* purposes. To adopt any other rule, of course, will only encourage parties who are unsuccessful in obtaining review by the Writ to resist implementation of the lower court's decision in the hope that the judgment may be collaterally attacked in an enforcement proceeding. Such a precedent would be disastrous for the federal judiciary.

It encourages a waste of resources as to matters settled, or conceded,[281] or revived repeatedly. The parties remain in a suspended state of uncertainty as today's ruling endures only until tomorrow's resistance. The result of depriving federal decrees of their preclusive effect, illustrated graphically here, is widespread civil disobedience amounting to an industry-wide contempt of court. This Court has expressed its disapproval of such collateral attacks in a variety of contexts.[282]

In sum, all of the prerequisites for application of the doctrine of *res judicata* are present, this Court should hold that the attempt at relitigation of the issues determined in the original judgment in *United States v. Washington* is barred. There can be no question that the prior judgment was rendered by a Court of competent jurisdiction, that it was a final judgment on the merits, that the same cause of action is involved in both suits, and that the same parties, or those

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281. In various courts, the State has changed positions "as nimbly as if dancing a quadrille." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 540 (1978). For example, in the initial appeal before the Ninth Circuit, the State urged that an "appropriate" allocation for salmon was ⅓ (sports), ⅓ (non-treaty commercial) and ⅓ (treaty). *See* Reply Brief of Appellants Department of Fisheries and State of Washington, 9th Circuit Cause No. 74-2414, December 26, 1974, at 20. Here, however, the State finds no basis for any allocation in the treaty, State Br. at 38-56, unless it is one defined wholly at the discretion of the State. *Id.* at 94-99.

282. *See Walker v. City of Birmingham*, 388 U.S. 307 (1967); *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947); *Stone v. Powell*, 428 U.S. 465, 493-95 (1977) (holding that considerations of economy and avoidance of nuisance litigation forbid federal habeas reconsideration of Fourth Amendment issues already litigated in the State courts); *Adams v. Illinois*, 405 U.S. 278 (1972), (holding non-retroactive and inapplicable to hearings already completed, the rule of *Coleman v. Alabama*, 399 U.S. 1 (1970) that counsel be present at a preliminary hearing); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), (sustaining the dismissal of a federal complaint where federal water rights are already being litigated in State courts).

in privy with them, are involved in both actions. *See Commissioner v. Sunnen*, 331 U.S. 597.

Regarding the last point, it must be emphasized that the final judgment is also *res judicata* against Washington's licensees, non-Indian fishermen, including the Petitioners in No. 78-139, because they are in privity with, and represented by, the State of Washington in this litigation. Just as the non-treaty fishermen and their Associations would have benefitted from any judgment in favor of the State of Washington, so too are they bound by the adverse result. The interests of the non-treaty fishermen are wholly derived from the State of Washington; the collective sum of those rights can be no more than the total right to fish "in common with" the tribes held by the State on behalf of its citizens. In these circumstances, a judgment against the State affecting those fisheries binds both the State and its individual licensees. *See, e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958); *New Jersey v. New York*, 345 U.S. 369 (1953). This issue is discussed in much greater detail in part IV, *infra*, in response to the Associations' argument that the District Court's orders cannot be enforced upon them because they were not parties to the original proceedings.

Finally, in light of the relief that is available to litigants pursuant to Rule of Civil Procedure 60(b), it is particularly clear that this Court should not encourage litigants to disobey and frustrate lower court decrees to obtain a vehicle for obtaining Supreme Court review, as the Petitioners have done here. The State and the non-treaty fishermen should not be rewarded in this appeal for the recalcitrant refusal to comply with the orders of the District Court below.

Rule 60(b) provides that a party may move the court to relieve it from a final judgment or order on the ground that "(5) . . . a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should be given prospective application; or (6) any other reason justifying relief from the operation of the judgment." Federal courts have continuing power to modify their judgments. As this Court stated in *Systems Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961):

> The court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned, through changing circumstances into an instrument of wrong.'

Quoting *United States v. Swift & Co.*, 280 U.S. 114 (1932). In attempting to obtain review of the District Court's final judgment in *United States v. Washington* by collaterally attacking the Court's enforcement orders in these appeals, the State has inappropriately circumvented the rule which is designed to allow modification of judgments when necessary in the interest of justice.

Rule 60(b) is the only appropriate method for those issues to be reopened at this time.[283] Accordingly, this Court should dismiss the Petitions as improvidently granted insofar as they would grant review of questions already determined by the District Court decision, affirmed by the Ninth

283. If the State were able to show, for example, that the fair needs of the tribes could be met with a smaller share of the resource than was allocated to them by the District Court, or that the tribes were wasting fish, so that the original judgment has been turned into "an instrument of wrong," Rule 60(b) would provide an appropriate vehicle to request an appropriate modification of the judgment. Similarly, a Rule 60(b) motion could be utilized by the State to seek modification based on changes in the law after the judgment was rendered.

Circuit Court of Appeals, and for which certiorari has been denied.[284]

II. An Allocation of Opportunity Is Necessary To Prevent Preemption of the Treaty Fishing Right.

If the underlying decision of the District Court is not dispensed with on the grounds of *res judicata* as discussed in the previous section, then it is necessary to reach the merits of the Court's allocation orders.

The State of Washington and the non-treaty fishermen's associations argue that, properly construed, the Stevens Treaties mean *only* that "each individual fisherman, Indian and non-Indian alike, has the right to participate in the fishery on a non-discriminatory basis and that the individual Indian treaty fisherman cannot be denied access to the fishery needed to exercise that right." State Brief at 35. They take the extreme position that the treaty language neither requires nor permits *any* allocation of the fishery resource between treaty fishermen and other citizens of the State of Washington. *Id.;* Puget Sound Gillnetters Brief at 24. That such an argument should be presented to this Court is anomalous; it marks an attempt by the State to

284. The tribes are aware, of course, that the State has pending before the District Court a motion to modify the judgment which has not yet been acted upon. However, Washington's complaint that the motion has been pending for a long time does not undermine the tribes' argument. If the State believes that ruling on its motion has been delayed unreasonably, it could simply renew its request to the District Court and seek expedition from the court, or, alternatively, file a petition for writ of mandamus to the Court of Appeals and attempt to compel a ruling.

It is quite apparent to the tribes, and must also be to the District Court, that the State has focused its collateral attack on its appeal of the enforcement orders and that the appeals seek to challenge virtually every aspect of the District Court's orders. In these circumstances it is not surprising that the District Court has deferred action while the matters were pending before the Court of Appeals and this Court.

In any event, this Court should not hear the State's collateral attack on the original Final Judgment and the fact that the District Court has not ruled on the State's motion does not alter this result.

resurrect arguments rejected by this Court over seventy years ago in *United States v. Winans*, 198 U.S. 371 (1905). It is particularly surprising in light of this Court's clear recognition of the need for an allocation in the *Puyallup cases*[285] and in light of the position taken by the Department of Fisheries below that an "appropriate allocation" of the salmon resource would be one-third to sports fishermen, one-third for non-treaty commercial fishermen, and one-third for treaty fishermen.[286] The State now attempts to reopen its concession made years ago concerning the need for an allocation. Further, the State's argument is a naked effort to relitigate, in this appellate forum, the findings of fact that underlie the District Court's determination and which were affirmed by the Court of Appeals in 1975.

Indeed, the entire position the State articulates is founded on a false factual premise, a premise specifically rejected by the District Court in its findings of fact—that Indian fishermen have been afforded an equal opportunity to harvest a fair share of the resource and would be afforded such an opportunity if the State makes no allocation whatsoever. In reality, because of the scope and intensity of the non-treaty fishing effort that occurs *before* the fish reach the tribal usual and accustomed grounds to which the tribal treaty rights are limited, the tribal opportunity, especially in the terminal areas such as South Puget Sound,

285. *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) (hereinafter *Puyallup I*); *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973) (hereinafter *Puyallup II*); *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977) (hereinafter *Puyallup III*).

286. See Reply Brief of Appellant Department of Fisheries and State of Washington, No. 74-2414, 9th Cir., December 26, 1974 at 20:

> Appellant proposes that an objective sharing formula should take cognizance of the purpose of fishing, and, treating the Indians subsistence and ceremonial fisheries specially, should provide the Indians with a one-third share of the remaining harvest of the base stock.

is effectively preempted before the Indian gear touches the water. As the Court of Appeals recognized, preservation of any meaningful treaty opportunity necessarily entails limiting the non-treaty fishery. 573 F.2d at 1130.

The basic circumstances that make it necessary for the District Court to require an allocation of the resource to prevent preemption and destruction of the treaty fishing right center around three circumstances: 1) the nature of the anadromous fish runs; 2) the location of the Indian treaty-protected fishing grounds in the "terminal areas" at the end of the migration path, FF 217, 384 F.Supp. at 393, Joint App. at 179-80; and 3) the pattern of State regulation which has authorized harvest of the runs before they reach the Indian fishing grounds, FF 218, 384 F.Supp. at 393, Joint App. at 180. The problems, inherent in the geography, and State regulatory pattern, have been severly compounded by the modern-day scarcity of fish.[287]

As demonstrated by fish tagging studies and the correlation of spawning escapements to mature salmon runs, anadromous fish runs are uniquely adapted to allocation because their behavior is highly predictable. The anadromous fish of Western Washington need not be "shepherded" to the stream gravel where they were hatched years before since their homing instinct as they return to spawn and die is perfect. So precise is their run timing, and so predictable their migratory pathways, that anadromous fish are highly susceptible to interception and capture by fisheries many tens or hundreds of miles from the natal streams. Unless fishing is constrained throughout the migratory cycle, fish harvesting must be totally banned in order to protect the

287. These factors are highly interrelated since State regulations have, in the past, permitted excessive harvest of the runs, leading to modern scarcity problems. *See* Statement of the Case, *supra*.

runs well before salmon and steelhead reach full size and enter the rivers.

State regulations which authorize fish catching during various stages of the salmon migratory cycle are intended to, and have the effect of, distributing these catches among would-be fishermen. Any regulation which places a limitation on fishing effort or prohibits fishing entirely at any given point in the run has the effect of "allocating" the fish catch to the fishermen whose effort occurs at another place or time in the migration. As Washington's Mr. Justice Utter stated, "Such allocation has been the principal effect of Department regulation for many years.[288] The question really is, therefore, to whom are the harvestable fish allocated, or, put another way, whose fisheries should be curtailed when fishing must be restrained.

The State's answer has given no recognition to the reserved federal rights. The inescapable fact is that since the 1890's, State "conservation" regulations have enabled non-treaty fishing interests to preempt the anadromous fish harvest. The treaty Indian fisheries, typically the last ones to take from the fish run because of their location,[289] are cut off.[290]

288. *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson*, 89 Wn.2d 276, 288 (1977), Petition No. 77-983, App. B-13. Both the Department of Fisheries and the American Institute of Fishery Research Biologists agree that one of the goals of management is "allocation of the yield among competing fisheries." *Amicus Curiae* American Institute of Fishery Research Biologists, Br. 14; *See* FPTO, §3-577.

289. FF 198, 384 F. Supp. at 389, Joint App. at 172.

290. This has been widely recognized both in the lower courts' decisions and in other cases. In *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963), the Court found that "conservation" as used in Oregon salmon regulations, was merely a label for a regulatory system which sought only to protect non-treaty commercial and sport fisheries. In a later case, *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), the district court again noted the concern of state regulations for allocation as well as perpetuation of the fish runs. *Id.* at 911.

As shown in the Statement of the Case, Washington law has increasingly provided for non-treaty preemption of the anadromous fish harvests, first by prohibiting Indian fisheries in rivers and estuaries and second by authorizing interception of the fish runs by mechanized fisheries astride the migration routes in the open waters of Puget Sound and by trollers and "sports" charterers in the Pacific Ocean.

Although the preemption of the tribal fishery occurs largely because of geographic factors—the concentration of non-Indian effort on the runs before they reach the tribal areas, the problem has been severely aggravated because of the failure of the State to enact any timely restraints on the number of non-treaty commercial fishermen. This multitude of State-licensed fishermen has shifted the balance between man and the anadromous fish from that at treaty times, when,

> Because of the great abundance of fish resources and [the] limited populations, there was no need to regulate the taking of fish by either Indians or non-Indians.[291]

Now, there is an urgent need to conserve salmon. Overfishing must be prevented to perpetuate the species, and to continue the productivity of the resource. The total fishing capability of all fishermen in Western Washington is sufficient, absent regulation, to decimate the resource.[292] As outlined in the Statement of the Case, this combination of factors resulted in a total tribal harvest in the years before the decision averaging about 5% of the total catch at [illegible]ual and accustomed places.

291. FF 9, 384 F. Supp. at 352, Joint App. at 103.

292. *See* RCW 75.28.500, where the State legislature recognized an overabundance of commercial fishing gear in state waters causing gr[illegible] pressure on the fishing resource and initiated a program to "buy ba[illegible] fishing gear from the fishermen.

This result is clearly inconsistent with the decisions of this Court. Beginning with *United States v. Winans,* 198 U.S. 371 (1905), where this Court refused to allow a non-Indian fish wheel operator to monopolize an Indian fishery, this Court has prohibited non-treaty preemption of the treaty-protected fishing right. Similarly, the state-authorized monopoly by rod and reel fishermen of the steelhead runs came before the Court in the *Puyallup* cases. The Court noted:

> The ban on all net fishing in the Puyallup Rivers for steelhead grants, in effect, the entire run to the sports fishermen. Whether that amounts to discrimination under the Treaty is the central question in these cases.

Puyallup II, 414 U.S. 44, 46-47 (1973). Although there was no doubt that Indians were free to pursue steelhead in the same manner as sports fishermen, the Court recognized that the treaty tribe had reserved special rights to harvest a portion of the catch at their usual and accustomed places and held that an apportionment was required:

> If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then *that number must in some manner be fairly apportioned* between Indian net fishing and non-Indian sports fishing . . .
>
> *The aim is to accommodate the rights* of Indians under the Treaty and the right of other people.

Puyallup II, supra, at 48-49 (emphasis added). In *Puyallup III,* 433 U.S. 165 (1977), of course, the allocation decreed by the trial court pursuant to *Puyallup II* was upheld.

What the District Court accomplished by its Final Decision and orders, was to "fairly apportion" the harvestable salmon between non-treaty and treaty fisheries. This, as Mr. Justice Utter concluded,

> is entirely consistent with the Supreme Court's holding in *Puyallup II* and adds nothing new to it.[293]

The holdings of this Court in *Puyallup II* and *Puyallup III* are clearly inconsistent with the position of the State of Washington and the fishing associations that *no* allocation whatsoever is necessary or appropriate under the treaties. Their attempts to distinguish the cases are completely unpersuasive.

At pages 60 and 61 of its brief, the State admits that the Court in *Puyallup III* approved an allocation designed to effectuate the accommodation between the Indian and non-Indian fishery required by *Puyallup II,* and that the allocation was necessary because "the State could not effectively conserve the steelhead resource in a non-discriminatory fashion without such an allocation." It defies logic, however, in the circumstances of this case, to argue that an allocation is necessary and appropriate for steelhead but not for the salmon fishery. In support of this argument, the State says only that the *Puyallup* allocation was, required to prevent total preemption of the steelhead resource while state regulations governing salmon fishing were non-discriminatory.

This assertion of non-discrimination is as absurd as the State's related contention that Indians enjoy an equal opportunity to fish. As the District Court specifically found:

> The regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plain-

293. *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wn.2d 276, 297 (1977), Petition No. 77-983, App. B-22 (Utter, J. dissenting).

> tiff tribes' usual and accustomed fishing places to which the treaties apply.

FF 217, 384 F.Supp. at 393, Joint App. 179-180.

And:

> The State and Director of Fisheries have, by statute and regulation, totally closed a substantial number of the usual and accustomed fishing areas of Plaintiff tribes to all forms of net fishing while permitting commercial net fishing for salmon elsewhere on the same runs of fish.

FF 218, 384 F.Supp. at 393, Joint App. at 180. *See also* FF 217; *id.* Other examples of State discrimination abound. *See* FF 193-195, 384 F.Supp. at 388, Joint App. at 170-171; Statement of the Case, *supra*.

The findings of the District Court and supporting evidence make it clear that the State has authorized an inappropriate share of the harvest to be taken by non-Indians and denied a fair harvest opportunity to the tribes. Without an allocation, the Washington Department of Fisheries has and will continue to effectively abrogate the Indian treaty right of "taking fish."

III. The Allocation Decreed By the District Court Was an Appropriate Allocation of the Resource Which Protected the Treaty Right to Fish Consistent With the Treaty Mandate of Sharing the Resource With Non-Treaty Fishermen.

A. *Appellants Have Grossly Distorted the Actual Effect of the District Court's Allocation Orders and the Respective Shares of the Treaty and Non-Treaty Fishermen.*

The argument of the State of Washington concerning the effect of the District Court's allocation order is less than accurate. The State notes that the total annual harvest

of the State of Washington is approximately eight million fish. State's Brief at 6. It then describes the District Court's allocation order as mandating an allocation of 50% of these fish to the tribes, plus a tribally-designated reservation catch, plus a tribally-designated ceremonial and subsistence catch, plus the harvest of the Indian fishermen outside their usual and accustomed grounds. The State characterizes the allocation formula as "50% plus."

As is apparent from the Statement of the Case above, this is a gross distortion of the working of the District Court's allocation orders. What the State is attempting to mask is the fact that a very substantial portion of the total Washington landings are unaffected by the allocation order. As a result, consistent with the District Court's orders, non-treaty fishermen can and do lawfully harvest far in excess of 50% of the Washington-caught salmon and steelhead. As noted in the Statement of the Case, the catch tables prepared by the State of Washington graphically demonstrate that in 1977, for example, non-treaty fisheries captured 82% of the total Washington landings of 7,914,000 salmon.

If this Court is to examine the propriety of the District Court's allocation orders, it is essential that the actual orders be reviewed, and not some hypothetical characterization. Particular attention should be addressed to the Order on Certain Questions, Joint App. at 456. Accordingly, the inaccuracies in the State's characterization will be briefly summarized.

1. Fish which would not return to usual and accustomed places are excluded. The Court's apportionment formula provides that the tribes shall have an opportunity to har-

vest their share of fish, "which, absent harvest enroute, would be available for harvest *at the treaty tribes' usual and accustomed fishing places.*" 384 F.Supp. at 344, Joint App. at 90 (emphasis added). Since many of the fish caught by Washington citizens would never have been available for harvest at tribal usual and accustomed places because they are migrating to unrelated distant rivers, they are automatically excluded from the allocation. In addition, the allocation formula only applies to fish which would be available at the usual and accustomed grounds absent harvest. As a result, the allocation orders make a substantial adjustment for "adult equivalents." Any juvenile fish caught by a non-treaty fishermen, for example, which would not have successfully migrated to the usual and accustomed fishing grounds because of natural mortality or harvest by *foreign* fishermen is excluded. Joint App. at 458-59. The magnitude of this adjustment is apparent by comparing Tables 6 and 7 of the State's catch figures. Joint App. at 640-41. As a result, only approximately one-third of the sport and troll catch in the ocean, one of the largest fisheries in Washington, is included in determining the non-treaty harvestable share. Transcript April 6, 1978 at 276.

2. "Opportunity" does not mean guaranteed catch, and in situations where the tribes lack adequate fishing power to harvest their share, the excess is made available to the non-treaty fishermen. The District Court has established a procedure under which the tribes must submit documentation of their expected fishing power. Joint App. 459. In any situation where the tribes do not have adequate fishing gear to harvest their full share, the excess is made available to the non-treaty fishermen. Indeed, it is only in

cases where the tribes have undisputed fishing power to take their full share that any allocation has been decreed.[294]

3. Equitable adjustment does not give the tribes more than 50% of the stocks which return to tribal areas. The original provision regarding equitable adjustment is no longer in effect since it was designed to counteract the fact that Washington fishermen took many fish bound for usual and accustomed places outside the tribes' usual and accustomed places. Under the Court's April 13, 1976, Order On Certain Questions, Joint App. at 459, the tribes' share is now measured according to harvestable numbers of salmon "that would return to fishing areas in the absence of non-treaty fishing." This automatically takes account for the non-treaty catch by Washington fishermen outside the usual and accustomed places and the equitable adjustment provision is no longer utilized.

4. Neither treaty nor non-treaty fish used for subsistence purposes are included in the allocation. Non-treaty commercial "take home" catch is not reported and does not count towards the total non-treaty share. In 1977, the Puget Sound treaty subsistence catch was approximately 35,000 salmon, 4.7% of the total Puget Sound origin treaty harvest. Joint App. at 593. The State commercial "take home" catch may be as large as 5% of the non-treaty commercial catch. *See* Transcript April 6, 1978, at 183. This is a much higher total, of course, because of the size of the non-treaty

294. This concept is critical in the IPSFC fisheries where the salmon runs are highly concentrated and pass through the tribal places in a short span of time. The regulations promulgated by the United States are founded on the assumption that the tribes do not have adequate fishing power, because of their limited gear, to take their full share in this area. As a result, the federal regulations governing this fishery have not required that 50% of these runs be harvested by treaty fishermen. In 1977, the non-treaty fisheries were allowed approximately 88% of that harvest. This is calculated from the State tables shown at the Joint App. at 637-38.

commercial catch. *See* Tables at Joint App. 635-39. As a result, neither the treaty nor non-treaty subsistence catch affects the allocation formula. The only difference is that the tribes are required to report their subsistence catch to the Court while the State fishermen are not. *See* Docket No. 4798.

5. Harvests by the State and some sport catches are excluded. The State's hatchery programs produce a large number of "jacks" which have no adult equivalents since they do not generally spawn. These precocious male salmon do not count towards the allocation. Docket No. 2787; Record in Court of Appeal No. 77-3654, R. 1044. They are harvested largely by State sports fishermen. In addition, the harvest by the State to provide salmon and salmon eggs which it sells commercially are not counted in the State allocation; this harvest was valued at $580,000 in 1977.[295]

6. The number of fish caught on Indian reservations is negotiated between the State and the tribes. The State can challenge a tribal estimate in District Court if it feels it is inaccurate. As a practical matter, the negotiations, which are conducted under the auspices of the Court's Fisheries Advisory Board, have resulted in significant reductions by the Indians in the size of their on-reservation exclusion in return for various agreements from the State that benefit the tribes. *See, e.g.*, Fisheries Advisory Board Reports No. 78-73 and No. 78-79, September 11 and 25, 1978. Docket No. 5313. In 1978, for example, agreement was reached between the tribes and the State on the appropriate size of the on-reservation exclusion for all but

295. Washington Department of Fisheries News Release 78/074, Apr. 26, 1978.

two tribes. *Id.* The tribes have a strong incentive to bargain with the State because the State's hatchery programs are so susceptible to manipulation to the benefit or detriment of the tribes. The State has, therefore, been able to effectively use the negotiating process to prevent any of the type of on-reservation preemption about which this Court expressed concern in the *Puyallup* litigation.[296] Order On Certain Questions, Apr. 14, 1976, Joint App. at 458 (Question 3).

7. The tribal catch outside of usual and accustomed places is *de minimus*. *See* Summary of Commercial Sales of Salmon and Steelhead Landed by Treaty Indian Fishermen, Docket No. 2876, 5284.[297]

As will appear in greater detail below, the actual allocation decreed by the District Court is a careful and pragmatic accommodation of the rights of the Indian and non-Indian fishermen. While the traditional right of the tribes to fish at their usual and accustomed places is recognized, their treaty right is restricted to those places. The non-treaty fishermen, on the other hand, retain their mobility to seek the best available places in Puget Sound. In addition, substantial portions of the Washington landings, predominantly harvested by non-Indians, are excluded from the allocation since these fish do not return to the usual and accustomed places. Finally, in the IPSFC fisheries,

296. In addition, the District Court specifically ruled that neither the State nor the tribes may authorize fishing which would preempt the opportunity of the other. CL 20, 384 F. Supp. at 401, Joint App. at 195.

297. As a practical matter, these *de minimus* tribal catches were simply included in the tribal share when the District Court assessed the actual allocation in 1977. The 1975 Joint Salmon Catch Report, Docket No. 2787, which was filed in 1977, based treaty catches on data prepared by the U.S. Fish & Wildlife Service reports, as can be seen from Docket No. 2876, 5184, include tribal harvests in all regions, without regard to usual and accustomed places.

because of doubt whether the tribes have the fishing power to harvest their full share, the non-treaty fishermen have been given the opportunity to harvest the vast majority of the fish. The District Court's allocation, as applied to the fisheries, resulted in a total tribal catch comprising 18% of the total Washington harvest; the "50% plus" allocation referred to by the State is purely hypothetical.

B. *The District Court Correctly Utilized the Applicable Canons of Construction to Interpret the Stevens Treaties.*

1. The State's arguments completely distort the process of interpreting Indian tribes.

The State's distortion of the accepted methods of interpreting Indian treaties is remarkable. The construction of the treaties argued for is completely at odds with the facts, the well-established rules of construction governing Indian treaties, the language of the treaties themselves, and the prior case law concerning the treaties. The State's argument, if accepted, would cause a virtual preemption of the treaty right.

The State has also ignored the language and structure of the treaties themselves. The whole focus of its argument is on the legal effect of the modifying clause "in common with the citizens of the Territory." But, in its analysis, the State ignores the pivotal language of the treaties. What the treaties secure to the tribes, of course, is "the right of *taking fish* at all usual and accustomed grounds and stations." *E.g.*, Treaty of Medicine Creek, art. III, 10 Stat. 1132 (1854). The State reads the subsidiary clause "in common with" to completely deny the primary right reserved to the tribe—the right of *taking* fish. Such a construction makes little sense.

In a similar vein, the State argues that the treaty language dealing with off-reservation fishing rights refers to "said Indians" and to "all citizens of the Territory" indicating that the fishing rights were shared by individuals, not by the tribe and the United States as governmental entities. State's Brief at 39. An examination of the structure and language of the remaining portions of the treaties completely undermines the State's arguments.[298]

The first article of each of the treaties, as well as the articles of the treaties which deal with the setting aside of the reservation, both of which precede the reservation of the off-treaty fishing rights, speak of the contracting party as the "said tribes and bands," the "said tribes," or as "aforesaid confederated tribes and bands of Indians."[299] The phrase "said Indians" in the reservation of treaty fishing rights can only be understood in relation to the previous

298. *Cf.*, RESTATEMENT, CONTRACTS §235(c)(1932); RESTATEMENT (SECOND) OF CONTRACTS, §228(2)(Tent. Draft 1973) pointing out the fundamental rule of contract interpretation that documents should be interpreted as a whole and the different parts of an agreement can be accurately viewed only in light of all the other parts.

299. Article I of the Treaties of Medicine Creek, (Dec. 26, 1854) 10 Stat. 1132, Point Elliott, (Jan. 22, 1855) 12 Stat. 927, Point No Point, (Jan. 26, 1855) 12 Stat. 933 and the Quinault Treaty, (July 1, 1855) 12 Stat. 971, all provide:

> The *said tribes and bands* hereby cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows: . . . .

(emphasis added) Article I of the Yakima Treaty refers to the Tribes as "the aforesaid *confederated tribes and bands of Indians*," 12 Stat. 951, while the Treaty with the Makahs refers to "the said Tribe," 12 Stat. 939 (1855). Article II of each of the treaties deals with the creation of the reservation for the tribe and in each case reserves certain land either to "said tribe," to the "tribes and bands aforesaid," to the "aforesaid confederated tribes and bands of Indians," or to the "said tribes and bands." *Id.* Similarly, Article IV of the Point Elliott Treaty, Article III of the Point No Point Treaty, and Article III of the Makah Treaty, all of which precede the article on the off-reservation fishing right, refer to the tribes, not to individual Indians.

references to the "tribes and bands" contained in the treaties. In context, "said" means "before mentioned."[300] The reference to "said Indians" refers to "tribes" and, therefore, strongly undermines the State's contention that the treaty language was intended to secure a right to individual Indians rather than to the tribes.

The State's argument is also contradicted by the text of the Yakima Treaty, Article III of which provides in part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to *said confederated tribes and bands* of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . .

(emphasis added). The Yakima Treaty unambiguously provides that the off-reservation treaty right is secured to the tribes. Since there is no evidence to support a conclusion that the United States intended the Yakima off-reservation treaty right to be secured to the Tribe, but to individual Indians of the other Washington tribes, the only logical interpretation is that "said Indians" in the other treaties refers to the "tribes."

The State and the Associations have even misapprehended the issue presented in interpreting the treaties. The question is not what the United States agreed to give the tribes, but rather the reverse. This Court placed the matter in proper perspective in *United States v. Winans*, 198 U.S. 371, 381 (1905):

> The right to resort to the fishing places in controversy *was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of*

300. BLACKS LAW DICTIONARY (Revised 4th ed. 1968). "This word is constantly used in contracts, pleadings and other legal papers, with the same force as 'aforesaid.'" *Id.*

> *impediment*, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, *the treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted*. And the form of the instrument and its language was adapted to that purpose.

(emphasis added) Similarly, in *Puyallup III* this Court, while recognizing that the Indian fishing right was to be shared with non-Indian fishermen, stated that "[a]s to the treaty Indians, this sentence effects a reservation of a previously exclusive right." 433 U.S. 165, 176, n. 16. *See also Winters v. United States*, 207 U.S. 564 (1908).

In order to interpret the meaning of the treaties, therefore, it is necessary to determine what the Indians agreed to give up and what they reserved to themselves. The argument by the Associations and the State that the tribes agreed to give up everything except their right to access to the water strains credulity and is completely at odds with the evidence regarding the negotiations. The Indians clearly regarded their fishing right to be of utmost importance in the negotiations and demanded and received assurances that it would be protected. As Dr. Lane summarized the anthropological evidence:

> [T]he Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but as owners of these rights, in the native way of looking at things, they were extending use rights to the non-Indians to share in the resources, but I don't think that they were giving up anything, or that they thought they were giving up anything.

Joint App. at 271-272.

A related distortion occurs because of the State's fixation on the language concerning the off-reservation fishing right, and its failure to consider this language in the context of the entire treaty negotiations. In order to appreciate the intended scope and meaning of this reserved right, some appreciation must be acquired of what the tribes ceded in exchange for this promise of the United States.

In the case of the Washington tribes, of course, the basic consideration to the United States was that the tribes cede the portion of Western Washington west of the Cascades. The United States was not dictating to these tribes as conqueror to the vanquished, but rather the tribes, as co-sovereigns, treated with the United States in friendship and in order to secure peace between the parties to the treaty. It is hardly to be supposed that the tribes voluntarily entered into an agreement under which they ceded the entire Puget Sound basin and the portions of the State west of the Cascade Mountains and reserved to themselves mere access to their usual and accustomed fishing grounds as the State suggests.[301] In light of the cessions in Article I of the treaties, such an interpretation would be to hold that the treaties were a fraud upon the Indians. In the State's discussion, however, all perspective of this is lost.

Perhaps most fundamentally, the State has lost sight of the spirit of the treaty negotiations. It must be emphasized that it was the United States, not the State of Washington, which negotiated the treaties. There is simply no indication in the record that the United States was motivated by the spirit of parsimoniousness which the State, in its analysis,

301. A recent article in the Seattle paper noted that the assessed valuation of King County alone was 21.5 billion dollars. Seattle Post-Intelligencer, Nov. 21, 1978, at A-4.

attributes to it. Rather, the evidence clearly indicates that the United States, consistent with its by then well-established duty toward Indian tribes,[302] treated with the tribes in good faith. Similarly, the evidence clearly indicates that the promises made by the United States to the tribes in the negotiations were accepted and relied upon.

Something of the flavor of the spirit of mutual good faith which permeated the negotiations can be gleaned from the following exchange recorded in the minutes of the negotiations for the Treaty of Neah Bay on January 31, 1855:

> The heads of the treaty had been adjusted and in the morning the Indians were again assembled—two additional sub-chiefs received papers. Viz: Tah-a-kowtl of Ozette and Kets-Knesum of the Stone House. The number of the whole tribe was found to be six hundred. Governor Stevens then addressed them:
>
> > My children—I have seen many other of my children before now. They have been glad to see me and to hear the words of the Great Father. I saw the Great Father a short time since and I since have to see you and give you his mind. The whites are crowding in upon you and in the Great Father wishes to give you your homes. He wants to buy your land and give you a fair price, but leaving you enough to live on and raise your potatoes. He knows what whalers you are, and how you go to sea, to take whales. He will send you barrels in which to put your oil, kettles to dry it out, lines and implements to fish with. The Great Father wants your children to go to school and learn trades and this will be done if we sign it. If it is good, I shall send it to the Great Father, and if he likes it, he will send it back with his name. If he wants it altered, he will let you know. When it is agreed to it is a bargain.
>
> The treaty was then read to them, interpreted clause by clause, and explained.

302. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12 (1831).

> Governor Stevens then asked if they were satisfied. If to say so—if not to answer freely and state their objections.
>
> Tse-Kaw-Wootl, brought up a white flag and presented it saying, *"Look at this flag, see if there are any spots on it. There are none, and there are none on our hearts."*
>
> Kalchote presented another flag. *"What you have said was good, and what you have written is good."*
>
> The Indians gave three cheers or shouts as each concluded. The Governor then signed the Treaty and was followed by the Indian chief and principal men.

Plaintiffs' Exhibit 16(b). (emphasis added)

In a similar vein, Governor Stevens made the following speech to the assembled tribes at the negotiations of the Treaty of Point No Point on January 26, 1855:

> Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not do for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you mechanics and a doctor to teach and cure you. Is not that fatherly? *This paper secures your fish.* Does not a father give food to his children? Besides fish you can hunt, gather roots and berries.

Plaintiffs' Exhibit PL-15, Joint App. at 330-331. (emphasis added)

The spirit which pervaded the negotiations as well as the actual evidence presented at trial concerning the understanding of the parties is inconsistent with an interpretation which would hold that the treaties are devoid of any present day significance and guarantee to the tribes no

more than does the Fourteenth Amendment. On one side, the treaties have been fully executed—the tribes have ceded their vast holdings in the State of Washington west of the Cascade Range and the State, as successor in interest to the United States, has received the benefit of that cession. Still, the State would deny the tribes the benefits of the consideration promised in return.

2. The proper focus of the process of interpreting Indian treaties as guided by the canons of construction

The State of Washington and the non-treaty fishing associations have both misunderstood the process of interpreting Indian treaties and misconstrued the District Court and Court of Appeals holdings. Both the State and the Associations attempt to characterize the District Court's interpretation as based purely on law. *See e.g.*, State's Brief at 42, Associations' Brief at 14.

In so characterizing it, and in directing rebuttal solely to the issue of what the United States negotiators must have meant by "in-common," the State has lost sight of the nature of the process of interpreting treaties. This process is not amenable to a simplistic labelling as law or fact but has attributes of both, as does the process of interpreting contracts generally. While the question of the meaning of language is clearly a question of fact, the courts have held that interpretation of a writing in contract law is the function for the court, not the jury.[303] Even in contract law, this process has a significant "legal" component because of the

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303. *See* 3 CORBIN ON CONTRACTS, §554 (1960); 4 WILLISTON ON CONTRACTS, §§601, 616 (3d ed. 1961).

application of rules of construction.[304] In Indian law, the canons of construction developed by this Court require that courts, when interpreting Indian treaties, exercise their judicial powers consistent with the canons and with the unique relationship of the tribes and United States.

The State's characterization that the District Court ruled as a "matter of law" while the Court of Appeals exercised "equitable discretion" is therefore neither accurate nor helpful. The State, in its brief, does not say one word about the application of these accepted canons of construction; to attempt to construe the treaties without the guidance supplied by these canons is to engage in an inquiry that lacks the particular focus it is required to have by federal law.

Although the canons of construction applicable to Indian treaties and statutes have been variously stated, their central purpose is clearly to insure the discharge of the Nation's trust obligation toward the Indians, first clearly articulated by Justice John Marshall in *Worcester v. Georgia, supra* and *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831), which compels action on its part consistent with the duties owned by a fiduciary. *See generally Seminole*

304. Professor Williston makes a useful distinction between "interpretation" and "construction." Interpretation, he argues, is the process of applying legal standards to expressions found in an agreement in order to interpret their meaning. Construction, on the other hand, is used to determine not the sense of individual words, but rather the legal meaning of an entire contract. "Construction" occurs whenever the import of the writing is made to depend upon a special sense imposed by the law. 4 WILLISTON ON CONTRACTS (3d ed. 1961) at §602. The process of construction, as defined by Professor Williston, is of central importance in interpreting federal Indian treaties because of the canons of construction consistently held applicable to Indian treaties since the early 19th Century. *See Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 582 (1832).

Nation v. United States, 316 U.S. 286, 296-97 (1942); *United States v. Kagama,* 118 U.S. 375 (1886).[305]

It is this trust responsibility which should give focus to the inquiry into the meaning of the federal promises regarding tribal off-reservation fishing rights to see that the promises of the United States are carried out. *See Tulee v. Washington,* 315 U.S. 681, 684-85 (1942).

Turning to the canons themselves, it is clear that the focal point of the Court's inquiry must be the understanding of the Indians. The fundamental rule that "treaties with Indians must be interpreted as they would have understood them" has been recognized and reiterated by the United States Supreme Court and state courts for nearly 150 years. Recently, the United States Supreme Court acknowledged the principle in *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 630 (1970), citing *Jones v. Meinan,* 175 U.S. 1, 10-11 (1899). And in another Indian treaty case, the Court stated:

> In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.

United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938). *Accord, Worcester v. Georgia,* 31 U.S. 515 (1832); *Starr v.*

305. As the Supreme Court expressed it in *Kagama:*

> These Indian tribes are the wards of the Nation. . . . Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

118 U.S. at 383-384.

Long Jim, 227 U.S. 613 (1913); *Choctaw Nation of Indians v. United States*, 318 U.S. 418, 431-32 (1943).

The applicability of this rule to the treaties now before the Court was emphasized by this Court in *Tulee v. Washington*, 315 U.S. 681, 685-86 (1942):

> From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, *in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.*[306]

A somewhat different, but related rule of treaty interpretation, is that doubtful clauses are to be resolved in a non-technical way as the Indians would have understood the language. *Fleming v. McCurtain*, 215 U.S. 56, 59-60 (1909). This rule effectuates the rule that treaties be read as understood by the Indians who often could not read and who were not learned in the technical language used by the United States. As this Court stated in *Jones v. Meehan*, 175 U.S. 1 (1899):

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a writen language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by

306. (Emphasis added) In *Tulee*, the Court held that a licensing fee, even though it did not discriminate against Indian fishermen could not be reconciled with a fair construction of the treaty. *Id.* at 685.

> an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore, be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Id. at 10-11.[307]

In addition, and perhaps most importantly, the treaties must be interpreted and applied in a manner that implements their objectives. As this Court stated of its holding in *Winans, supra*, "[n]o other conclusion would give effect to the treaty." 198 U.S. at 381. *Winans* was followed and extended by this Court in *Seufert Bros. v. United States*, 249 U.S. 194 (1919). In *United States v. Rickert*, 188 U.S. 432, 438, 443-44 (1908), this Court construed a tax exemption in order to carry out the obligations assumed by the government toward Indians. *See also Squire v. Capoeman*, 351 U.S. 1, 9-10 (1956), holding that an implied income tax exemption was available to Indians to further a specific Congressional purpose. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court noted that the congressional purpose in creating the reservation for

307. These observations of the Court are particularly apposite in the instant case where the State and the non-treaty associations argue that the treaties should be construed according to a technical meaning. The State argues the words held at common law a construction that has the effect in the instant case of completely emasculating the treaty guarantees. On the other hand, as discussed elsewhere in this brief, the Indians clearly understood that the effect of the treaty language was to preserve to them a meaningful opportunity to fish so as to "provide a volume of fish which is sufficient to the fair needs of the Tribe." CL 20, 384 F. Supp. at 401.

the Metlakatla Indians was to assist and protect the Indians in their effort to train themselves to the habits of industry and become self-sustaining. *Id.* at 89. In order to further that purpose, the Court held that Congress must have necessarily, by implication, reserved the surrounding waters of the Annette Islands as part of the reservation in order to give them fishing grounds with which to support themselves. The Court arrived at this conclusion even though the statute made no mention of the surrounding waters or of the status of the Metlakatlans as fishermen.

Finally, treaties must be interpreted liberally consistent with the Nation's trust obligation and not to the prejudice of the Indians. This Court recently stated in *Antoine v. Washington,* 420 U.S. 194, 199 (1975):

> The canon of construction applied over a century and a half by this Court is that wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.

Similarly, in *Choate v. Trapp,* 224 U.S. 665, 675 (1912) the Court stated:

> The construction, instead of being strict, is liberal; doubtful expressions instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception for more than a hundred years. . . .

See also Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); *Seminole Nation v. United States,* 316 U.S. 286, 296 (1942); *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 174 (1974); *Morton v. Ruiz,* 415 U.S. 199, 236 (1974).

In its brief, the State argues that these canons of construction have, in effect, been superceded by this Court's

observation in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978):

> These instruments [treaties and legislation], which beyond their actual text form the backdrop for the intricate web of judicially-made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Id. at 206.

The State's argument, if accepted, would of course turn 150 years of Indian law on its ear. As the State would have it, instead of interpreting ambiguities in the treaty liberally in favor of the Indians, and instead of interpreting the treaty in the way that the tribes must have understood them, the treaty language should be interpreted according to the purported dictates of Kent's Commentaries, in a strict and technical legal sense. This is so, the State argues, even though this technical meaning was never communicated to the tribes and even though there was no evidence that the representatives of the United States had ever read Kent's Commentaries, or intended to use the words in a technical sense.[308]

It is hardly to be supposed that this Court, in *Oliphant,* intended to overrule, *sub silentio,* the body of case law concerning the interpretation of Indian treaties discussed above. Quite obviously, what the State has done, is to quote *Oliphant* language out of context and to misconstrue

308. In any event, as will be demonstrated below, the State has completely misconstrued the common law meaning of the phrase "in common with." Further, one of the more interesting and most glaring defects in the State's analysis is its failure to mention that Kent's Commentaries contains considerable discussion concerning Indian property rights and the relationship between the United States and the tribes. Many of the basic tenets of Indian law had, by then, already been established as "common notions of the day." *See* Section III-D, *infra.*

the Court's language. A careful examination of the *Oliphant* opinion confirms this conclusion. The Court in support of the quoted statement cites *Draper v. United States*, 164 U.S. 240, 245-247 (1896); *Morris v. Hitchcock*, 194 U.S. 384, 391-393 (1904); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965); and *DeCoteau v. District County Court*, 420 U.S. 425, 444-445 (1965). *Draper, Morris* and *Warren Trading Post* are not helpful on this particular point.[309] In *DeCoteau*, however, the issue presented was whether an Indian reservation had been terminated. The Court carefully preserved the essential role for the canons of construction as demonstrated by its careful consideration of the Indian's understanding. The Court concluded that the Indians themselves understood that the reservation would be terminated. 412 U.S. at 449. The Court noted that it did not lightly conclude that Indian reservations were terminated. It stated:

> The Congressional intent must be clear to overcome 'the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 quoting *Carpenter v. Shaw*, 280 U.S. 363, 367. Accordingly, the Court requires that the 'Congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.' *Mattz v. Arnett*, 412 U.S. at 505.

309. *Draper* involved the question of whether the State of Montana or the United States had jurisdiction to try a non-Indian committing a criminal offense against another non-Indian on the reservation. The Tribe, therefore, was not directly involved. Though the Court relied on surrounding circumstances in *Morris v. Hitchcock* and *Warren Trading Post*, in both cases the legal issues were resolved favorably to the position of the tribes and the Court had no occasion, therefore, to consider whether reliance on surrounding circumstances was at issue with the ordinary canons of construction.

420 U.S. at 444. Where Indian understanding, as well as that of the government was clear, the "doubtful expression" canon could not be used to "create" ambiguity.

Moreover, it should be emphasized that in *Oliphant*, the treaty being interpreted by the Court was silent on the point at issue between the parties—whether tribes possess criminal jurisdiction over non-Indians. 435 U.S. at 191 (1978). This Court may have been reluctant to sanction a rule that would allow an Indian tribe to argue congressional silence on a particular issue, particularly in the absence of any clear indication of Indian understanding on the point, should be construed in favor of the position advocated by the tribe. This has no bearing on the situation now before the Court, however, where the treaty explicitly addresses the issue of the tribes reserved fishing rights and the only question is the interpretation of that language.

Moreover, the issue before the Court in *Oliphant*, was of a completely different character than the issue now before the Court. The question in *Oliphant* was whether the tribe retained inherent sovereignty to try criminally nonmember citizens of the United States for crimes committed against Indians, a matter already subject to the jurisdiction of the United States. The Court emphasized the basic criminal rights which would ordinarily be extended to any non-Indian offender for any crime to be tried by any State or federal court—guarantees, however, which were not applicable to the Indian tribes. The tribe's position competed strongly, therefore, with traditional inferences drawn concerning the availability of constitutional guarantees.

In contrast, the only issue now before the Court is the extent of the tribes' reserved property rights. Clearly, it is

not inconsistent with the status of Indian tribes, or with non-treaty constitutional liberties[310] that they should possess the treaty fishing rights declared by the District Court. Indeed, many of the cases discussing the canons of con struction deal with questions of Indian tribal property rights. *See e.g., United States v. Winters,* 207 U.S. 564 (1908); *United States v. Winans,* 198 U.S. 371 (1905); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Tulee v. Washington,* 315 U.S. 681 (1942); *Antoine v. Washington,* 420 U.S. 194 (1975); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973); *Choate v. Trapp,* 224 U.S. 665 (1912). Not only is there no tension between this reservation of rights and their status as tribes, but it appears from the evidence that this is the primary consideration upon which the tribes insisted in exchange for ceding their vast holdings.

C. *The Court's Decision Correctly Construed the Indian Treaties in Light of Their Purpose and Intent, and the Understandings of the Negotiators.*

In previous sections of this brief we have examineed the proper canons of construction which must be applied in this case. Treaties must be construed as a whole and so as to effectuate their purpose and intent as understood by the tribal negotiators. *See* III, B(2) *supra.* We turn now to an examination of the facts which were applied by the District Court and which support its decision. This review will show that not only was the decision well within the equitable discretion of the court, but that the court's decision was virtually mandated by the evidence concerning the execution of the treaties and the purpose and intent of the negotiators.

310. The equal protection argument raised by the State and Associations is without merit. *See* Part VII, *infra.*

To fully understand the purpose and intent of the treaties, it is necessary to understand three points: First, the taking and utilization of fish were at the very core of the cultural, religious and dietary existence of the Indians. Second, the taking and trading of fish formed the basis for a viable commercial Indian economy. Third, the treaty negotiators fully understood the central and predominant position of the right of taking fish and intended to preserve the Indian commercial economy and cultural way of life.

1. The paramount dependence of the Indian tribes on fish for their cultural, religious and dietary existence

The District Court found "almost universal and generally paramount dependence" upon the products of the sea to sustain the Indian way of life.[311] The Court noted that the native social organization reflected seasonal movements necessary to harvest the fish[312] and that the Indians had developed specialized techniques for harvest and storage which enabled them to utilize food as a dietary source throughout the year.[313] The Court found that the "first salmon ceremony" was celebrated virtually throughout the area as a religious rite to insure the continued return of the salmon.[314]

These findings were compelled by the evidence presented.

Dr. Lane noted that "throughout most of the area salmon (including steelhead where available)" was the staple

311. FF 3, 384 F. Supp. at 350, Joint App. 100.
312. FF 4, 384 F. Supp. at 350, Joint App. 100.
313. *Id.*
314. FF 6, 384 F. Supp. at 350, Joint App. 101.

food and the most important single food resource available to the native population,[315] a fact noted by the Indian agent, M.T. Simmons,[316] and by George Gibbs, the Secretary to the Treaty Commission.[317] The salmon harvest was taken by a variety of means and in a variety of areas with the Indians following the fish through their seasonal changes.[318] Fish were specifically noted to be a "staple" to the Quileutes,[319] the Yakimas,[320] and the Tulalips.[321] They were an "important" and essential element of diet to the Nisquallies,[322] the Puyallups,[333] the Sauk-Suiattles,[324] and the Skokomish.[325]

It is beyond question that fish were central to Indian religious beliefs. As the Court found, the first salmon ceremony was celebrated generally throughout the area and was essentially a religious rite to welcome and pay homage to the salmon and to insure their continued return to the area. It was thought that if the salmon were not treated properly they would become offended and cease to return to the stream where they had been improperly attended.[326] The religious rite was but a part of a wider conception of the interdependence and relatedness of all living things.[327]

315. Exhibit USA-20, Joint App., 366.
316. Ex. P.L. 40, at 577.
317. Ex. G-4, at 193-197.
318. FF 4, 384 F. Supp. at 351, Joint App. 100, and exhibits cited therein.
319. Ex. USA-22, at 13-14.
320. FPTO §3-102.
321. Ex. USA-92, at 21.
322. FF 82, 384 F. Supp. at 368, Joint App. 133 and evidence there cited.
323. FF 97, 384 F. Supp. at 370, Joint App. 138, FPTO §3-68.
324. Ex. USA-29, at 11.
325. Ex. USA-23, at 20.
326. Ex. USA-25, at 1, Joint App. 354.
327. Ex. USA-20, Joint App. 369.

It is likewise clear that fish were important in a broader cultural context. Thus the Nisquallies indentified star constellations by reference to fish and fisheries.[328] Fishing played a central role in Puyallup culture and the Puyallups lavished attention and concern on the salmon.[329] The Quileutes named months of the year for fish or fishing activities.[330]

And, of course, today, taking, preparing, eating and trading fish are still important functions for Indian communities. Fishing provides the basis for cultural identity and cohesive force in Indian society.[331]

2. The importance of fishing to Indian commerce and trade

The District Court found that fish constituted a major element of Indian trade and economy,[332] that intra-tribal trade was substantial[333] and that fishing increased preceding the treaties to accommodate increased demand for non-Indian consumption and for export.[334] There is no basis whatsoever in the record to dispute these findings.

Indian trade and commerce in fish was central to their way of life. Indians formed a very considerable proportion of the trade of the Sound.[335] Extensive trade was carried on in order to acquire not only food but raw materials and manufactured goods. This trade involved both necessities and luxuries.[336] At treaty times surplus food could be con-

328. Ex. USA-20, Joint App. 369.
329. Ex. USA-26, at 11.
330. Ex. USA-22, at 13-14; *see also* FF 105, 384 F. Supp. at 372, Joint App. 140.
331. Ex. USA-20, Joint App. 394.
332. FF 3, 384 F. Supp. at 350, Joint App. 100.
333. FF 7, *Id.* at 351, Joint App. 102.
334. *Id.*
335. Ex. P.L. 11, Joint App. 329.
336. Ex. USA-20, Joint App. 369.

verted to wealth. Distribution was effected through a complex exchange system.[337]

It was clear that Indians depended upon fishing for their livelihood and those fisheries could not be taken away without destroying them.[338] The Makahs, for example, used their preeminence in fishing to import many basic items such as canoe and house materials, they engaged in a wide trade up and down the cooast and were "emphatically" a trading people.[339] The Makahs had always ". . . as far back as knowledge about them goes, engaged in large-scale commercial fisheries, as producers, processors, and traders."[340] This trade allowed them to enjoy a high standard of living.[341]

After the treaties and in reliance thereon, the tribes continued to fish for commercial purposes.[342] This trade and commerce played an important part in the economy of the area as a whole with the Indians playing a central role in the business of the non-Indians.

The influx of settlers into the Territory increased the demand for consumption and export. Almost all of this demand, "including that for export, relied on Indians to supply the fish.[343] Smoked salmon was exported to China at 25¢ per pound. The business of securing that salmon had been done solely by the Indians.[344]

White traders at Neah Bay bought all the fish the In-

337. *Id.* at 369.
338. *Id.* at 374.
339. *Id.* at 401.
340. Ex. USA-21, Joint App. 409.
341. Ex. USA-21, Joint App. 415.
342. FF 31, 384 F. Supp. at 357, Joint App. 113-114.
343. Ex. USA-20, Joint App. 371.
344. *Id.* at 372.

dians could bring for sale.[345] Thus, it is beyond doubt that at and immediately subsequent to the treaties, Indian fishing and Indian trade in fish "formed an integral part of the pioneer economy."[346]

3. The purposes and intent of the treaty negotiators

Fishing then was clearly the single most important activity to Western Washington Indians. It was central to their diet, religion, culture, trade and commercial activities. It was, as this Court has noted, "not much less necessary" to their existence than the atmosphere they breathed. *United States v. Winans,* 198 U.S. 371, 381 (1905).

There can be no question that the treaty negotiators for both parties perceived its importance and intended to preserve it in the treaties.

The tribal negotiators, of course, understood the importance of fishing in the lives of their people and insisted that it be preserved through the treaty document. As the treaty negotiations it was noted that "all they keep talking about is their fisheries."[347] At this point, application of the canons of construction compels the conclusion that the District Court correctly construed the treaties.

The rules of construction dictate that: treaties are not to

345. *Id.* at 379.

346. *Id.*, at 393. We are incredulous at the State's misstatements regarding these matters. The State alleges that trade between Indians and non-Indians was ". . . inconsequential compared to the volume of the present day commercial salmon harvests" citing FF 7 and 8. (State Br. 28) Those findings say no such thing. FF 7 states that "*Intra*-tribal trade was substantial" but that it was "not possible to compare it" with present day volumes. As to trade with *non*-Indians the finding notes the central place Indian fishing played. FF 8 deals with the status of non-Indian commercial fishing.

347. Record in 9th Circuit Cause No. 74-2414, R. 1946, Joint App. 273.

be construed to the prejudice of the tribes; the terms of the treaties are to be carried out so far as possible in accordance with the meaning they were understood to have by the tribal representatives and not according to the technical meaning of words by learned lawyers; and they must be interpreted to carry out their purpose and intent. *See* discussion, Part III-B, *supra*.

Application of these canons to this case clearly supports a decision which insures the cultural and economic well-being of the tribes, since it is evident that both parties to the treaty had the same objectives and goals in mind. It will be recalled that federal law mandated that the treaty commissioners act in good faith. The Act of August 14, 1848, 9 Stat. 323, establishing the Oregon Territory, extended to that territory §14 of the Northwest Ordinance of 1787 (1 Stat. 51). The Act provided that "good faith shall always be observed toward the Indians." Supreme Court decisions compelled a similar fiduciary standard. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831). Further, there is no question but that the treaty commissioners understood the importance of fish in Indian culture as noted above:

> The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture, but also as a significant element of trade with the settlers.[348]

Given the Indian insistence on this point they could not have understood otherwise. For example, the treaty negotiators actively involved in the negotiations with the Treaty of Neah Bay (Makah) "understood the commercial value of the Makah fishery and the extent of the Makah trade with whites."[349] There was no intent to prevent the

348. Ex. USA-20, Joint App. 382.
349. Ex. USA-21, Joint App. 415.

Indians from using fisheries for economic gain.[350] At Neah Bay, Governor Stevens told the Indians that far from wanting to stop their fisheries he wanted to send them more modern apparatus to help them.[351] Not only was there no intention of creating a class society with the Indians on the bottom of the economic rung, but the treaty commissioners clearly wanted to provide the Indians a means of participating and prospering in the economy of the territory.[352] The promises made to the Makahs, for example, can only be seen as related to commercial development.[353]

The State's own anthropologist testified that the treaty commissioners did not contemplate that the Indians would be restricted in their fishing.[354] As Governor Stevens told the Indians gathered at Point No Point, "this paper secures your fish."[355]

It seems clear then that the treaty commissioners pursuant to their instructions to deal honorably with the Indians not only properly *perceived* the importance of fishing to the Indians but also *intended* to preserve that importance in the treaty documents:

> The right of *taking fish,* at all usual and accustomed grounds and stations, is further secured to said Indians. . . . (emphasis added)

Construing then, the treaty as a whole as to its purposes and objectives, it is clear there was a "meeting of the

350. *See* FF 21, 384 F. Supp. at 355, Joint App. 109, and sources cited therein.
351. Ex. PL-16(b), Joint App. 331.
352. Ex. USA-20, Joint App. 396.
353. Ex. USA-21, Joint App. 416.
354. Record in 9th Circuit Cause No. 74-2414, Tr. 2381.
355. Ex. PL-15, Joint App. 331. The State's allegation that the treaty commissioners proposed that the Indians have the right to leave their reservations only for "the limited purpose of seeking food" (State Br. 44) is directly contradicted by the evidence.

minds" between the two parties to the treaty to the effect that the right of fishing must be secured to the Indians in order to preserve their way of life and economy in return for their relinquishment of their other rights and property.

4. The meaning of the phrase "in common with"

The general purpose of the treaty reservation of fishing rights was to secure the fishing right to the Indians so that they might maintain their way of life. The State argues, however, (State Br. 42-61) that the words "in common with" are a limiting concept designed to limit the treaty fishers to fishing simply the same as all other citizens, that is, subject to State laws and controls for whatever purposes.

There is absolutely no support for this contention in the record. To the contrary, the evidence establishes that the fishing rights phrase and in particular the words "in common with" did not bear the meaning suggested by the State to either party to the treaty.

We think it now clear beyond any further argument that the most likely interpretation of the fishing rights phrase to the Indians was simply that they would relinquish their heretofore exclusive control of fishing and extend "use rights" to the non-Indian citizens but that there would be no restrictions on their fishing and they would continue to fish for their needs.

> The treaty commissioners knew that fish were important to the Indians, not only from the standpoint of their food supply and culture, but also as a significant element of trade with the settlers. Both parties wanted these aspects to continue—the Indians in order to sustain their prosperity and the government in order to promote the prosperity of the territory. I believe that both parties intended the Indians to continue full use of their fishing places. . . .[356]

At most the Indians were agreeing to share the waters of Puget Sound with the non-Indians.[357] The Indian concepts of ownership were highly developed and allowed the Indians to extend "use rights" to others.[358] The Indians were clearly concerned with retaining "their ownership over the fishery resource."[359] As owners of those resources the tribes understood themselves to be fully reserving their previous powers to determine the priorities of uses as between themselves and the non-Indians. *See* Joint App. 277. The tribes were clearly *not* agreeing that developing non-Indian fisheries would be allowed to interfere with continued tribal fishing as the basis of tribal economy. *See* Joint App. 383. As Dr. Lane concluded:

> [T]he Indians understood that they retained full rights to their usual and accustomed fisheries, wherever these may be, but that as owners of these rights, in the native way of looking at things they were extending use rights to non-Indians to share in the resources, but I don't think . . . they thought they were giving up anything.[360]

It is also clear that the federal negotiators were thinking along these lines. Governor Stevens noted in response to expressions of concern by the Indians that "this paper secures your fish." Ex. PL-15, Joint App. 351. Dr. Lane testified that the "in common with" language must have been understood and intended to assure non-Indians an opportunity to fish but not at the expense of Indian claims and rights and that it was intended to allow non-Indians to

356. Ex. USA-20, Joint App. 382.
357. Lane testimony, Joint App. 284.
358. *Id.* at 260.
359. *Id.* at 271.
360. *Id.* at 271-272.

fish subject to prior Indian rights. Ex. USA-20, Joint App. 396-97. The State's own anthropologist testified that the treaty commissioners had no thought that the Indians ever would be restricted in their fishing.[361]

Thus both the United States negotiators and the tribal negotiators intended that Indian fishing would continue as it had before the treaties: non-Indians would also have access to the Indian fisheries, but without interfering with the continued pursuit of traditional Indian fishing.[362]

This then is the most likely meaning of the fishing phrase: that the Indians would continue to fish as they had before unmolested and without surrender of any of their ownership rights, but that they would extend use rights to the non-Indian settlers who could also share the fishery.

Certainly the least likely possibility is that put forth by the State, *i.e.*, that the Indians would fish subject to the same controls and conditions as the non-Indians in the same way that one might pasture a horse on the commons.[363]

Further, such an interpretation would completely undermine the basic understandings about the treaty, noted above, that the Indians would have their fish secured so that they might continue their way of life. Their civilization was totally dependent upon fish for diet, religion and culture. Their economy, which allowed most of them a relatively high standard of living, was based on commerce in fish. To presume that the tribal negotiators were sur-

361. Record in 9th Circuit Cause No. 74-2414, Tr. 2381.
362. Ex. USA-20, Joint App. 383; *see* FF 26, 20, 384 F. Supp. 357, 355, Joint App. 112, 109.
363. *See* Lane testimony, Joint App. 281.

rendering their fisheries so that they would fish "on the same basis" as all other citizens subject to the control of a territorial government in which they had no vote is preposterous.

Moreover, such a concept would be completely incompatible with the Indian concepts of ownership and use rights noted previously.

Finally, the possibility that the fishing clause and in particular, "in common with" meant a 50-50 or equal sharing between the two parties to the treaty, remains to be examined. Although, as we have noted, the more likely understanding was that the Indians were simply relinquishing exclusive fishing rights, it is possible that the concept of equal sharing was discussed.

While there were no words in the Chinook jargon for "common" or "with", there were words for "half" (sit'-kum), and "fish" (pish).[364] Thus presumably, it would have been possible for the negotiators to have discussed concepts of dividing the fishery in half.

At least one set of tribal negotiators appeared to have used the language "in common with" to mean one-half. At the Treaty of Neah Bay *Ka-bach-sat* of Tso-yess stated:

> I do not wish to leave all my land. I am willing you should *have half*, but I want the other half myself.[365]

(emphasis added)

In response to *Ka-bach-sat's* speech, another head man, *It-an-da-ha* of Waatch responded:

> My wish is like the rest, I do not wish to leave the saltwater. I want to fish *in common with* the whites.

364. *See* Ex. Y-21.
365. Ex. PL-16(b) at 3.

> I don't want to sell all the land. I want a part *in common with* the whites to plant potatoes on.[366] (emphasis added)

Thus, *Ka-bach-sat* and *It-an-da-ha* appeared to be using the phrase "in common with" to connote one-half, albeit focusing more on "land" than "fish".

Subsequent to the negotiations of the treaties, we also find S. S. Ford, a participant in the Fox Island Council proceedings, as representing that the government was offering the Indians ". . . for fishing privileges, one-half of the rivers and Sound. . . ."[367]

At the negotiations of the Point-No-Point Treaty a Skokomish elder, *One-lun-teh-tat*, also spoke of the concept of one-half:

> I wish to speak my mind as to selling land great chief! . . . I don't want to sign away all my land, take half of it, and let us keep the rest.

To the same effect spoke another chief, *Hool-hole-tan*:

> I don't want to sign away my rights to the land . . . let us keep half of it. . . .[368]

At the negotiations for the Quinault Treaty two Chinook chiefs, *Nah-Kot-ti* and *Moos Moos*, utilized the concept of one-half in discussing salvage rights:

> When anything came ashore on the weathered beach, whales or anything, they wanted one-half . . .[369]

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366. *Id.*

367. Fox Island Council proceedings, Executive Order of January 20, 1857, Executive Order File 1850-92, Records of the Bureau of Indian Affairs, Record Group 75, National Archives. (This item is not in evidence.)

368. Ex. PL-15 at 2-3.

369. Ex. PL-17(c) at 1(g).

> On another day of the negotiations, *Nah-Kot-ti* also spoke of surrendering half of his salvage rights to the whites: . . . on the beach [he] would give up half he found.[370]

These tribal negotiators were familiar with the concept of one-half in terms of surrendering their currently existing rights, and in the case of the Makah negotiators, used the term "half" synonomously with the phrase "in common with".

Thus a review of the evidence strongly supports the concept that the tribal negotiators thought they were at most surrendering exclusivity to fishing, agreeing to extend use rights to the non-Indians and agreeing to share the fish with those citizens. They would continue to take all the fish they needed or wanted.

There is *some* support for the idea that the tribal negotiators may have been understanding an equal sharing in the sense of a 50-50 split with the citizens of the Territory. That is the very *least* they were guaranteed.

There is absolutely *no* support whatsoever for the State's concept that the Indians were agreeing to fish on exactly the same basis as non-Indian citizens, to be subject to controls of the territorial or state government as it evolved, to have their fishing gear and methods outlawed, or to have their fishing rights prempted by prior fisheries.

Nor is there any support in the facts or the "legal milieu" for the State's contention that the words "in common with" had a specific legal meaning contemplated by the federal negotiators. This point will be discussed more thoroughly below.

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370. *Id.* at 1(o).

D. *The State's Argument that the 19th Century "Legal Milieu" Demonstrates a Government Intention to Limit the Tribal Treaty Right to a Mere Right of Access to the Fishery and the Right to Compete Individually with Non-Indians Must be Rejected.*

1. The State misinterprets the common law fisheries rights. To the extent of their relevance, the common law tends to uphold the lower court decision.

As noted in Part III(B), *supra,* the central focus of the inquiry into the meaning of the treaties must be upon the understanding of the tribes, not upon whatever uncommunicated concepts the United States representatives may have had. The State's speculations concerning what concepts of incorporeal hereditaments the federal negotiators may have held consistent with the contemporary status of the common law are quite simply irrelevant.

More importantly, the previous section demonstrates that, in actual fact, the tribal insistence that their fishing rights be preserved was repeatedly communicated to the federal negotiators and agreed upon. The message conveyed by Governor Stevens, in turn, was "this paper secures your fish," a specific communication of the federal negotiators' agreement which must supercede the State's speculations. Finally, not the least of the defects in the State's analysis is the fact that it has completely misconstrued the common law concerning fisheries in 1855.

The State contends that the treaty language was intended to create a "common fishery," State's Br. at 48-56, a common law term which described the "right of the public to fish in waters not apportioned as exclusive waters." S. A. Moore, *The History and Law of Fisheries,* 34-36 (1903); 3 J. Kent, *Commentaries on American Law,* Part VI, at 410 (5th ed. 1844). In Great Britain, the term referred to the rights of all British subjects to fish in the areas of the sea and navigable rivers which are not subject to any specific grant, pursuant to the regulation of the sovereign. S. A. Moore, *supra,* at 34-36.

However, the word "common" was also used in the common law to describe a "common *of* fishery," which was quite different than a "common fishery." 2 W. Blackstone, *Commentaries* §34 (14th ed. 1803), 3 Kent, *supra,* at 410. A "common *of* fishery" was the non-exclusive right, acquired by grant, "of taking fish *in common with* certain others in waters flowing through another's (sic) man's land." J. Gould, *On A Treatise On The Laws Of Waters,* §183 (3d ed. 1900). (emphasis added) Gould distinguishes a "common fishery," on the other hand, as one *not* tied to a particular stream or fishing area. *Id.; see also* 2 H. Farnham, *Waters and Water Rights,* §379 (1904).

The treatises also mention two other types of fisheries, "free," and "several," but the most certain conclusion one can draw from review of these treatises and the common law background is that these four fisheries were often confused.[371] The State argues that even the United States Solicitor General himself confused the "common of" and "common" fisheries. State's Brief at 50, n. 28. *See also* 3 Kent, *supra,* at 409-410.

The phrase "in common with," was used to describe attributes of both "common fisheries" and "common *of* fish-

371. Several authorities hold that a free fishery is the same as a common fishery. J. Gould, *supra,* §183; 2 Farnham, *supra,* §379, ("A free fishery is merely the right to fish in a certain place *in common with* all others who may have a right to fish there, and is the same as an unlimited common of fishery.") (emphasis added)

eries," and these rights themselves were the subject of much confusion.

The State's contention that the words "in common with" created a "common fishery," however, can be completely discounted. To the extent these common law principles are relevant at all, it is clear that the attributes of a "common *of* fishery" are much closer to the demonstrated intentions of the treaty parties, than are the attributes of a "common fishery." While there was no question that fishing rights in public waters could be granted away by the sovereign body, Gould, *supra*, §36; 2 Farnham, *supra*, §368a,[372] a "common fishery" was, by definition, a right to fish in open waters *not* subject to any grant of alienation. 3 Kent, *supra*, at 412. The right which the grantee would receive would clearly not be a "common fishery," but rather, depending on its terms, a "common *of* fishery," a free fishery or a several fishery. The treaties were grants of fisheries by the tribes to the United States on behalf of its citizens. *See United States v. Winans*, 198 U.S. 371 (1905). But lacking any common law precedent to create a "common fishery" by grant it is unlikely that it was the intention of the parties to do so.[373]

Further, a "common fishery," by definition, was the right of the public to fish in all public waters not restricted to any particular place. 2 H. Farnham, *supra*, §379; Gould, *supra*, §183. The treaties, however, specifically limited the

372. The right of the *king* to grant fisheries in public waters was foreclosed by the Magna Charta, but this limitation did not extend to Parliament nor to the United States, which succeeded to the powers of both King and Parliament. 2 Farnham, *supra*, §§368a, 370. The right of the legislature, directly or through a subordinate body, to grant fishing rights in public waters in uncontroverted. 2 Farnham, *supra*, §370.

373. In fact, at common law, "the unorganized public," could not acquire fishing rights either by grant or prescription. 1 C. Kinney, A Treatise on The Law of Irrigation and Water Rights, §364 (2d ed. 1912).

tribal treaty rights to "usual and accustomed" grounds. As many writers have noted, it is the limitation of the fishing right to a specific place which distinguishes a "common *of* fishery" from a "common fishery." *E.g.*, J. Gould, *supra*, §183. The reservation by the tribes of a "common fishery" at specific usual and accustomed places would be a contradiction in terms.

Moreover, the rights to a "common fishery" did not include a right of easement to get to the fishery. As stated by Lord Kent, "[i]t is everywhere agreed, that this common right is liable to be modified and controlled by the municipal law of the land, and no person has a right to pass over the lands of others in order to get to the water." 3 Kent, *supra*, at 413. As the State admits, however, *United States v. Winans* held that the treaties guaranteed a right of access. The common law concept of a "common fishery" is, therefore, inapposite.

On the other hand, certain attributes of a common law "right of commons" are present in the treaty reservation. A "common *of* fishery" was capable of transfer; it could be acquired by grant or prescription. 3 Kent, *supra*, at 413; J. Angell, *A Treatise On Water Courses*, §79 (6th ed. 1869). It is tied to a particular location, 2 Farnham, *supra*, at §379, and, included an easement right of access over private lands to the fishing location. 2 Farnham, *supra*, §373. And, most important for present purposes, it was subject to apportionment.[374] It was also recognized that a

374. A "common *of* fishery" is merely one of a number of rights of common. W. B. Edwards, A Compendium of the Law of Property in Land and of Conveyancing Relating to Such Property, 231 (5th ed. 1922). The commentaries on rights of common agree that such rights could be apportioned up to the extent of the grant. Edwards, *supra*, at 234; H. W. Woolrych, A Treatise of the Law of Rights of Common, (2d ed. 1850) at 125-26. 3 H. Tiffany, Real Property, §847 (3d ed. 1939).

holder of "common *of* fishery" rights could not interfere with the rights of another "commoner," Gould, *supra*, at §§185-187, a principle certainly at odds with the non-treaty preemption of the treaty opportunity.[375] In sum, neither Kent, nor the other commentators support the attenuated analogy the State draws with the 19th Century common fisheries. If Gibbs did have a particular meaning in mind, it is not the limited version the State suggests. What is more likely is that he used the phrase as it was used in other treaties of the United States—a point which will be discussed in part 3 below.

2. Tribal sovereignty and the trust responsibility of the United States were well-established concepts at treaty time and part of the legal milieu.

Although there is much to criticize about the State's discussion of the "legal milieu" surrounding the negotiation and execution of the Stevens treaties, most conspicuous is the omission of any mention of the law governing the relations between the United States and the Indian tribes. By 1854, of course, many aspects of this relation had been settled, including both the status of the tribes as domestic dependent sovereigns, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and the trust responsibility owed by the United States to the tribes. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).[376] And, as noted

375. *Compare* Gould *supra*, §187, regarding the prohibition on owners of fisheries downstream in non-navigable rivers from fishing out the river in derogation of rights of upstream fishery owners.

376. As Justice Marshall stated:

> Meanwhile, [the tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

Cherokee Nation v. Georgia, 30 U.S. at 17.

above, it was in *Worcester v. Georgia* that the Supreme Court first articulated the fundamental postulate that ambiguities in federal treaties or statutes dealing with Indians must be resolved favorably to the Indians. 31 U.S. at 582.

One of the ironies presented by the State's reliance on the 5th edition of Kent's Commentaries to support their technical interpretation of "in common with," is that Kent's previous chapter contains an extensive discussion of the principles of Indian law already articulated by the United States Supreme Court in 1844. *See generally*, 3 *Kent's Commentaries* at 377-400 (5th ed. 1844). Included in Kent's Commentaries are extended references to *Cherokee Nation* and *Worcester*. Kent noted that the Cherokee Nation had been recognized by the United States as a "nation," to which the United States pledged protection. *Id.* at 381-382. Kent described the holding of the Supreme Court regarding the status of Indian land tenure in *Cherokee Nation* and noted that "discovery" conferred rights on the European powers only among themselves. He continued:

> [I]n respect to the Indians, it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper, so far as the rights of the natives were concerned.

Id. at 383 (footnotes omitted). Kent also described at length the Court's holding on the sovereign status of the tribes in *Worcester*. *Id.*

Regarding the policy of the United States government towards the Indian tribes, Kent stated:

> The government of the United States, since the period of our independence, has pursued a steady system of pacific, just and paternal policy towards the Indians,

> within their widespread territories. It has never insisted upon any other claim to the Indian lands, than the right of preemption, upon fair terms; . . . The efforts of the national government to protect the Indians from wars with each other, from their own propensity to intemperance, from the frauds and injustice of the whites, and to impart to them some of the essential blessings of civilization, have been steady and judicious and reflect lustre on our national character.

Id at 398-399.[377]

If one accepts the State's conclusion that Governor Stevens and Gibbs were erudite enough to have been familiar with Kent's discussion of incorporeal hereditaments, they must have been also familiar with the section of the *Commentaries* specifically addressed to the negotiation of treaties with the tribes to extinguish Indian title. Similarly, they must have been familiar with the law concerning the status of Indian tribes as domestic sovereign nations and the trust responsibility owed by the United States to the tribes. As described below, even today, the sovereign status of tribes forms the "backdrop" against which treaties must be construed. This backdrop provides strong support for the decision below. *See* Part III E, *infra*.

3. The United States' contemporaneous interpretation of "in common with" in treaties between the United States and Great Britain supports the conclusion that the United States intended a reservation to the tribes of an equal apportionable share of the fisheries.

In 1818, after several months of negotiation, the United States and Great Britain entered into an agreement which

377. In describing the policies of the colonial government toward the tribes, Kent noted particularly that the Massachusetts legislature, in 1633, recognized the Indian right to enjoyment of their hunting and fishing places and declared that they should have relief in any of the courts as the English have. *Id*. at 391.

provided in part:

> It is agreed between the high contracting parties, that the inhabitants of the said United States shall have, forever, ***in common with*** the subjects of his Brittanic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Quirpon Islands. . . . (emphasis added)

Treaty of Oct. 20, 1818, United States—Great Britain, 8 Stat. 248, Treaty Series No. 112. Agreements regarding those fisheries which used the "in common with" language were also entered into in 1854, Treaty of June 5, 1854, United States—Great Britain, 10 Stat. 1089, Treaty Series No. 124, and in 1871. Treaty of May 8, 1871, United States—Great Britain, 17 Stat. 863, 12 Treaties and International Agreements 171.[378] The position taken by the United States with respect to the rights created by these agreements strongly supports the contention that the United States intended that the tribes reserved the right to an opportunity to an equal share of the fishery at their usual and accustomed places.[379]

United States officials throughout the 19th Century interpreted the rights conferred by the Northeastern Atlantic Treaties as apportionable shares in the fishery, compensable if interfered with, and specifically referred to the right as a tenancy in common. At the time the United States and Britain entered into the Treaty of 1818, France was claiming *exclusive* rights to fish in those same areas by virtue of a previous grant from Great Britain. In 1823,

378. These later treaties were in force only for short periods of time.

379. Two caveats are necessary. First, the analogy between the two situations is not complete. Although the United States treated with the tribes as with foreign sovereigns, the relationship between the United States and the various tribes was unlike the relationship between the United States and Great Britain in several key respects. The tribes were

[Footnote 379 continued on next page.]

John Quincy Adams, then Secretary of State, wrote to Honorable R. Rush, Minister of the United States to Great Britain, regarding this claim. He requested that Mr. Rush inform Great Britain that while they supported their claim against France,

> . . . if the British Government admits the claim of France to *exclusive* fishery . . . *they will necessarily see the obligation of indemnifying the United States by an equivalent for the loss of that portion of the fishery, expressly conceded to them by the convention,* which, in the supposed hypothesis, must have been granted by Great Britain under an erroneous impression that it was yet in her power to grant.

5 Am. State Papers (For. Rel.) 528-529 (emphasis added). Mr. Adams on another occasion referred to the United States' rights to "an equal share" in the fishery. J. Q. Adams, *The Fisheries and the Mississippi,* 184 (1822).

Mr. Adams' view that the 1818 treaty language "in common with" gave to the United States a specific compensable "share" or "portion" of the fishery is in vivid contrast to the State's position that the Indian treaties gave to the tribes merely *access* to a "common fishery," a fishery for which the loss would be non-compensable.[380]

"domestic dependent sovereigns" of the United States, to whom the government owed fiduciary obligations. Further, the economic and social situation of the tribes regarding their fisheries was completely different from that of the United States and Great Britain and the "states of mind" of the parties to the Indian treaties were probably quite different than those of the parties to the Northeast Atlantic Fisheries Treaties.

Second, the major bone of contention between the United States and Britain was whether Great Britain had any power to regulate United States fishermen. The allocation of the resource was simply not a problem. Nevertheless, the interpretation given to the words "in common with" by the United States in those treaties provides a more apt analogy than "common fisheries."

380. It is clear that a state can abridge or remove the public's fishing right in state waters without compensation. It is equally clear that tribal treaty rights to fish "in common" are compensable. *Whitefoot v. United States,* 293 F.2d 658, 155 Ct. Cl. 127 (1961), *cert denied,* 369 U.S. 818 (1962). This is an additional indication that the right reserved by the tribes was not merely a right to the "common fishery."

The United States' position was affirmed in 1878 by another Secretary of State. In connection with a regulation conflict with Great Britain, Secretary William M. Evarts, wrote to the President regarding the rights of the United States under the Treaty of 1818 as follows:

> Whatever this fishery was in its natural extent and value, in its geographical area, and its multitude and variety of fish products, that was the subject of which Great Britain possessed the *jus disponedi,* and that the subject of which the United States proposed to acquire an undivided share. *The proportion of this fishery which Great Britain was to part with and the United States was to appropriate does not affect the question of what the entire property was and was understood to be.* Whatever the United States would have acquired had Great Britain parted with the whole fishery, *the subject partioned between them was this entirety, no matter what the shares in which it was to be enjoyed might be.*

H. Ex. Doc. No. 84, 46th Cong., 2d Sess. 1881, at 7 (emphasis added).

> There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of *either's share of the common fishery* . . . thus disabling either government from impairing the share of the other by introducing foreign fishermen into the common fishery.

Id. at 8 (emphasis added).

It should be reiterated that the specific allocation of the Northeast fisheries was not at issue when these views were propounded. The United States throughout this period was simply rejecting the British view that the rights which the United States acquired by virtue of the "in common with" provision were only rights to access and opportunity to the fisheries limited by whatever Great Britain allowed her own subjects. These views, however, particularly when

seen in light of the entire background of the 1818 treaty, show that the United States considered it held an approtionable equal share in the fishery.

In addition to the specific official interpretations noted above, the background of the 1818 Treaty indicates that its intent was to preserve for the United States a "tenancy in common" in the subject fisheries. After the War of Independence, in 1783, the United States and Great Britain entered into a treaty under which the inhabitants of the United States reserved fishing rights in certain areas around Newfoundland. Treaty of 1783, Art. 3. The rights "reserved" were described as a "tenancy in common" by Secretary of State Livingston, in a letter to Dr. Franklin in 1782. 9 *Franklin's Work* (Sparks ed.), 135, cited in 3 *Wharton, International Law Digest* §301 (1886). Wharton, a leading authority on International Law, in describing the 1818 Treaty negotiations also states:

> The British commissioners were aware of the American claim:
>
> (1) That the fisheries were conquered from France in a large measure by the colonies.
>
> (2) That they were held by the colonies in common with the parent country, and that *this tenancy in common*, from the fact that the colonies were endowed at the time with distinct local government, made the fisheries, in such tenancy, the appurtenances of the colonies as distinct political entities.
>
> (3) That this tenancy in common was recognized by the Treaty of Peace of 1783, and the same rights in the fisheries were assigned to the United States (incorporating as they did the colonies) as were assigned to Great Britain, the United States continuing to enjoy these fisheries in common with Great Britain.

3 *F. Wharton*, supra, §304 (emphasis added). He also states that the Treaty of 1818 "recognize[d] the existence

of these territorial rights and affirm[ed] their continuance," 3 F. Wharton, *supra*, §304.[381]

Perhaps the most erudite description of the inclusion in the Treaty of 1818 of the words "in common with" was given in 1910 in a brief on behalf of the United States in an arbitration proceeding before the Hague.[382] The brief discussed the reasons for the inclusion of those precise words as follows:

> The American negotiators had declared that whatever extent of fishing ground might be secured to American fishermen, they were not prepared to accept in a tenure or on conditions different from those on which the whole had theretofore been held, and to evidence that the right taken was on the same tenure and conditions as the prior right, they proposed and insisted on inserting in the treaty, the renunciatory clause therein found, with the twofold view of preventing any implication that the fishery secured was a new grant and of placing the permanence of the rights secured and of those renounced on the same footing, and also of expressly stating that the renunciation extended only to the distance of three miles from the coast.
>
> Their [the words 'in common'] desirability suggested itself to the British negotiators, no doubt, when preparing the draft finally agreed on, as a safeguard against any implication of an exclusive right in the United States, *and also to prevent the crowding out by American fishermen of the British fishermen, of which Lord Bathurst had complained and which was in effect the practice of an exclusive fishery, and they were accepted by the American negotiators as proper for that purpose, and also as desirable from their*

381. Ordinarily, of course, when title to property is held by two or more tenants in common, and the fractional part is not specified in the transfer document, equal shares are presumed. 2 AMERICAN LAW OF PROPERTY, §6.5; 2 TIFFANY, REAL PROPERTY, §426 (3d ed. 1939).

382. The entire proceeding is contained in S. Doc. No. 870, 61st Cong., 2d Sess., Volume 1-12. The Brief for the United States is in Volume 8.

> *standpoint, for the further purpose of fixing beyond question the equal measure and quality of right in the fisheries for which they were contending.*

S. Doc. No. 870, 61st Cong., 2d Sess., Vol. 8 at 46-47. (emphasis added; footnotes omitted).

The United States was concerned with preserving the same rights they previously had, the tenancy in common created by the partitioning Treaty of 1783. The British negotiators felt, and the United States agreed, that the provision "in common with" would prevent any practical crowding out of British fishermen by an excess of Americans, and would guarantee "the equal measure and quality of right in the fisheries for which they were contending." The precise situation which the British and American negotiators *intended to prevent*, by including the words "in common with"—the practical diminishment of the equal measure and quality of the fishing right by the entrance of an excessive fishing effort by one party, is exactly what the State of Washington contends was *intended* by the inclusion of those same words in the Indian treaties. Such a contention cannot be sustained.

The words "in common with," used in fishing treaties between Great Britain and the United States, as interpreted by the United States and numerous commentators, guaranteed to the parties an equal measure or proportion of the fishery, and insured against any diminishment of that share by an increased fishery effort of one party. The treaty was so interpreted by three United States Secretaries of State, several commentators, and a brief of the United States government in an action before an International Court in 1910. Further, the origin of those treaties as an outgrowth of a partition of fisheries between two equal sovereigns supports this position.

Finally, the State's proposed interpretation of the "in common with" provision was specifically rejected by the United States throughout the late 1800's and early 1900's, in the context of denying the right of Great Britain to regulate American fishermen under the Treaty of 1818. The position of the British government, at least as viewed by the United States, was that the words "in common" granted to the United States the right to fish in "the manner, or means, or times of fishing, which the grantor himself might employ." Brief of United States, North Atlantic Coast Fisheries Arbitration, S. Doc. No. 870, Vol. 8, *supra*, at 41. Similarly, the State of Washington contends that the words "in common" in the Indian treaties convey the same meaning—the tribes may fish alongside non-Indians whenever and however non-Indians are entitled to fish. This view, however, was emphatically rejected by the United States:

> This Government conceives that the fishery rights of the United States conceded by the Treaty of Washington, are to be exercised wholly free from the restraints and regulations of the statutes of Newfoundland.[383]

Mr. Evarts, Secretary of State, to Mr. Welsh, February 17, 1879, *cited* in 3 F. Wharton, *supra*, §308.

The dispute over regulation was submitted to the Permanent Court of Arbitration at the Hague in 1909.[384] In

383. This is remarkably identical to the District Court's Findings of Fact concerning the Tribes' understanding of their rights in the fisheries, FF 26, 384 F. Supp. at 357, Joint App. 112, and to Dr. Lane's testimony that the Indians believed they would never be controlled in their fishing by any non-Indian government. (Record in 9th Circuit Cause No. 74-2414 Tr. 1875, 1963) To the extent there was a "meeting of the minds," at the Treaty negotiations, it was most likely an understanding that there could be no interference in the rights.

384. The court did not completely adopt the position of the United States. However, it is the *intent* and *understanding* of the *United States* with which we are concerned here.

briefing the issue, the United States took the position that

> . . .*[t]here is no permissible use of the words* from which can be gathered an intention to limit the fishery right granted, to the manner, or means, or times of fishing, which the grantor himself might enjoy.

(emphasis added) *Id.* Arguing that such an interpretation of the treaty provision was inconceivable, the brief also argued:

> If it could be thought that the British negotiators had such a result in mind it is impossible to conceive that the American plenipotentaries would have accepted a fishing right so empty and valueless.

Id. If the State of Washington's contentions were upheld, the tribes' treaty guarantees would be equally "empty and valueless." That such a result could have been intended by either the tribes or the United States is similarly inconceivable.

E. *The District Court's Allocation Is the Minimal Allocation That Can Be Sustained Consistent With the Evidence, the Canons of Construction, and the Prior Decisions of This Court.*

In light of the argument above, there can be no reasonable dispute, the tribes believe, that *some* kind of allocation is necessary in order to prevent State-authorized preemption of the treaty fishing right. The next question that is presented for determination then, is what the actual allocation should be. In making this determination, the District Court was faced with the task of reconciling the clear reservation in the treaties of a *right* of *taking* fish, secured to the tribes, with the concept implicit in "in common with" that the tribes would share the resource with the citizens of the territory. In addition, in making this determination, the court was required to consider the evidence presented concerning the negotiations of the

treaties and the understanding of the parties, and consider the relevant legal precedents governing the meaning of the treaty.[385]

Obviously, this was no easy task. However, the conclusion of this process seems to the tribes to be clear: when all of these factors are considered, there are only two alternatives which can be sustained consistent with the evidence and with the legal rules enunciated by this Court. Either the District Court was correct and the import of the Stevens treaties is that the tribes and the non-treaty citizens share equally the fish passing through the usual and accustomed fishing places of the tribes, *or* the treaties secure to the tribes sufficient fish to meet their fair needs. The second alternative, a more generous one to the tribes, was the one suggested to the District Court by the tribes at trial. It is based on the precedents of this Court dealing with reserved water rights. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963).

There is neither evidence nor legal precedent for the State's interpretation of the treaties and the District Court specifically rejected it. This section of the argument will demonstrate that the District Court's decision represents a reasonable reconciliation of the various factors outlined above; the equal sharing principle represents the absolute *minimum* that could be held reserved by the tribes consistent with the evidence and the previous decisions of this Court.

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385. As noted in Part III-B, *supra*, the process of construing Indian treaties consistent with federal law consists of both law and fact. In addition, the canons of construction long held applicable to the interpretation of Indian treaties, require the federal courts to give a particular focus to their inquiry.

As noted above, the pivotal canons of construction concerning Indian treaties require that treaties be interpreted so as to carry out their ultimate objectives and as they were understood by the Indians. *See Winters v. United States*, 207 U.S. 564 (1908); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). This Court has applied the canons to effectuate the general purpose of the treaties—to provide permanent homes for the Indian tribes where they could become economically self-sustaining. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737, 752, 754 (1866); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Winters v. United States, supra; Alaska Pacific Fisheries v. United States, supra*. A closely related purpose for the establishment of reservations generally has been to enable the Indians "to maintain . . . their way of life . . . ." *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968). These generalized purposes are, of course, reflected in the Stevens treaties. *See e.g.*, Treaty of Medicine Creek, Arts. II, V, VIII, and X, 10 Stat. 1132 (1854).

In the case of the Stevens treaties, however, the evidence demonstrates a specific intention that the tribes should continue to sustain themselves through fishing. As noted above, the expert testimony before the Court indicated that the tribal negotiators probably understood that they were surrendering the exclusivity of their fishing right in agreeing to share the resource with the non-Indians, but that they would continue to take all the fish they needed for personal, ceremonial and economic use. The fact that the parties to the treaties intended that the tribes should continue to support themselves through fishing is strongly

supported by the fact that the reservations created for the Washington tribes were much smaller than those created for the Plains and other Western Indians. As the Ninth Circuit Court of Appeals observed in *Skokomish Indian Tribe v. France*, 320 F.2d 205, 210 (9th Cir. 1963):

> It is clear that the reservation was intended only as a residence, and the Indians were to remain free to roam and fish at their usual places.

It is also clear, as indicated above, that the United States negotiators understood the importance of fishing to the Indian culture and economy and specifically agreed to guarantee its perpetuation—"this paper secures your fish."

Finally, there is some circumstantial evidence that the tribal negotiators may have understood that there would be an equal sharing of the resource with the citizens of the territory, a concept capable of being conveyed in Chinook jargon.

There is nothing in the facts, however, in support of the State's conclusion that the tribes were agreeing to fish on exactly the same basis as the non-Indian citizens and that they would be subject to the identical controls of the territorial government. In fact, there is some indication that the tribes believed that they would have the right to control the non-Indians' permissive use of tribal usual and accustomed places. Consistent with this evidence concerning the basic purpose of the treaties, the District Court held:

> The rights secured by the treaties to the Plaintiff Tribes is a reserved right, which is linked to the marine and fresh water areas where the Indians fished during treaty times, *and which exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes.*

(emphasis added) CL 20, 384 F.Supp. at 401, Joint App. at 195.

The District Court's conclusion that the purpose of the treaties was to provide a volume of fish sufficient to the fair needs of the tribes is also supported by a number of this Court's decisions. In *Winters v. United States*, 207 U.S. 564 (1908), the question presented was whether the Indians of the Fort Belknap Reservation had a superior right to use the waters of the Milk River for domestic and irrigation purposes. The reservation had been created by the Treaty of 1888, under which the tribe ceded to the United States a large tract of land formerly used and occupied by them, but retained a smaller portion of that tract which became the Fort Belknap Reservation. Under ordinary principles of water law, the non-Indian settlers in the area would have had a superior right to use the water of the Milk River because of their prior appropriation. The treaty made no mention of the reservation of any water right.

Nevertheless, the Supreme Court held that the tribe, by implication, necessarily reserved to itself a superior right to use the water. The Court stated:

> It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless.

207 U.S. at 576. Although it was argued to the Court that the Indians must have been aware of this and still made no reservation of the waters, the Court answered:

> The Indians had command of the lands and waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?

Id. The Court concluded:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. *And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.* On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them.

Id. at 576-577 (emphasis added).[386] In this situation, where there may also be competing inferences which can be drawn concerning the meaning of the treaty, the one which will support the basic purpose of the treaty, to allow the Indians to sustain themselves economically based on fishing, should be adopted.

The *Winters* case, in which no actual apportionment of the water was ordered by the Court, was followed and extended by this Court in *Arizona v. California*, 373 U.S. 546 (1963). The core of the Court's holding in *Arizona v. California* regarding Indian water rights was:

> The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the

386. The Court's reference to the "double sense" in which words might be used is particularly applicable in the instant case where the State and the non-treaty fishermen argue that the "in common with" language of the treaties should be interpreted in the same technical legal sense they argue it held at common law according to Kent's Commentaries on American Law. *See* Part III–C-1, *supra*.

> waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such, are entitled to priority under the Act.
>
> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all of the practicably irrigable acreage on the Reservations.

373 U.S. at 600. The Court specifically rejected Arizona's contention that the water should be allocated between the State and the tribes based on the sort of "equitable apportionment" that has been utilized by this Court in adjudicating the rights of various states to the waters of an interstate stream. 373 U.S. at 597. It is significant that in both *Winters* and *Arizona v. California*, the Indian water rights were given priority even though there is no evidence that the Indians had actually bargained for special water rights and even though no particular mention of them was made in the treaties.[387]

Finally, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), this Court made clear that the reserved rights doctrine applied not only to water but also to fisheries. In that case, the question was presented as to whether a statute setting aside "the body of lands known as the Annette Islands" as an Indian reservation in Alaska

387. The vitality of the *Winters* doctrine was recently reaffirmed by this Court in *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976).

also included within the reservation the navigable waters surrounding the Islands. The issue was presented because of the presence of an extensive non-Indian fish trap. The trap owner argued that the statute referred only to the "body of lands" and consequently the reservation did not include any of the surrounding water.

The Court noted that the Annette Islands bore a fair supply of timber but that only a small portion of the upland was arable; on the other hand, salmon and other fish were plentiful in the waters surrounding the reservation. The Court stated:

> The purpose of the Metlakahtlans, in going to the Islands, was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

248 U.S. at 88. In spite of the fact that the statute made no specific reservation of the waters surrounding the islands nor of the fishing activity of the Indians, the Court concluded that the use of the adjacent fishing grounds was essential to the purposes of the reservation and that, consistent with the rule of construction that statutes passed for the dependent tribes should be liberally construed, the reservation necessarily included the surrounding waters as well as the upland. *See also Menominee Tribe v. United States*, 391 U.S. 404, 406, n. 2 (1968).

The considerations favoring effectuating and giving priority to the Indian treaty rights reserved by the treaties in

the instant case, are, of course, much stronger since the reservation of the treaty right was *express*. The Northwest tribes specifically demanded and received assurances that their ancient fishing rights would be protected and the treaties expressly secure them the "right of taking fish at usual and accustomed grounds and stations." The evidence clearly demonstrates that the reservation of the fishing right to the tribes was not an incidental part of the consideration promised them, but was the one central protection that the tribes insisted upon to protect a culture and economy centered around the anadromous fish.

The implied reservations of water rights construed in *Arizona v. California* guaranteed the Indians sufficient water to irrigate all of the reservation's practicably irrigable acreage. Surely the construction of the *express* guarantee of the Stevens Treaties cannot be less generous. Especially in the context of the historical evidence concerning Indian commercial fishing, *Winters* and *Arizona v. California* strongly support the conclusion that the tribes are entitled to an opportunity to catch sufficient fish to enable them to earn a livelihood as well as satisfy their subsistence and ceremonial requirements.

As discussed in Part II, *supra*, the inescapable fact facing the District Court was that an allocation was necessary because State regulations had effectively authorized non-treaty fishermen to preempt the resource and had discriminated against the Indian treaty opportunity. In attempting to make any quantification of the Indian treaty opportunity, however, based solely on Indian "need," the District Court faced a number of difficulties. First, because of the historic pattern of state discrimination and preemption, the Indian fishing effort prior to 1974 was not a reliable guide. As the District Court specifically found, the pattern of State regulation had forced many Indian fishermen out of the industry. FF 33, 384 F.Supp. at 358, Joint App. at 115; *see also* Ex. USA-20, Joint App. 395. On the other hand, measuring Indian needs in terms of economic realities, the evidence clearly indicated that in order to maintain an adequate standard of living the tribes would have to take an exceedingly large share of the fish. For example, based on 1973 figures, evidence was presented to the Court that if the tribes took 80% of the harvestable number of the fish from the fisheries in ten major river systems in Puget Sound, it would provide enough income to provide only 401 Indian families with an annual income of $11,000.00,[388] scarcely comparable to that necessary to enjoy a standard of living comparable to that enjoyed by their non-Indian neighbors.[389] Moreover, the compilation of Indian needs was complicated by the well-established fact that fishing, at treaty times, was the universal male occupation of the Washington Puget Sound and ocean tribes. *See* Joint App. at 365.

In addition, the Court was also faced with the difficult problem or reconciling a reserved right sufficient to meet the Indian needs, vis-a-vis *Winters* and *Arizona v. California*, with the treaty language clearly providing that the resource would be shared with non-Indian fishermen. This, as noted above, did not present any problem at the time of the negotiation of the treaties since full protection of Indian tribal needs was not threatened by the minimal

388. Ex. MS-1, Table 13 at 30-32.

389. *Cf.*, 25 U.S.C. §1451, where Congress established a federal policy designed to enable Indians to "enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."

non-treaty harvest. In 1974, however, the fishery resource was not so abundant. Recognition of the full contemporaneous needs of the tribal fishermen, in light of this shortage, would have led to the prohibition of any non-treaty fishing on stocks bound for many Washington rivers, and a predominant share on others.

In order to reconcile these conflicting considerations, the District Court concluded that the exercise of the tribes' fishing right was limited:

> The right [secured to the tribes by the treaty] is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes.

CL 20, 384 F. Supp. at 401, Joint App. at 195.

And:

> The exercise of a treaty tribe's right to take anadromous fish is limited only by the geographical extent of the usual and accustomed fishing places, the limits of the harvestable stock, the tribe's fair needs for fish, *and the opportunity for non-Indians to fish in common with Indians outside reservation boundaries.*

CL 25, 384 F. Supp. at 402, Joint App. at 196. (emphasis added)

And:

> The phrase "in common with" operates only to limit the exercise of the tribes' right to a share of the resource which will be consistent with preservation and maintenance of the resource and with the reasonable harvest by others of such fish as are not reasonably needed by the tribe. . . .

CL 28, 384 F. Supp. at 402, Joint App. at 197; *see also* Declaratory Judgment ¶17, 384 F. Supp. at 407, Joint App. at 206.

The District Court's allocation order gives recognition to a portion of the "fair needs" of the tribes and allows

them to harvest fish in their traditional ways at their traditional places, while reserving to the non-treaty fishermen not only an equally fair share of those runs, but essentially full freedom to harvest the plentiful salmon runs bound for places other than Puget Sound. The court's allocation resulted in a total tribal catch constituting only 18% of the total Washington catch in 1977; the District Court's allocation principle of equal sharing of the runs passing through the usual and accustomed places of the tribes, is the *minimal* logical accommodation of Indian needs with the tribal agreement to share the resource with the citizens of the Territory.

The District Court's allocation is also strongly supported by the doctrine of tribal sovereignty. Fundamentally, the District Court's allocation gives specific recognition to the fact that the treaties were negotiated between two parties, the United States and the tribes. As noted in Part III-D-2, *supra*, the concept of Indian tribes as sovereign entities capable of entering into treaties with the United States was well established by 1854. Kent specifically discusses the quasi-sovereign status of Indian tribes and the policy of the United States to extinguish Indian title with fair compensation through the mechanism of entering into treaties with the tribes themselves. 3 Kent, *supra*, at 381 *et seq.* Indeed, as this Court recently recognized in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973) the concept of tribal sovereignty has survived and remains today a cornerstone of federal Indian law. While the doctrine has undergone considerable evolution, and the power of the United States to enter into treaties with the tribes eliminated, the Court nevertheless held that tribal sovereignty provided the "backdrop" against which the applica-

ble treaties and statutes must be read. 411 U.S. at 172-173. Indeed, the concept of tribal sovereignty has served, directly or indirectly, to resolve many modern cases. *See e.g., Williams v. Lee,* 358 U.S. 217 (1959); *United States v. Wheeler,* 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

As the Ninth Circuit Court of Appeals recognized in the initial appeal, "the treaties must be viewed as agreements between independent and sovereign nations. *McClanahan,* 411 U.S. at 172, 93 S.Ct. 1257." It is the co-sovereign status of the tribes and the United States which provides the fundamental principle to be applied in the judicial apportionment—that of equal sharing.

The State of Washington contends that the "equality of opportunity" implicit in the "in common with" language of the treaty was meant to establish parity between individual fishermen, not between the tribes on the one hand and the State, as successor to the rights of the United States, on the other. State Br. at 39.[390]

390. The State put it as follows in its brief:

> The critical question is: How is equality of opportunity to be measured? Is it to be equality of opportunity among all *individual* fishermen, Indian and non-Indian alike? Or is it to be equality between two *groups* of fishermen, one treaty Indians and the other all citizens, both Indian and non-Indian?
>
> This initial question of how equality is to be measured is pivotal.

State's Br. at 39. While the State's reference to "*groups* of fishermen" obscures the fact that the treaties were negotiated between two sovereigns, the United States and the tribes, not "groups," the State's formalization of the issues is correct at least in this respect: it amounts to a concession that if *any* allocation is to be made to the tribes at all, application of the concept of equality of opportunity leads naturally to the conclusion that tribes should be given an opportunity to harvest 50% of the fish bound for usual and accustomed grounds and that the fishermen licensed by the State should be granted an opportunity to harvest the other 50%. Equality of opportunity means either an equal sharing between the sovereigns, the District's Court's position, or it means individual equality with no allocation whatsoever. If the State's position that the treaty permits no allocation at all is rejected, as it must be, the State's argument would support the conclusion that no reasonable position is available less than that decreed by the District Court.

Not only does the language of the treaty, as discussed above, undermine this conclusion,[391] but the State's contention totally ignores the nature of Indian society, the established case law on Indian treaties and Indian hunting and fishing rights, and generally accepted principles governing the relationships between governing bodies and their citizens in the former's treaty relations.

The Court of Appeals correctly recognized that the Indians' fishing rights continued to be *tribal* rights, not belonging to any individual Indian. 530 F.2d at 688. In so doing, the Court specifically recognized the long-standing approach of the United States government to Indian property rights. *Cf.* 3 Kent's Commentaries, *supra,* at 383. In fact, 25 U.S.C. §177, enacted June 30, 1834, 4 Stat. 730, provides in part:

> No purchase, grant, lease or other conveyance of land, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

By implication, the statute recognizes that title to Indian lands rested in the tribes. As the court held in *Montana Power Co. v. Rochester,* 127 F.2d 189, 192-93 (9th Cir. 1942):

> The Indian society is communal in character rather than individualistic; and this is particularly true in respect of the hunting and fishing grounds of the Indians.

See also Journeycake v. Cherokee Nation, 28 Ct.Cl. 281, 302 (1893), *aff'd.,* 155 U.S. 196 (1894). Similarly, in

391. The reference in the article of the treaty reserving the off-reservation fishing right to "*said* Indians" refers back to the earlier language in the previous articles describing the parties to the treaties as the "tribes." In context, therefore, said Indians means the tribes, not individual Indians as the State contends.

Whitefoot v. United States, 293 F.2d 658, 156 Ct.Cl. 718 (1961), *cert. denied*, 369 U.S. 818 (1962), the court stated:

> While property is vested in a tribe, it is the individual member who enjoys the use of the property. [citing Federal Indian Law] As to fishing, this is true. But like the lands, the interests in the fisheries are communal, subject to tribal regulation.

Id. at 663 (footnote omitted). *See also Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974) where the Court of Appeals noted that tribal fishing rights were communal rights even though individual members benefitted from those rights.[392] *See also* F. Cohen, *Federal Indian Law*, 750 (1966).

In its original decision, the Ninth Circuit Court of Appeals succinctly described how the tribal nature of the fishing right, coupled with the communal nature of tribal property, completely undermined the State's assertion that the treaties intended to reserve only a right of individual competition:

> Each tribe bargained as an entity for rights which were to be enjoyed communally. *See Sac and Fox Indians (Iowa) v. Sac and Fox Indians (Oklahoma)*, 220 U.S. 481, 483-84 (1911). Reservations were reserved to each tribe qua tribe. Not until 1887 was the President authorized to allot reservation lands to individual Indians. 24 Stat. 388. Individual Indians had no individual title to property, but participated in the communal rights of the tribe. 'The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder

392. The language from *United States v. Winans*, 198 U.S. 371 (1905) quoted in the State's Brief at n. 24 is not inconsistent with these cases. Each individual Indian *does* have an enforceable right, as a member of the signatory tribes, to utilize the tribal fishing rights. Nevertheless, the treaty negotiations were conducted with the tribes and the treaties themselves were signed by the tribes not by individual Indians. The individual fishing right is merely derivative of his membership in the tribe.

> in the property of a corporation.' F. Cohen, *Handbook of Federal Indian Law*, 183 (1942, reprinted 1971). The right to fish at usual and accustomed area grounds was one such communal property right pertaining to the tribe. [citations omitted] *To hold that Indian negotiators intended it to secure for each member of the tribe the right to compete for fish on equal terms as an individual with each individual settler—the State's view of the "in common with" clause as a prototype of the Fourteenth Amendment's equal protection clause—thus would be to disregard the fabric of Indian society at the time the treaties were concluded, a society of communality whose nature was reflected in the subsequent legal character of property ownership which evolved in Federal Indian law.*

520 F.2d at 688. (emphasis added)

In addition, it is a well-established principle of international law that when a sovereign nation treats with another nation the rights created are held by the sovereign, even though individual citizens may derivatively enjoy the rights. This pertains to fishing rights as well as others. As stated in the *Restatement (Second), Foreign Relations Law of the United States*, §113, Comment (e) (1965):

> [M]any international agreements such as treaties of friendship, commerce, and navigation, contain provisions establishing certain benefits for the nationals of the states that are parties to the treaties. The traditional view is that any rights arising out of such provisions are, under international law, those of the states and that individual rights are only derivative through the states.[393]

393. In the United States, where a treaty is the supreme law of the land, individuals can directly enforce their rights under the treaty, as in *Winans*. RESTATEMENT (SECOND) LAW, Foreign Relations Law, §101, Comment (e) (Tent. Draft No. 3, 1959). The example which the RESTATEMENT gives is when two nations grant certain fishing rights to the other's nationals. *Id. See* Part III–D-3, *supra*, describing the Treaty of 1818 between Great Britain and the United States which describes certain North Atlantic fisheries rights which the inhabitants

[Footnote continued on Page 166.]

As the Ninth Circuit realized, recognition of the co-sovereign status of the United States and the tribes leads naturally to the conclusion that they intended by "in common with" to provide that their respective constituents would share the resource equally. 520 F.2d at 687-88:

> We affirm the conclusion of the District Court that the fundamental principle to be applied in a judicial apportionment is that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. This conclusion flows naturally from the circumstances in which the treaties were signed.
>
> Treaties must be viewed as agreements between independent and sovereign nations.

And, later on the same page:

> In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. An attempt to partition equitable rights which these parties were to hold in common must reflect this initial equality. The District Court was not required to decree a perfect 50-50 division of fishing opportunity. . . . Nevertheless, a 50-50 apportionment reflects the equality existing between the two bargaining parties and best effectuates what the Indian parties would have expected if a partition of fishing opportunity had been necessary at the time of the treaties.

In addition, the District Court's allocation, as the Court of Appeals recognized, is supported by analogy to the law of co-tenancy. 520 F.2d at 687. This is particularly true in light of the fact that the similar language in the treaty of

of the United States shall have "in common with the subjects of his Brittanic majesty . . . ." The United States has consistently interpreted the Treaty as creating national, not individual rights. *See, e.g.*, the argument of Senator Elihu Root, the United States representative during the Hague proceedings. E. Root, *North Atlantic Fisheries Arbitration*, 126 (1917).

1818 was described by a number of American Secretaries of State and legal authorities as creating a "tenancy in common." *See* Part III-D-3, *supra*. While it is true as Judge Kennedy pointed out in his concurring opinion in *Puget Sound Gillnetters Association v. United States District Court*, 573 F.2d 1123, 1134-1135, that co-tenants do not necessarily hold equal shares of the property, nevertheless, it is well established that where title to property is held by two or more tenants in common, and the fractional share of each co-tenant is not specified in the transferring document, equal shares are presumed, in the absence of contrary evidence. *See* 2 American Law of Property, §6.5; Tiffany, *Real Property*, §426.[394]

Finally, the District Court's interpretation has ample support in its finding that the words "in common with," in common parlance at the time the treaties were negotiated meant "belong equally to more than one." FF 24, 384 F. Supp. at 356, Joint App. 111. Under questioning by the Court, Dr. Lane testified that a contemporary dictionary definition would be a useful source in divining the intent of the non-Indian drafters. As the District Court concluded: "By dictionary definition and as intended and used in the Indian treaties and in this decision, 'in common with' means *sharing equally* the opportunity to take fish at 'usual and accustomed grounds and stations'. . . ." 384 F. Supp. at 343, Joint App. 88-89.

394. The tribes do not contend that the law of co-tenancy is, in all respects, a perfect analogy. Nevertheless, like the other factors outlined above, it strongly supports the conclusion that the treaty opportunity to fish passing through the tribal usual and accustomed grounds should be subject to an equal sharing principle. Although the State and the Associations take great comfort in Judge Kennedy's concurring opinion, the tribes believe that both the Petitioners and Judge Kennedy took the Ninth Circuit co-tenancy analysis much too literally.

In sum, the District Court's decision to limit the tribes' reserved fishing right to a 50% share in light of their agreement to share the fish resource with the citizens of the other negotiating sovereign, is clearly reasonable.. The next two sections of the brief address problems with implementation of the District Court's decision which have arisen since it became final.

IV. The District Court's Orders Are Consistent With Conservation of the Resource and Are Appropriate Under the Circumstances.

In this section the Tribes respond to Petitioners' charges that the District Court's orders frustrated efforts to preserve the fish resource, displaced the State as manager, improperly allocated the 1977 harvest and cannot bind the State-licensed fishermen.

A. *State Conservation Power Is Unimpaired.*

Washington misrepresents the effect of federal court orders on State conservation authority, saying:

> Before the state can enforce regulations of general applicability on treaty Indians fishing in usual and accustomed grounds, *it must first establish to the satisfaction of the District Court that the regulation is "reasonable and necessary for conservation."*

State Br. at 103 (emphasis added). This is an *exception* not the rule. The Associations repeat this inaccuracy,[395]

395. The Gillnetters state "any Department of Fisheries regulation" was prohibited "unless the Department first satisfied the court of the conservation need. . . ." Associations' Br. at 16.

In addition, the American Institute of Fishery Biologists make the same error. Brief of *Amicus Curiae* American Institute of Fisheries Research Biologists at 24, 27. The Institute also claims that State regulations must be submitted to the Fisheries Advisory Board 48 hours prior to effectiveness, Br. 28, apparently referring to the Order Re: Rules of Procedure of Fishery Advisory Board and Resolution of Disputes, Docket No. 2703. Again, the Institute is simply incorrect. The order explicitly conditions the procedure on parties contributing "to a central 24-hour telephone service to receive notice by the State." Since the parties have not agreed on a foolproof way to operate such a system, the procedure referred to by the Institute has never gone into effect.

thereby glossing over the hundreds of in-season openings, closings, and restrictions of fishing which constitute the bulk of the State's conservation regulation, and for which the District Court has made explicit provision. Thus the State and the Associations utterly distort the harmonious relationship between the federal court's decrees and State conservation authority. In fact, Washington has *never* found it necessary to make such a showing to the District Court because of the actual means by which the fishery is regulated.

Washington's agencies regulate fisheries by both permanent and emergency regulations. The two types of regulations serve distinctly different purposes and are treated separately by the lower court. Emergency regulations are promulgated in advance of, and throughout, the fishing season to control fishing times, places, species, gear and so forth. Control of these variables insures adequate escapement to perpetuate the fish runs. These regulations are the true conservation regulations, and no court review or approval is required before they may be applied to treaty fishing. The court ruled:

> In order to accommodate . . . conservation necessity . . . emergency regulations are enforceable by the state upon fiilng with the court and service upon the tribes.

384 F. Supp. at 417, ¶19, Joint App. 225. The Order for Program to Implement Interim Plan simply provides:

> Emergency regulations are *enforceable upon filing* them with the court and service upon the other parties. . . . Any party may respond and seek immediate review. Requests for emergency consideration by the court will be given priority and determined rapidly.

Joint App. at 439. (emphasis added) These rulings are explicitly designed to permit the State of Washington to apply *all* of its in-season regulations to treaty fishermen.

Emergency regulations are used because data from incoming fish runs change rapidly, and the State has no opportunity to comply with the notice and comment requirements for permanent regulations under the Washington Administrative Procedure Act. The State Act, therefore, allows agencies to promulgate emergency regulations[396] and regulation of the Washington salmon harvest has been accomplished through emergency regulations in recent years. In 1978, for example, the State adopted 139 such emergency orders. These regulations are, by the District Court's orders, immediately enforceable against treaty Indian fishermen and supercede any conflicting tribal regulations.[397] Any tribe seeking to challenge the conservation justification for the regulation must invoke the court's jurisdiction and come forward with the evidence showing the absence of a conservation purpose. 384 F.Supp. at 417, ¶19, Joint App. 225.

Permanent regulations by contrast, are not used for making the day-to-day adjustments needed to preserve

396. Emergency regulations are accompanied by a finding that the regulation is necessary for the preservation of the public health, safety or general welfare, and a short statement of the facts constituting the emergency. RCW 34.04.030. These regulations become enforceable under State law upon filing with the Washington Code Reviser's Office.

397. There is a narrow exception for two tribes, the self-regulating Yakima and Quinault Nations. These tribes historically, and at present, meet all of the qualifications and conditions specified at 384 F. Supp. 340-41, Joint App. 84-85. An essential condition of their exceptional status is that their regulations must include "any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation." *Id.* If any self-regulating tribe fails to include regulations which *are* necessary for conservation, or fails to enforce them, it thereby ceases to meet the conditions for self-regulatory status and becomes fully subject to the effects of state emergency regulations. In such case there would be no need to rely on the tribe for compliance, State's Br. 104, for the State could take unilateral action to protect the fish. Notably, neither tribe has ever violated this condition, so the State's concern about having inadequate latitude to implement a conservation program, is obviously misplaced.

the fish runs. These regulations implement the broad scope of state police power to implement policy and meet the needs of the body politic,[398] as defined by the legislature. These regulations, together with legislative enactments form the regulatory structure which the District Court found, "operate(s) to discriminate against the tribes' treaty right to fish." CL 38, 384 F.Supp. at 403, Joint App. 199. In fact, the District Court specifically enjoined several of the general regulations, 384 F.Supp. 415, ¶6, Joint App. 221.

The lower courts have properly required a showing that general regulations, which are not immediately related to any specific time or place where fish runs might be damaged, must be necessary for conservation. That is the rule consistently enunciated by this Court's cases. In *Puyallup I* this Court noted:

> As to a 'regulation' concering the time and manner of fishing . . . we said that the power for the State was to be measured by whether it was 'necessary for the conservation of fish.' . . .
>
> *The measure of the legal propriety* of those kinds of conservation measures *is* therefore *distinct from the federal constitutional standard concerning the scope of the police power of a State.* (citing cases)

391 U.S. 392, 401 n. 14 (1968). (emphasis added) If no showing of conservation necessity was required for the State's permanent regulations to be applicable, *United States v. Winans*, 198 U.S. 371 (1905), *Tulee v. Washington*, 315 U.S. 681 (1942) and *Puyallup II*, 414 U.S. 44

398. The permanent regulations, among other things, classify types of fish, close waters to all commercial fishing at all times, forbid certain types of fishing gear, require specified fish receiving tickets and use of weight delivery sheets. They contain a whole host of general regulatory enactments, unrelated to specific conservation needs, *see* Chapter 220, Washington Administrative Code.

(1973) would be undermined since the permanent regulations require licenses and forbid the use of "fixed" gear.

The distinction between the lower court's orders affecting permanent and emergency regulations is essential. It illustrates the District Court's refusal to interfere with regulations which, in the State's judgment, are necessary for *protection* of a fish run. The court's rulings reflect a complete awareness of the need for in-season regulations which fishermen understand to be binding upon them. It precisely complies with this Court's rule that treaty fishing rights may be curtailed *when necessary for conservation.*[399]

> Rights can be controlled by the need to conserve a species; and the time may come when the life of the steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon.

Puyallup II, 414 U.S. 44, 49 (1973).

The State now claims a need to "be able to bind all citizens, both treaty Indians and other citizens to its regula-

399. The Tribes still feel, however, that it is unfortunate that the legal basis for State regulation of off-reservation fishing has never been adequately explained. Nowhere in any of the treaties was there any provision for the future State of Washington or any other non-Indian government entity to place restrictions on native fishing. As we stated in our conditional cross petition in the original appeal in this matter (Causes No. 75-588 and No. 75-592):

> The record establishes beyond question that the Indian parties did not intend to submit their fishing rights to the control of any then non-existent non-Indian authority. Nothing in the record or the treaties can support a contrary interpretation, especially in view of the rules of Indian treaty construction.

Brief of Respondent Indian Tribes in Causes No. 75-588 and No. 75-592 at 28.

This argument is not being detailed here. Although the tribes are still firmly committed to its validity, the question appears to be now settled by this Court as a matter of domestic law governing Indian treaty fishing rights. Thus, the tribes have put forward their arguments under those doctrines.

tions to prevent overfishing of salmon stocks." State's Br. at 112. This is precisely what the District Court's orders permit the State to accomplish. Neither treaty nor non-treaty fishing is permitted to cut into escapement requirements; no judicial hearing or showing of necessity precedes the application of these regulations to treaty fisheries,[400] and the State is simply wrong in implying to the contrary.[401]

The State similarly misrepresents the facts in asserting that the District Court's rulings do not "equitably pro-rate the sacrifices necessitated by conservation goals between the two groups—treaty Indians and all other fishermen," State Br. at 104. In fact, all fish needed to meet conservation requirements are subtracted before allocations of harvest opportunities are made for either group. 384 F.Supp. at 343, Joint App. 88. Washington raised this same argument in 1974 prompting the District Court to explain that its rulings were being "taken out of context" and did not exempt the treaty fisheries from an equal share of conser-

400. Washington alleges (State Br. 109) that it has repeatedly been required to intervene to close treaty fisheries for conservation needs. It is important to note that enactment of an emergency conservation closure occurs as a matter of course whenever the State, through its catch monitoring activities, determines that the total number of harvestable fish have been taken. It does not ordinarily mean that anyone is fishing improperly. The closures are enacted so that enforcement officers can prevent further fishing. Most closures cover more than one area and more than one tribe. *See* W.D.F. Technical Report 40, 1977 Summary, at 4, Docket No. 5440. The tribes also enact closures in those situations, sometimes earlier than the state closures. *Compare, e.g.*, tribal regulations filed 10/20/78, Docket Nos. 5189, 5190, with State regulation filed 10/23/78, Docket No. 5203.

401. As the Chief of Harvest Management for the Department of Fisheries states as to the effect of the District Court's rulings: "Although treaty Indians have legally specified authority over tribal fisheries, the ultimate responsibility for conservation of the salmon resource is embodied in the Department." Joint App. 554.

vation sacrifices.[402] The Court of Appeals also explicitly ruled that treaty Indians must share in the sacrifices necessary to meet escapement needs. 520 F.2d at 686 n. 3, Joint App. 48. In context, the court's rulings are simply a restatement of its finding that the State typically regulates its fisheries to allow all of the harvest of the runs to be taken before they reach many of the usual and accustomed places of the plaintiff tribes. Regulations which thus zone treaty fishermen out of the harvest and reserve the harvest for non-treaty fisheries cannot be considered *necessary* for conservation. They are merely the net result of the political pressure of non-treaty fishing interests. *See Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169, 173 (9th Cir. 1963); *Sohappy v. Smith*, 302 F.Supp. 899, 907-08 (D.Or. 1969).

The Petitioners' description of conservation regulations and of sharing the sacrifices needed to meet escapement goals are an outright attempt is mislead this Court. But it is hypocritical in the face of overwhelming evidence that the State has refused to make any effort to control illegal non-treaty fishing, to suggest the court's orders have "precipitated the rash of uncontrollable illegal fishing" State Br. at 104.

Long before the State Supreme Court rulings halted state enforcement, Washington had adopted a tolerance policy of not issuing citations.[403] In the past two years the State has utterly refused to enforce its regulations against non-treaty fishermen encroaching on the tribal share.[404]

402. Rulings on Fisheries Questions per Reconsideration Motion, No. 16, 384 F. Supp. at 411, Joint App. 213.

403. Sgt. L. Nelson testimony, Joint App. 523 (Mar. 28, 1978); B. Gruett testimony, Joint App. 603, ¶9 (Oct. 11, 1976).

404. W. Miller testimony, Joint App. 519 (Sept. 27, 1977).

The State's management staff have pointed out that fisnermen tend to evaluate the cost of being cited relative to the profits of continued illegal fishing.[405] Obviously the deterrence to illegal fishing will be minimal when both the Director of Fisheries and the Attorney General's staff announce on the record that there is little likelihood of State convictions.[406]

Finally, the District Court's concern with protecting the fish runs is exemplified by its encouragement of tribal enforcement of tribal regulations. There are no "conflicting voices of authority," State Br. at 109, directing the tribal fishermen, for the State has clear power to enforce its conservation regulations if any regulatory conflict arises.[407] In fact, the tribal regulations are even more restrictive than State closures, for they implement both conservation policies and the internal and social policies of the Indian governments. Some regulations restrict tribal harvests to protect ceremonial fisheries or to ban economically wasteful gear types. Tribal regulations also effect a division of harvest *among* the Indian tribes. The State has no conservation interest in which treaty fisheries take harvestable fish, *see* 384 F.Supp. at 417, ¶15, Joint App. 224.

In actual practice tribal regulation greatly assists enforcement of conservation regulations because of the presence of tribal officers, their familiarity with the unique

405. A. Austin, Docket No. 3945, Joint App. 606-07. *See* G. Marshall testimony, Tr. Nov. 3, 1978 at 21.

406. G. Sandison testimony, Joint App. 514 (Aug. 8, 1977); J. Johnson argument, Joint App. 514-15 (August 26, 1977).

407. The Washington Department of Fisheries recently reported, "Tribal regulations can also be more restrictive than Department regulations. This is usually due to inter-tribal allocation of no conservation interest to the Department. Where Department conservation regulations exist, conflicting tribal regulations are moot and have no authority. Where both regulations are the same, they are complementary." *1977 Summary of Regulations*, Technical Report 40, Docket No. 5440.

treaty fishery and the deterrent power of sanctions applied by a tribe to its members. Protection of this limited tribal regulatory power reduced the need for close State supervision and is most consistent with the intent of the treaties.[408] Moreover, in light of the postive effects of tribal enforcement efforts and the superceding character of State regulations which are necessary for conservation, the lower court's orders do not abridge this Court's ruling in *New York ex rel. Kennedy v. Becker,* 241 U.S. 556 (1916). There the Court dealt with separate *exclusive* regulatory powers which might effectively deny, to all, the power to preserve the fishery. Here the State's conservation power is carefully preserved. Only the tribes are denied the power to fully implement conservation policies for, since their jurisdiction is limited to treaty fishermen, they have been helpless to prevent the massive illegal fishing, by non-treaty citizens, which occurs literally before their eyes.[409]

The State calls for an end to the proliferation of management meaning that tribal regulation of their own members should be terminated. *See* State Br. at 109, 112. But the State's suggestion seeks to invade areas of concern exclusively and properly within the authority of tribes. As this Court said in *Puyallup III:*

> The [state] has no interest in how the catch is allocated among Indians . . . On the other hand, the Tribe has a separate interest in affording equitable treatment to its members. . . .

Puyallup III, 433 U.S. at 173. Similarly this Court said in *United States v. Wheeler,* 435 U.S. 313, 326, 331 (1978):

> The sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. . . .
>
> They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions . . .[410]

B. *The State Remains the Principal Fishery Management Authority.*

"Court preemption of the management of the fishery," argues the State of Washington, "is now complete." State's Br. at 4. And: "[t]he decisions . . . have substituted the district court as the manager of the fish resource in state territorial waters." State Br. at 100. These sweeping generalities overstate and obscure the actual lower courts' equitable remedies, which are carefully tailored to the nature and the scope of the violations of federal law found. The Associations ask this Court to believe that the District Court has designated, "himself as, in effect, the State Fisheries Commissioner." Association's Br. at 47. The facts are otherwise.

First, the field of fisheries management is broad and the court's ruling that harvest opportunities of certain stocks

408. The Indians clearly did not understand and were not told that their fishing might be restricted by a non-Indian government. Lane testimony, Joint App. 261-62. They *did* understand that their ownership right to the fishery, and customary modes of enforcement to protect it, were being preserved. *Id.* at 271, 377.

409. In 1977, for example, the number of chum which survived the fishery fell 72,000 fish short of the escapement goal in Hood Canal (Compare escapement goal, App. A-43 in Petition in No. 78-119 with escapement achieved, Joint App. 595). This was due to illegal non-treaty fishing which harvested some 110,000 chum salmon in violation of State regulations. Ex. PL-M-4(a), *see* Transcript April 6, 1978, at 285, 325.

410. *See Williams v. Lee,* 358 U.S. 217, 221 (1959) and the Court of Appeals' well-reasoned opinion in *Settler v. Lameer,* 507 F.2d 231 (9th Cir. 1974). The fact that tribes exercise their authority over tribal fisheries beyond reservation boundaries is not relevant. The treaties expressly reserved tribal rights off-reservation and therefore act as express federal law preempting otherwise applicable state law, 520 F.2d at 684, Joint App. 45, *cf., Mescalaro Apache Tribe v. Jones,* 411 U.S. 145, 149 (1973).

must be shared equally with treaty fisheries, has no effect whatever on most state activities.[411] The Assistant Director for Salmon within the Department of Fisheries, presides over five separate divisions which are responsible for salmon artificial production, natural production, harvest management, research and development and construction and engineering. Even within the comparatively narrow field of salmon harvest management, the District Court has carefully limited its action to the absolute minimum consistent with preserving the tribal treaty right.

Second, salmon harvest management involves data collection, pre-season run size estimation, in-season run size revisions, prediction of catches by Washington trollers and sports fishermen, setting maximum fishing harvest rates and establishment of escapement goals. All parties rely upon the State of Washington to perform these tasks. As the Chief of Harvest Management for the State Department of Fisheries stated in 1976: [T]he Department plays the leading role in establishing the technical basis for management of the runs and recommending harvest management considerations . . . ." Joint App. 354. In short,

411. Of course, Petitioners do not literally suggest that the District Judge has assumed the role of State Director of Fisheries, for the Director has responsibilities far broader than regulation of salmon harvest. The Department of Fisheries has a staff of 600 employees regulating 80 other species of fin fish, 44 types of shell fish, and the use of at least 26 types of fishing gear. Washington Administrative Code 220-12-010; 220-12-020; 220-16-101 to 145. State Fisheries management activities cover seals, sea lions, fishing in fresh water lakes, oyster diseases and pests, and other matters. The Department of Game manages 29 categories of game fish. Only one, the steelhead trout, is implicated in the litigation.

Even salmon management encompasses fish receiving tickets, aquaculture standards and facilities, and licensing review boards for state fishermen—matters unrelated to the District Court's orders requiring allocation of fishing opportunity. In short, as is obvious from the record in this case, the lower court's orders have neither preempted management of the fishery in state waters nor established the District Judge as the State Fish Commissioner.

Washington manages the salmon and steelhead fisheries. *See* 384 F.Supp. at 417, ¶17, Joint App. 224-25; Implementing Program, Joint App. 438-40.

Third, it *is* true that the Court has established *mechanisms* to settle technical disputes out of court and a procedure to judicially resolve those which cannot be settled. These were initiated in 1974 with the adoption of an Interim Plan, 384 F.Supp. at 420, Joint App. 229, which requires State and tribal biologists to formulate general principles for fisheries management and exchange of biological data. From the outset, the Court has used a fisheries expert as a technical advisor, to assist in this process.

To minimize judicial involvement in technical matters, the court initially required the parties to notify the technical advisor as disputes arose, prior to any judicial consideration. This procedure was refined through the creation of the Fisheries Advisory Board consisting of a representative of the State, of the affected tribes, and the nonvoting technical advisor. Joint App. 452.

The Fisheries Advisory Board has successfully resolved many of the underlying technical disputes in the salmon, steelhead, and herring fisheries. *See* Docket Nos. 5312, 5313. The high degree of technical cooperation achieved between the parties has resulted in a substantial improvement of management of the salmon fisheries.

The District Court has also unquestionably urged the parties to resolve their disputes informally and has required the parties and the Fisheries Advisory Board to submit plans for achieving a full settlement as was accomplished in the *United States v. Oregon* litigation.[412] After much

412. *See* Court of Appeals Record No. 77-3654, R. 824, 827, 829, 1013, 1021.

work in the Fisheries Advisory Board, the tribal delegate and the State delegate to the Board, approved a management plan on July 13, 1977.[413] The agreement was refined in additional discussions, then was adopted without material change by the District Court on August 31, 1977.[414] The Memorandum Order Adopting Salmon Management Plan, App. A-61, Petition in No. 78-119, contains nothing more than the parties' agreements to use mutually acceptable definitions and procedures in developing technical information. In practice, State management proceeds as usual except that Washington solicits comments from tribal fisheries biologists and, where appropriate, incorporates the tribal information into the pre-season harvest guidelines.[415] Typically, the tribes accept Washington's harvest management without any dispute, *see* Joint App. 610-13. Even if the tribes disagree with the State's plans, however, Washington can, and does proceed unilaterally unless the District Court's jurisdiction is invoked by a party and the Court finds that the treaty right is being restrained without a conservation justification.[416]

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413. Court of Appeals Record No. 77-3654, R. 1216.

414. In presenting the plan for Court approval, the Court's Technical Advisor reported:

> The attached report . . . states the points now agreed upon by the Fisheries Advisory Board. I believe that this statement, which represents a lot of hard work on the part of many people, is as far as the parties can go this year in reaching agreement on the technical aspects of the salmon management plan. Naturally there are many points which both sides would like to see further refined. I recommend that the Court adopt these agreed upon statements and order that they be implemented and encourage the parties to continue work to refine issues that may still be in dispute.

Joint App. 592.

415. *See* Docket No. 4476, 4477, 4480, 4586, 4615, 4702-A, 4722, 4750, 4809, 4843, 4912, *compare* Joint App. 560.

416. 384 F. Supp. at 419, ¶25(b), Joint App. 228.

C. *The District Court's 1977 Allocation Order Is Not An Abuse of Its Discretion.*

The allocation orders entered by the lower court completely belie the claim that the District Court has displaced the State as the manager, State Br. at 6. The Court, in essence, has said nothing more than that fishing opportunities on Puget Sound origin runs must be shared equally. Washington has refused to comply. It has not been preempted.

In 1974, 1975, and 1976 the District Court relied totally upon Washington to devise regulations which gave the tribes an opportunity to harvest fish at their usual and accustomed grounds and stations. In each case, Washington failed to maket the "substantial reductions" in non-treaty fishing required by the Court. In 1974 and the early fisheries of 1975, the State's compliance was in part blocked by adverse state court rulings. In the 1975 fall fisheries, however, and in 1976, the State's failure to make significant reductions[417] was simply further illustration of the

> recalcitrance of Washington State officials . . . which produced the denial of Indian rights requiring intervention by the district court.

520 F.2d at 693 (Burns, J. concurring), Joint App. 60.

Without more, this default by the responsible state officials provided ample justification for further remedial orders of the District Court. *Milliken v. Bradley*, 433 U.S. 267, 281 (1977), *citing Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971). However, the interference by the State Supreme Court literally forced the District Court to act. The State Supreme Court in the cases now before this Court in No. 77-983 ruled that the

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417. *See* Preliminary Injunction 1975 Chum Fishery, Joint App. 450-51; Order Re: 1976 Coho ¶7-9, Joint App. 466, 468-69.

Department of Fisheries was without authority to allocate fishing opportunities between treaty and non-treaty fisheries, which, the court found, were similarly situated. The Department of Fisheries immediately reverted to the pattern of fishing regulations it had used prior to the District Court's decision in 1974. Testimony of P. Mundy, Joint App. 507 (Aug. 8, 1977). The Department publicly announced that it would not enforce reductions of non-treaty fishing, thus making official what had actually been an unofficial tolerance policy for some time. Since the District Court acted only when Washington refused, its entry of an allocation order is entirely reasonable.

The District Court, in 1974, and the Court of Appeals, in 1975, had clearly established the State's liability for regulating salmon fisheries for the sole benefit of its non-treaty citizens and in derrogation of the tribes' federally-guaranteed reserved right to take fish.[418] The lower court was, therefore, presiding over the remedial portion of the litigation.

This Court in *Milliken v. Bradley*, 433 U.S. at 280-81, set out the standards for the exercise of federal equitable principles in such circumstances and the District Court's orders measure up to these standards nicely: (1) The remedy related to the condition which offends the Constitution. It prohibited the State of Washington from regulating treaty fisheries in a manner not necessary for conservation and prevented the preemption of the salmon harvest by non-treaty fisheries. (2) The Allocation Order was indeed *remedial* in nature; it was designed as nearly as possible

418. See FF 217-18, 384 F. Supp. at 393, Joint App. 179-80, CL 32, 38-40, 384 F. Supp. at 403-04, Joint App. 198-99, 520 F.2d at 685, 687, Joint App. 46, 50.

to restore the treaty Indian tribes to the position they would have occupied in the absence of the State's unlawful conduct. The Order accomplished this by allocating the salmon runs which would normally return to usual and accustomed grounds and stations absent interception by state fisheries. The harvest allocations to the tribes were well within the fishing capabilities of the authorized treaty Indian fishermen. This enabled them to capture as near to an equal share of the harvest as the peculiar facts and equities of the season permitted. (3) The federal court remedy took into account interests of the State in managing its own affairs consistent with the Constitution. The State not only admitted but literally cried out that it was unable to manage the salmon harvest in a way which complied with the established federal rights of the parties. The State and non-treaty fishermen, as the Court of Appeals noted, gave the Court "no reasonable choice," 573 F.2d at 1126, App. A-3, Petition in No. 78-119.

Under these circumstances the District Court's actions were clearly within its equitable powers. As this Court recently stated:

> In fashioning a remedy, the district court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The district court had given the Department repeated opportunities to remedy [the violation]. If petitioners had fully complied with the court's earlier orders, the present [orders] might well have been unnecessary. But taking the long and unhappy history of litigation into acount, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.

Hutto v. Finney, ___ U.S. ___, 98 S.Ct. 2565, 2572 (1978). Under the extraordinary facts of this case it is clear that

the District Court went no further than was necessary[419] to assure compliance with its 1974 decree.

Neither the allocation nor the enforcement orders raise any question of ordering State officials to act outside their authority.[420] Washington was enjoined from authorizing harvest of the treaty share, and the Court itself performed the task of making the allocations, which the Department of Fisheries could no longer lawfully do. The Court's action makes any claim as to the scope of State officials' authority moot.[421]

Finally, the lower court's orders do not abridge the 10th Amendment or principles of federalism. *Cf.*, Associations' Br. at 53-54. The treaty power, along with the 14th Amendment, prohibits certain State conduct, *see Missouri v. Holland*, 252 U.S. 416 (1920). A federal judgment enforcing such prohibitions does not abridge the 10th Amendment's

419. As the Court of Appeals stated, "The tribes have a right to the enforcement of the treaties." 573 F.2d at 1129, App. A-10, Petition in No. 78-119. Under the circumstances, the District Court had not merely the power, but a duty, to protect tribal rights by allocating fish. *Id.* at 1130, App. A-13, *cf., Berry v. Cooper*, 577 F.2d 322, 323 (5th Cir. 1978); *United States v. DeSoto Parish School Bd.*, 574 F.2d 804, 811 (5th Cir. 1978), *cert. pending* No. 78-458.

The Associations' argument that the 1977 and 1978 allocation orders have converted fishing "opportunity" to a "guarantee" of actual numbers of fish is nonsense. It must be recalled that allocations have been decreed only in situations where the tribes have "power" to harvest their full share. In these circumstances, absent prior interception, they *will* take their share as expressed in numbers of fish. The order creates no property interest in these fish prior to capture and gives the tribes only an *opportunity* to capture that number by preventing prior non-treaty preemption.

420. Even the Associations are unsure that the Court ordered the State to allocate. On one hand they say the District Court assumed "control over all allocations," Association's Br. at 17, on the other hand, they assert that the District Court ordered officials to "enforce regulations for the purpose of allocating the harvest of fish in Puget Sound," *Id.* at 50. Obviously, both things could not have and did not occur in 1977. The Court made the allocation and itself provided the necessary enforcement mechanisms.

421. If this Court nevertheless considers this issue it should realize that the cases cited in the Associations' Br. at 52, *viz. Bell v. School Board of Powhatan County*, 321 F.2d 494, 499 (4th Cir. 1963); *Thax-*

reservation of non-delegated powers to the State. *See Milliken v. Bradley*, 433 U.S. 267, 291 (1977), *Monell v. Department of Social Services of City of New York*, — U.S. —, 98 S.Ct. 2018, 2035 n. 54 (1978). Nor, under the extreme circumstances of this case, can the District Court's orders be said to have interfered with the functioning of a state agency on a broad prophylactic basis without regard to the need for a careful matching of its remedy to the condition which offends the Constitution. *Cf, Rizzo v. Goode*, 423 U.S. 362, 378 (1976). As the Court of Appeals noted:

> [W]e do not see now, given the state's inability or unwillingness to act, the district court could have protected tribal rights without making orders allocating fish in some manner.

573 F.2d at 1130, App. A-13, Petition in No. 78-119.

D. *The District Court's Injunctions Against State-Licensed Fishermen Are Proper.*

This section addresses the contention that the federal court cannot lawfully enforce an allocation between treaty and non-treaty fisheries because the individual non-treaty

ton v. Vaughan, 321 F.2d 474, 477 (4th Cir. 1963); *Wright v. County School Board*, 309 F.Supp. 671, 677 (E.D.Va. 1970), *rev'd other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); *Bradley v. School Board*, 51 F.R.D. 139, 142 (E.D.Va. 1970), stand, not for the proposition that a state can altogether escape its power and responsibility to operate its fisheries in conformity with federal law, but rather for the rule that where a state has directed *certain* officials to exercise a power *to the exclusion of others*, courts should ordinarily respect the state's own allocation of its powers and responsibility. Similarly, *Missouri ex rel. Laclede Gaslight Co. v. Murphy*, 170 U.S. 78 (1898); *United States ex rel. Johnston Co. v. County Court of Clark County*, 95 U.S. (5 Otto.) 769 (1878); *Board of Supervisors of Carroll County v. United States ex rel. Reynolds*, 85 U.S. (19 Wall.) 71 (1873) are erroneously cited by petitioners. The cases simply hold that *mandamus* is not the correct remedy to enforce state official compliance with an unclear federal right. At least one of the cases suggests that an injunction would be available to obtain such compliance.

fishermen are not named parties in the litigation. As a practical matter, it is not necessary for the Court to reach this question. As Washington points out, if the Court concludes that the treaties reserve to the tribes rights which are separate and distinct from those of non-treaty citizens, "such a conclusion would remove the impediment . . . to the exercise of necessary regulatory power by the Department of Fisheries." State Br. at 99. Thus, there will be no continuing need for injunctions like the ones at issue. The District Court's injunctions of September 27, 1977 and June 6. 1978, have become necessary only because of the unfortunate hiatus in State enforcement power.

The Court of Appeals upheld the September 27 injunction concluding,

> The fishers' interest is . . . derivative of the State's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interests to which it is a party.

573 F.2d at 1132. If this Court reaches the argument, it must agree that the court was correct. The State has vigorously litigated this case, not as a reluctant representative, but in its sovereign capacity on behalf of citizens, and as the consistent representative of its licensees, the non-treaty fishermen. In addition, the District Court's orders can be sustained by the All Writs Act, 28 U.S.C. §1651, for they are necessary to protect and effectuate the court's judgments.

1. The State has fully litigated the extent of its sovereign interest in the fishery, and this binds its fishermen.

The United States and the Indian tribes have prosecuted this action against the State of Washington to vindicate their treaty rights and prevent state-authorized preemption of those rights by the non-treaty fishermen. Although the State Departments of Fisheries and Game have intervened, the State of Washington remains the principal defendant. Washington has vigorously defended its sovereign interest in regulating and preserving the fishery for exploitation by its citizens. *Cf., Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371 (1978) (Burger, C. J., concurring).

This Court recently confirmed the continuing vitality of *parens patriae* in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), holding that a state appropriately represents and binds its citizens in litigation where the sovereign interests of the state are implicated.[422] The Supreme Court of Washington has also recognized the *parens patriae* doctrine as it relates to Washington's sovereign interest in its fish resources. *Washington Kelpers Assoc. v. State*, 81 Wn.2d 410, 502 P.2d 1170 (1972), *Cf., State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936). Moreover, the State legislature has declared that "preservation of the salmon industry and the salmon resources of the State of Washington is vital to the State's economy." RCW 75.18.005. Washington thus acted in its governmental capacity, in

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422. The states act as *parens patriae* in protecting their citizens' interests in clean water, *e.g., New York v. New Jersey*, 256 U.S. 296 (1921), *Missouri v. Illinois*, 180 U.S. 208 (1901); sufficient water, *e.g., Kansas v. Colorado*, 206 U.S. 46 (1907); clean air, *e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); free trade, *e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); and preservation of fish, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

defense of its sovereign interests, in this litigation.[423] Clearly when Washington protects its interest in the fishery it also represents the interests of its citizens in the fishery. Under these circumstances, when a State is a party as *parens patriae*, any judgment rendered against the State binds all citizens of the state. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958); *New Jersey v. New York*, 345 U.S. 369 (1953); *Wyoming v. Colorado*, 286 U.S. 494 (1932).[424]

In *City of Tacoma*, this Court considered the *res judicata* effect on state citizens of a judgment against the State of Washington. A judgment was obtained against the State of Washington in a complex series of lawsuits involving construction of a hydroelectric project to supply electricity for the City. The judgment was upheld by the court of appeals and certiorari was denied by this Court. Subsequently, a group of citizens sought to relitigate some of the issues in a second action, and this Court stated:

> The final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings,

423. Members of this Court have expressed in several ways the relation of the State to fish resources within its boundaries. Whether the State's interest in the right to harvest fish and in the fish themselves is described as "common ownership," *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), or as a "power to preserve and regulate the exploitation of an important resource," *Douglas v. Seacoast Products*, 431 U.S. 265, 284 (1977), it is clear that the State's sovereign interests are implicated.

424. The *parens patriae* role is particularly appropriate in the instant case where the litigation focused on the portion of the harvestable fish resource which may be made available to state citizens collectively. In defending this litigation, Washington did not act on behalf of any single citizen group. Rather, the State defended its sovereign interests in the fishery and attempted to maximize the portion of the resource available for exploitation by its citizens.

> and, like it, were bound by the judgment. *Wyoming v. Colorado*, 286 U.S. 494, 506-509 . . . . We conclude that the judgment of the Court of Appeals, upon this Court's denial of the State's petition for certiorari, became final under §313(b) of the Act, and is binding upon the State of Washington, its Directors of Fisheries and of Game, and its citizens, including the taxpayers of Tacoma.

Id.

As the Court of Appeals recognized, the most useful analogy is to a series of Supreme Court cases dealing with apportionment of water rights in interstate rivers and streams:

> States litigate their quasi-sovereign rights to water, and appropriators under the state's laws are bound by those decisions without being parties. [*Nebraska v.* Wyoming, 295 U.S. 40, 43 (1935)] Washington's fishers are its privies in litigation over the State's quasi-sovereign right to its fish in the same way that Wyoming's appropriators are its privies in litigation over the state's quasi-sovereign right to water.

573 F.2d at 1132 n. 15. In a whole series of cases, this Court had held that judgments against defendant states in water apportionment adjudications are binding on individual water users within the state, notwithstanding the fact that they were not joined as parties. The principle is stated clearly in *Wyoming v. Colorado*, 286 U.S. 494, 506-507 (1932):

> We are of the opinion that the record, opinion and decree in the prior suit, here reviewed at length, *show very plainly that the decree must be taken as determining the relative rights of the two States, including their respective citizens*, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion.

286 U.S. at 506-507. (emphasis added) Later in the opin-

ion, the Court specifically addressed the argument raised by the Associations:

> But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of a suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was "not between private parties" but "between the two sovereignties of Wyoming and Colorado"; and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indissolubly linked with those of her appropriators. 259 U.S. 468. Decisions in other cases also warrant the conclusion that *the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree.* (emphasis added, citations omited)

Id. at 509-09.[425]

The same doctrine was applied by this Court in *Arizona v. California*, 373 U.S. 546 (1963), in a situation closely analogous to the one before the Court because of the presence of reserved Indian rights. In that case, the Court held that five Indian reservations enjoyed reserved rights to waters of the Colorado River and that the Indian share of

425. In a similar context, in *Nebraska v. Wyoming*, 295 U.S. 40 (1935), the argument was presented that the Secretary of Interior whose water rights were derived from the State of Wyoming, was a necessary party to an interstate water adjudication. The Court rejected this contention:

> [The Secretary of the Interior's] rights can rise no higher than those of Wyoming, and adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.

295 U.S. at 43. *See also Hinderlider v. La Plata Co.*, 304 U.S. 92, 107-08 (1938); *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

the water was to be charged against the apportionment of the states in which the reservations were located. 373 U.S. at 601. The Court's decree carrying into effect its opinion makes it evident that the Court contemplated that its adjudication would be directly binding not only upon the states that were parties to the litigation, but also upon the individual water users within the respective states. The Court enjoined "the States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, . . . and all other users of water from the mainstream in said States, their officers, attorneys, agents, and employees . . ." 376 U.S. 340, 347. In light of the Court's decree, no credible argument can be made that the allocation decreed in favor of the tribes was not binding against individual non-party water users in the state.[426]

The analogy between the water apportionment cases is furthered by the fact that in the water allocation cases the Court's task has been simply to determine the apportionment of water between the sovereigns involved in the litigation, but not among individual citizens of the sovereign. Therefore, the goal of each of the states in the litigation, in representing its citizens, is to maximize the amount of water that is available for its water permittees

426. *Arizona v. California* exemplifies that the presence of Indian tribes in adjudications of this type does not prevent the Court's judgment from having its *res judicata* effect on citizens of the state. As the tribes have described in Section III, *supra*, this litigation involves allocation between sovereign interests. This explains why the State does *not* represent the interests of the treaty tribes although it acts as *parens patriae* for its citizens, *see* Associations' Br. at 59. The tribal government entities have rights which are entirely distinct from those of individual state citizens. The Gillnetters answer their own argument elsewhere in their brief when they say, "The Indians superior freedom to fish today arises merely because the State of Washington succeeded to the plenary powers of the federal government over only non-Indian citizens of the Territory when the State was admitted to the Union." Associations' Br. 28, n. 18.

to use. Similarly, in *United States v. Washington*, the State has attempted to minimize the treaty allocation, and maximize the total number of fish made available to its licensees. No questions have been presented as to the sharing of the total allocation made available to state licensees among themselves. Although sport fishermen, trollers, and gillnet and purse seine commercial fishermen all have distinct interests, no questions as to any allocation among those groups' interests is presented by this litigation.

Underlying the doctrine of *parens patriae* is a policy of preventing precisely the kind of protracted, expensive litigation which is represented by the non-treaty fishers' collateral attacks on the District Court decision in this case.

> The principle is a necessary recognition of sovereign dignity as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and *there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.*

New Jersey v. New York, supra, 345 U.S. at 373. (emphasis added) No adjudication allocating rights to take water or fish would be immune from chaos and "total frustration," *cf., Puyallup III,* 433 U.S. 165, 176 (1977), were not states deemed to stand in the relation of *parens patriae* to their citizens on matters affecting sovereign interests.

Further, the propriety of Washington representing its citizens in this litigation is especially clear as applied to its licensed fishermen. The State's relation to these citizens is even closer than its relation to unidentified future fish appropriators. Because of their licensee/licensor relationship, the non-treaty commercial fishermen represented by the Associations are in privity with Washington.

The non-treaty fishermen clearly have a successive relationship to a right possessed and regulated by the State of Washington. At common law the right to harvest wild fish, as *ferrae naturae,* belongs to all citizens of the state collectively, but the state in its capacity as sovereign holds the right to take fish in trust for the citizens' benefits. *Geer v. Connecticut,* 161 U.S. 519 (1895). For the individual citizen, the ability to take fish legally is a privilege, granted exclusively by the sovereign. It is not a right granted or reserved by the individual. Id., at 533-34. Under state law, "[f]ishermen have no private property rights in taking salmon." *Washington Kelpers Assoc. v. State,* 81 Wn.2d 410, 415, 502 P.2d 1170 (1972), *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936). The privilege exercised by the non-treaty fishermen is wholly derivative of the State's right. Washington State grants its citizens the privilege of fishing by licensing them: no non-treaty citizen may fish who is not licensed by the State and no licensee may fish except as permitted by the licensor. The permanent regulations of the Director of Fisheries provide:

> It shall be unlawful to take, fish for [or] possess . . . fish . . . in or from any of the waters . . . of Washington . . . except at the times, places and in the manners . . . provided for in the regulations of the Department of Fisheries.

Wash. Admin. Code 220-010(1). A better example of two parties in privity,[427] where one controls the other, is hard to imagine.[428]

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427. *See also* the recent refinement of the RESTATEMENT OF JUDGMENTS which very explicitly recognizes that a non-party may be bound by a judgment if he is represented by a governmental entity. RESTATEMENT OF JUDGMENTS §85(1)(d) (Tent. Draft No. 2, 1975).

428. The non-treaty fishermen's assertion that "the rights and interests of non-treaty commercial fishermen, . . . stand quite independent of the

[Footnote continued on page 194]

Privity in this sense provides firm ground for injunctions which bind the fishermen although they are not named parties. As the Court noted in *Regal Knitwear v. N.L.R.B.*, 324 U.S. 9, 14 (1945):

> [A] decree of injunction not only binds the parties defendant but also those *identified with them in interest,* in privity with them, represented by them or *subject to their control.*

(emphasis added) In both *Regal Knitwear* and, more recently, in *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973), the Court upheld federal remedial orders extending not only to those persons specifically named in F.R.C.P. 65(d), but also to "successors and assigns" of those persons. The Court looked beyond mere form to the actual relations of the entities in order identify "successors." As noted above, a similar relationship exists here.

In these cases, Washington State plainly did and does represent the rights of non-treaty fishermen.[429] Even the briefs to this Court demonstrate this identity of interest. Washington has filed an extensive brief examining the intention of the treaty parties, the effect on non-treaty fisheries and concluding that no allocation can be made for treaty right fisheries. The non-treaty fishermen simply

State's sovereign rights," Associations' Br. at 73, is quite simply wrong. The non-treaty organizations argue that the limitation imposed by the State upon the number of salmon licenses elevates their property interest in the license to an interest separate from that held by all citizens as a whole. However, not only was RCW 75.28.450 enacted *following* Final Decision No. 1, but this argument simply falls in light of the water cases. The existence of limited amounts of water has never been held to vest in state permittees a property right separate from that of any other citizen which would support intervention or a separate action to challenge the enforcement of the decree. Moreover, the fact the licenses are issued to the fishermen by virtue of the State law only serves to emphasize the purely derivative nature of their "rights" and their privity with the State of Washington.

429. *E.g.*, Transcript August 21, 1978, at 80-85.

adopt and reiterate the State's arguments.[430] In fact, their views differ only on the collateral question of the Department of Fisheries' state law authority. Associations' Br. at 54-55, n. 44.

Finally, the Associations argue that they have not been adequately represented by the State. Associations' Br. at 57 *et seq.* This contention is without merit. A strong presumption exists that a state adequately represents the interests of its citizens. Wright and Miller, *Federal Practice and Procedure,* §1909 (1972). *See also Leach Lake Area Citizens Committee v. Leach Lake Band Of Chippewas,* 486 F.2d 888 (8th Cir. 1973).

The sincerety of this argument is belittled by their reliance on the arguments raised by the State. As they comment on the effectiveness of the State's argument: "The State has *convincingly demonstrated* on the basis of historical evidence that . . . ." Associations' Br. at 32.[431]

430. Since the commencement of this action, the Washington Department of Game has consistently taken the position that there is no treaty right to a separate fishery, thus effectively representing citizens whose views differed from the earlier, slightly more accommodating, proposals of the Washington Department of Fisheries, *cf., City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 326 (1958) and Associations' Br. 65. The State of Washington reaffirms this hard-line stance before this Court, as it did before the Court of Appeals.

The basic issue throughout this litigation has always been how harvest opportunity is to be divided between treaty and non-treaty fishermen. The record is devoid of suggestions that the State has represented one group of licensees to the detriment of another. The actual allocation of harvest between non-treaty sport and commercial fishermen is a direct and intended result of other state regulatory decisions.

431. The Associations did not even seek to raise this issue before the District Court. Instead they attacked the judgment collaterally in state court, where neither the tribes nor the United States were parties. Associations' Br. at 62 n. 50. As they admitted frankly, they "foresaw the futility of intervention once the [District] Court had established its pattern." Second Supp. Brief of Petitioners, 9th Circuit No. 77-3129, now No. 77-139. Such avoidance of clear federal law and jurisdiction has not been and cannot be countenanced. *Southwest Airlines v. Texas International Airlines,* 546 F.2d 84 (5th Cir. 1977).

2. The District Court acted properly, pursuant to the All Writs Act, in enjoining non-parties from interfering with its judgment.

The State and its non-treaty licensees have consistently resisted the decrees, orders and injunctions entered by the District Court, *see* 573 F.2d 1123, 1126 (9th Cir. 1978), App. A-2-3, Petition in No. 78-119, and *United States v. Olander*, 584 F.2d 876 (9th Cir. 1978), *cert. pending*. This section will discuss the breadth of the District Court's power to protect the federal rights which it has enunciated, the similarity of this and numerous school desegregation cases, and an alternate legal theory under which the District Court may protect the peaceful enjoyment of property partitioned by the court.

Because the District Court adjudicated public, not private, rights it may take broad action to protect these rights. The fishing rights litigation involves interpretation of treaties between sovereigns: the United States on one hand and self-governing Indian tribes on the other. The parties to the treaties are in agreement as to the meaning. This Court is presented with the anomalous situation in which a third party, the State of Washington, whose rights are only derivative of the rights of the United States, seeks to undermine the understanding of the parties to the treaty. The public nature of this controversy gives the District Court much wider latitude in granting relief against parties and non-parties than it would have in an action concerning private rights. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 179-80 (1973), citing *Virginia Ry. Co. v. System Federation*, 300 U.S. 515, 552 (1937).

Where constitutionally guaranteed public rights are concerned, this Court has held that the remedies needed to

protect these rights must be broad, flexible and imaginative, even if these remedies infringe upon the activities of persons not party to the original action which declared the rights. *Hutto v. Finney*, — U.S. —, 98 S.Ct. 2565 (1978); *Bell v. Hood*, 327 U.S. 678 (1946); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

Like the school desegregation cases, the fishing rights decisions have led to unusual, widespread disobedience of the court orders. When district courts which issued orders designed to remedy segregated schooling encountered similar resistance, this Court strongly endorsed supplemental district court action to ensure compliance with the court orders. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Swann, supra; see also United States v. Hall*, 472 F.2d 261 (5th Cir. 1972).[432] The Court should take similar action here. The All Writs Act, codified at 28 U.S.C. §1651 (1966), was specifically designed for such situations and its use is particularly appropriate where, as here, the non-treaty fishermen are in privity with a state which has already fully litigated its sovereign interests in the fish resources. The illegal fishing by the State's licensees has brought about the very preemption and disregard of federal rights which the State was ordered to halt. The fishermen's conduct prevents

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432. Petitioners attempt to avoid the clear analogy between their conduct and that described in *Hall* by branding Hall as an "agitator" who was not a party to the underlying case and whose rights were not adjudicated in the original desegregation decision. Associations' Br. at 69-70 n. 56. In light of the record here, replete with deliberate disobedience of federal court orders, *see* Joint App. 516-17; 528-29; 599-609; Transcript Nov. 3, 1978; *United States v. Olander, supra*, at least some members of the trade organizations can fairly be characterized as "agitators." Additionally, the court in *Hall* expressly found that the rights of *all of the community, including Hall*, were adjudicated in the underlying action. 472 F.2d at 267.

Washington from making the reductions in fishing which the Court has ordered, 384 F.Supp. at 420, ¶5, Joint App. 230, and from respecting the federal reserved right.

When the established public rights of parties are threatened by the actions of non-parties, the district court may fashion any remedies necessary to protect the enjoyment of the party threatened. These remedies may include limits on the actions of non-parties and eventual prosecution of the non-parties for contempt of the limitation order. The law on this subject is so clear[433] that the non-parties' continuing

433. *Doe v. Ceci*, 517 F.2d 1203 (7th Cir. 1975) (injunction against state court judge to prevent enforcement of a judgment obtained by a non-party doctor, which obstructed the federal defendant's compliance); *United States v. Texas*, 356 F. Supp. 469 (E.D. Tex. 1972), *aff'd.* 495 F.2d 1250 (5th Cir. 1974) (injunction against state court order, obtained by parents, which frustrated school district's ability to comply with federal court's previous school transfer judgment); *Newburg Area Council, Inc. v. Board of Education*, Nos. 7045 and 7291 (W.D.Ky., July 30, 1975), previous opinions at 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), *mandamus issued*, 521 F.2d 578 (6th Cir. 1975)) (district court orders specifying what persons who wished to protest desegregation decision could and could not do; later prohibiting protest demonstrations altogether); *In re Curtis' Petition*, 240 F. Supp. 475 (E.D.Mo. 1965), *aff'd.* 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967) (civil rights demonstrators with actual notice of restraining order not entitled to writ of habeas corpus following contempt convictions though they were neither named defendants nor members of the class restrained by the injunctions); *Lucy v. Adams*, 224 F. Supp. 79 (N.D.Ala. 1963), *aff'd. sub nom. McCorvey v. Lucy*, 328 F.2d 892 (5th Cir. 1964) (injunction against named university dean bound successor in office who had knowledge); *Kasper v. Brittain*, 245 F.2d 92 (6th Cir. 1957), *cert. denied*, 335 U.S. 834 (1957) (affirming contempt conviction of non-party who was served with temporary restraining order to prevent interference with operations of federal defendants' integrated school); *Bullock v. United States*, 265 F.2d 683 (6th Cir. 1959), *cert. denied*, 360 U.S. 909 (1959) (affirming contempt conviction of non-party participating with another non-party against whom restraining order had previously been issued); *National Labor Relations Board v. Sunshine Mining Co.*, 125 F.2d 757 (9th Cir. 1942) (injunction against non-party creditor action which interfered with N.L.R.B.-ordered employer payments to employees); *Russell v. United States*, 86 F.2d 389 (8th Cir. 1936) (criminal contempt conviction proper where defendant, in no way connected with underlying legal dispute, obstructed marshall replevying goods pursuant to court order);

denial of the District Court's power can fairly be characterized as outlawry, *see* Joint App. 499.

Finally, the District Court acted *in rem* in partitioning the right to take fish, and it retains jurisdiction over the *res* to the extent necessary to prevent interference with the partition. *United States v. Washington* is an *in rem* action to divide the property right in the taking of fish. 520 F.2d at 687-88, Joint App. 50; 573 F.2d at 1126, 1128, App. A-2, 4, 7, Petition in No. 78-119. The label "*in rem*" properly applies to a wide variety of actions where the court, in order to give effect to its jurisdiction, must control the property. *See* 1A Pt. 2 *Moore's Federal Practice*, ¶0.214 (1978). Of necessity, the scope of *in rem* injunctions must

Minerich v. United States, 29 F.2d 565 (6th Cir. 1929), *cert. denied*, 279 U.S. 843 (1929) (non-party, not a striker, held in contempt for urging violation of an injunction directed to striking coal miners, on a finding that he had knowledge of the injunction); *United States v. Crookshanks*, No. CR-77-168 (D.Ore. Nov. 30, 1977) (contempt conviction of non-party fisherman violating injunction issued to protect court's allocation between Indian tribes and states); *Mims v. Duvall County School Board*, 338 F. Supp. 1208 (M.D.Fla. 1971), *subsequent opinion*, 350 F. Supp. 553 (M.D.Fla. 1972) (injunction against demonstrators to prevent non-party disruption of school integration); *Montgomery County Board of Education v. Shelton*, 327 F. Supp. 811 (N.D. Miss. 1971) (injunction against state court proceedings, brought by non-parties and others, which interfered with an existing federal order regarding desegregation demonstrations); *Coffey v. Braddy*, 372 F. Supp. 116 (M.D.Fla. 1971) (court may enjoin persons not before the court who, having actual notice of the federal affirmative action proceeding, seek to block city department's efforts to comply with decree); *State ex rel. Flowers v. Robinson*, 8 Race Rel. L. Rep. 848 (Etowah Co., Ala. Cir. Ct. 1963, No. 16,743) (sheriff may enforce injunction prohibiting named persons "and all persons having notice of this order" from obstructing traffic during demonstrations); *Abercrombie Enterprises v. Opton*, 7 Race Rel. L. Rep. 565 (Durham Co., N.C. Sup. Ct. 1962) (theater owner entitled to injunction prohibiting trespassing and interference with clientele by named civil rights activists and others with notice or knowledge of the order); *see also In re Debs*, 158 U.S. 564 (1895) cited with approval in *United States v. Barnett*, 376 U.S. 681 (1964); and Garrigan v. United States, 163 F.16 (7th Cir. 1908), *cert. denied*, 214 U.S. 514 (1909).

be broad, *cf., Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973).

The treaty right of taking fish is meaningless if certain fishermen destroy the fish before the holder of the right, the tribes, has an opportunity to exercise it. The broad relief granted by the District Court was designed and is necessary to prevent just such destruction or diminishment of fishing opportunity.[434]

V. The State Supreme Court cases Do Not Present A Justiciable Case or Controversy Under Article III of the United States Constitution, and Are Void for Other Procedural Errors. In Addition, the State Court Decision That It Lacks Power to Recognize Treaty Rights In Its Regulation of the Washington Salmon Fisheries Must Fall Under the Supremacy Clause

> For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The State 'must. . . yield to an authority that is paramount to the State."

434. Under these circumstances a decree of injunction issued to protect the property right before the court can lawfully bind third parties. *See In re Lustron Corp.*, 184 F.2d 789, 798 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951); *Board of Governors v. Transamerica Corp.*, 184 F.2d 311, 315 (dicta) (9th Cir. 1950); *Zeleznik v. Grand Riviera Theater Co.*, 128 F.2d 533 (6th Cir. 1942); *Converse v. Highway Construction Co.*, 107 F.2d 127 (6th Cir. 1939); *Cherry v. Insull Utility Investments, Inc.*, 58 F.2d 1022 (N.D. Ill. 1932), *rev'd. on other grounds sub nom. Guaranty Trust of New York v. Fentress*, 61 F.2d 329 (7th Cir. 1932); *Rivera v. Lawton*, 35 F.2d 823 (1st Cir. 1929); *Havner v. Hegnes*, 269 F. 537 (8th Cir. 1920); *City of Fresno v. Edmonston*, 131 F. Supp. 421 (S.D.Cal. 1955) (enjoining a non-party irrigation district and others from defeating federal jurisdiction by a state administrative proceeding where the right to appropriate water was the *res* before the court); *In re Portland Electric Power Co.*, 97 F. Supp. 903, 914 (D. Or. 1947); *United States v. Dean Rubber Mfg. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946); 7 MOORE'S FEDERAL PRACTICE, ¶65.13, n. 1 (1978); and *see Lamb v. Cramer*, 285 U.S. 217 (1932) (removal of part of the *res pendente lite* adjudged contempt).

Justice Frankfurter concurring in *Cooper v. Aaron*, 358 U.S. 1, 22 (1958).

The State Supreme Court decisions are, of course, an outrage. *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn.2d 677, 565 P.2d 1151 (1977) was rendered on June 9, 1977, well after the District Court's decision in *United States v. Washington* became final following this Court's denial of certiorari in 1976. *Fishing Vessel Association v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977), was decided by the state Supreme Court in November 1977, after *Puyallup III*, and after a pattern of massive non-treaty illegal fishing in violation of the orders of the federal District Court had developed. In the context of the events that were then occurring on the waters of Puget Sound, the decision was especially obnoxious. Its holding that the final decision of the District Court was illegal and unconstitutional gave tremendous encouragement and, in effect, legal sanction to the outlaw fishing that was then occurring. As dissenting Justice Utter stated:

> I am convinced that, whatever may be the personal inclinations of the members of this court, continued refusal to accept the legal principles enunciated in . . . *Puyallup II* . . . *Puyallup III* and *United States v. Washington, supra*, will place upon us significant responsibility for whatever unfortunate events hereafter transpire.

89 Wn.2d at 288, 571 P.2d at 1379-80.

It is quite clear that the state Supreme Court was primarily motivated by a desire to prevent implementation of the Indian treaty rights as adjudicated by the federal courts. Not only was the State court utterly lacking in any sense of comity for the prior judgments of the federal courts concerning the same subject matter, but as Justice

Horowitz recognized in dissent, the State court in *Puget Sound Gillnetters v. Moos* actively invited the Director of the Department of Fisheries to violate the prior injunction of the United States District Court, 88 Wn.2d at 697, 565 P.2d at 1161.

Although the state court decisions have addressed a number of federal issues, including the scope and meaning of the treaties and whether the District Court's interpretation of the treaties denies non-treaty fishermen equal protection of the laws, the State cases are so saturated with procedural errors that they do not provide a suitable vehicle to reach any of the substantive issues regarding the meaning of the treaty or the correctness of the District Court's orders. Further, the State and the Associations, in challenging the District Court's interpretation of the treaties and subsequent orders, raise the same arguments that were utilized by the state Supreme Court. To the extent that this Court reaches those cases at all, therefore, the federal cases should be utilized to resolve those questions, not only because the tribes and the United States are parties, but also because of the adequacy of the record in the federal proceedings, and the lack thereof in the state court proceedings.

However, the issue of whether the state court decision itself, apart from its procedural defects, can be squared with the Supremacy Clause is presented *only* by the state court cases. Accordingly, the Tribes will address that issue in this brief.

A. *The Holding of the State Supreme Court That State Officials Lack Authority to Implement the Treaty Rights Were Based on Federal, Not State Law, and Should be Reversed.*

Before discussing the impact of the Supremacy Clause on the State's asserted state law defense to implementation of the federal rights, it is first necessary to determine whether this is really a *state law* issue. This is not a simple task in light of the state court's confusing analysis.

Puget Sound Gillnetters and *Tollefson* appear to have held that the Department of Fisheries lacks authority under state law to pass any regulations whose purpose was to allocate to the Indian treaty fishermen any portion of the harvestable salmon runs. Notwithstanding the holding that the Department lacks authority to allocate fish between state commercial and Indian commercial fisheries, the actual *effect* of the state regulations has clearly been to allocate a substantial portion of the resource to the non-treaty fishery, at the expense of the treaty tribes. They have accomplished this by affirmatively authorizing the harvest of fish before they reach their usual and accustomed grounds. *See* Part II, *supra*. In effect the state Supreme Court in *Puget Sound Gillnetters* held that the Department of Fisheries had a statutory *duty* to authorize this "first come, first serve" method of regulation:

> Reading those statutes together, it will be seen that the department has the statutory duty to authorize the harvesting of salmon not required for natural or artificial spawning. It is clear, therefore, that the Department may restrict the harvesting of salmon by commercial fishermen only to the extent that no surplus exists and that the restriction is necessary to prevent the impairment of the supply of salmon.

88 Wn.2d at 682, 565 P.2d at 1153, Petition No. 77-983, App. D at 6.

Moreover, as the State points out at pages 97-98 of its brief, and as the state Supreme Court recognized, the State Department of Fisheries does in fact "allocate" fish between different groups of fishermen.[435] The State argues that this is for the purpose of "conservation" in the sense that it promotes an orderly fishery:

> In order to avoid such anarchy on its waters and the attendant destruction of salmon runs for future years, the Department of Fisheries divides the state's territorial waters into geographic fishing zones, and sequentially opens and closes these zones to different types of fishing gear. By manipulating fishing times and gear limitations for each zone, the Department is able to insure a fair opportunity for all fishermen to participate in the fishery, and thereby obtains the fishermen's respect for and compliance with its conservation regulations.

State Br. at 101. The state Supreme Court in *Puget Sound Gillnetters* said that this "allocation" was lawful because

> [c]lassification which distinguishes between commercial and non-commercial fishermen has a reasonable basis in fact, which is related to the legitimate governmental purposes of conservation and promotion of the economic welfare of the state. [On the other hand.] [d]istinctions between fishermen based upon their race or ethnic background are not proper.

88 Wn.2d at 684, 565 P.2d at 1154, App. D at 8. Similarly, as Justice Utter noted in dissent:

> It cannot seriously be argued that the Director of the Department of Fisheries lacks power to allocate fish between distinct and competing user groups for pur-

435. It should be noted that RCW 75.12.010 specifically authorizes the Director of Fisheries to allocate between gillnet and purse seine gear. The statute provides in part:

> [T]he Director may maneuver units of lawful gillnet and purse seine gear in any number of equivalents at his discretion, by time and area, to fully utilize such harvestable portions of these salmon runs for the economic well being of the citizens of this state. . . .

Quoted in *Puget Sound Gillnetters, Id.*, 565 P.2d at 1153.

> pose of conservation and systematic exploitation of the resource. Such allocation has been the principal effect of Department regulations for many years.

Tollefson, 89 Wn.2d at 288, 571 P.2d at 1380, App. B at 13.

In sum, according to the State of Washington and its Supreme Court, any regulation whose purpose is to allocate fish between user groups can be sustained as necessary for "conservation" on the ground that its purpose is to promote an "orderly fishery," *unless* the regulation is designed to make fish available for Indians. The Washington Supreme Court held in *Puget Sound Gillnetters v. Moos* that Indian fishermen are in the same class as non-treaty fishermen and that any regulation designed to make fish available to them unlawfully discriminated among fishermen of the same class. *Puget Sound Gillnetters v. Moos*, 88 Wn.2d at 684, 565 P.2d at 1154, App. D at 8. Or, as the state Supreme Court in *Tollefson* characterized the issue raised in *Puget Sound Gillnetters v. Moos:*

> Does the Director of the Department of Fisheries have the statutory power to make an unequal allocation of fish among members of the same class of user?

89 Wn.2d at 279, 571 P.2d at 1375, App. B at 4.

It is apparent, the tribes believe, that the attempt to characterize the issue as one of *state* law power to "allocate" is a subterfuge. In reality, the Washington Supreme Court has determined *federal* law issues: Whether it is consistent with the treaties to distinguish between treaty and non-treaty commercial fishermen, and whether it is unconstitutional to promulgate regulations designed to make a share of the harvest available to the treaty fishermen. The Court's answers to these questions turn on its interpretation of the treaties and of the Equal Protection

Clause, not upon the state court's construction of Title 75 of the Washington statutes.

These issues, however, have already been adjudicated in the District Court. Regardless of what effect a federal court judgment might have in the state courts on a question of *state* law, it is clear that federal court determination of such federal law issues is binding on the state court since the State was a party and the court a state instrumentality. This would be the case even if the purported federal defense was not raised by the State in the federal litigation. As this Court held in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948):

> The rule [of *res judicata*] provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which has been offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose,' . . . The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

The state Supreme Court has improperly failed to give *res judicata* effect to the District Court's judgment on the *federal* law issues on which it based its decision. Accordingly, its inaccurate characterization of its ruling as *state* law cannot be used to shield the State from its duty to implement the decision.

B. *The State of Washington and its Department of Fisheries Must Manage and Regulate the Fisheries Under its Jurisdiction so as to Insure That Federally-Guaranteed Treaty Fishing Rights Are Protected: The State Court Judgments, Which Prevent and Obstruct Such Enforcement of the Federal Rights, Are Void Under the Supremacy Clause*

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made*, or which shall be made, under the Authority of the United States; *shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.*
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, *and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution.*
>
> . . .

U.S. CONST. art. VI (emphasis added).

In the alternative, even if the state court's characterization of its decisions as being based on *state law* is correct, the decisions must nevertheless be reversed. The State-imposed limitation on the power of State officials directly interferes with the enforcement and protection of federal rights which are the supreme law of the land and the limitations are, therefore, void. In light of the arguments raised by the Associations, it must be emphasized that this issue does not concern the power of the federal court to order state officials to act beyond their power under state laws; instead, the issue is the validity of the state limitation on the power of state officials to give recognition to the federal right.

The tribes do not dispute that the state court is the final

arbiter of the meaning of state law. Similarly, since the agencies of the state are creatures of state law, the extent of their authority under state law is a state law question. However, the Washington Supreme Court went further and held that "[t]he judicial determination of a state official's authority to act is solely and exclusively within the jurisdiction of the state courts." *Puget Sound Gillnetters*, 88 Wn.2d at 689, 565 P.2d at 1157, App. D at 13. This statement is wrong on two counts: First, it is not the case that the only source of a state officer's powers and duties is state law; a state officer is obligated to honor and protect federal rights. Second, the statement is invalid in the context of a federal court decision which had already held that the state action would lead to a denial of a federal right. As the United States Supreme Court stated in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960):

> When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument of circumventing a federally-protected right. . . . [This lack of insulation] has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition."

The Supremacy Clause of the United States Constitution is itself, a direct restraint on the actions of state officials and imposes upon them certain obligations. It must be emphasized that the Supremacy Clause makes federal laws and treaties the supreme law of the land, binding on the judges of every state, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. In addition, art. VI specifically requires

all state executive and judicial officers to "be bound by an oath or affirmation to support this constitution."

In determining the applicability of the Supremacy Clause to the state Supreme Court, it must be recalled that the State of Washington is not acting in a neutral manner in its regulation of the fisheries. The *effect* of state regulation with respect to Indian treaty rights has been to affirmately authorize the taking of fish by non-treaty citizens *before* the fish reach the usual and accustomed grounds of the treaty tribes. As noted above, the state court has held that the Department of Fisheries is *required* to do this since it cannot prohibit commercial fishing until such time as a conservation danger is presented. State power is clearly being used here "as an instrument for circumventing a federal right." *Gomillion v. Lightfoot, supra.*

It is well established that if state officials act at all, they can be required to act in accordance with the guarantees of the Constitution. This may include imposing duties upon them which are beyond the duties required by state law, or even in violation of state law; these duties are, in effect, federal duties.

In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1946), for example, Prince Edward County had closed all public schools of mixed racial enrollment. Suit was brought against the school district for refusing to operate the system of public free education in Prince Edward County and to enjoin the payment of public fees to help support private racially-segregated schools. The Virginia Supreme Court had held that, as a matter of state law, the County had an option of operating or not operating public schools. The United States Supreme Court held this determination to be "a definitive and authorita-

tive holding of Virginia law, binding on us." 377 U.S. at 230. However, the Court nevertheless held that closing of the schools operated to deny petitioners equal protection of the laws. The Supreme Court affirmed the District Court order enjoining the County from its public funding of private schools and approved an order requiring the County to reopen the public schools and assess taxes to finance them. In other words, notwithstanding the correctness of the County's assertion that it had complied with state law, the County was required to overcome the additional hurdle of complying with obligations imposed by the United States Constitution.

Similarly, this Court, has in numerous instances held that state-imposed limitations on an official's power are not a barrier to the official's obligation to implement federal rights. For example, in *Ward v. Board of County Commissioners,* 253 U.S. 17 (1920) the Court held that a tax exemption held by an Indian, determined by the federal courts to be a vested property right, gave an Indian a federal right to a tax refund notwithstanding the inconsistent provisions of state law. The Court, after referring to its previous holdings that a tax exemption existed, stated:

> This being so, the State and all its agencies and political subdivisions were bound to give effect to the exemption. It operated as a direct restraint on Love County, no matter what was said in local statues.

253 U.S. at 21.

Similarly, in *Testa v. Katt,* 330 U.S. 386 (1947), the Rhode Island Supreme Court had held that it was not obligated to enforce a federal statute which was considered a "penal law" under state law. The Supreme Court, after

accepting the state law characterization as binding on it, unanimously held that it

> makes no difference in which of these categories the Rhode Island court chose to place the statute which Congress has passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitutes a nation. It disregards the purpose and effect of Article VI, §2 of the Constitution. . . .

330 U.S. at 389. Having established a forum in which state law could be enforced, the Rhode Island court was obligated to enforce federal law, notwithstanding any state law prohibition. Similarly, having undertaken to regulate the fisheries, the State of Washington is affirmatively obligated to regulate them in such a manner as to give recognition to federal rights, notwithstanding any contrary provision of state law.

Similar problems have, of course, arisen numerous times in the desegregation cases following *Brown v. Board of Education,* 347 U.S. 483 (1954). In *Brown* itself, state laws affirmatively requiring segregated schools were involved. 347 U.S. at 486-88, n. 1. Typical was *North Carolina Board of Education v. Swann,* 402 U.S. 43 (1971), which arose when the State of North Carolina had enacted an anti-busing bill. The Court stated:

> The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. But more important, the statute exploits an apparently neutral form to control

> school assignment plans by directing that they be "color blind;" that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.

402 U.S. at 45. The parallel to the instant case is virtually complete. The state law, as interpreted by the state court, prohibits the state from considering the existence of Indian treaty fishing rights in regulating the fishery. Although the State declaration is apparently "neutral" on its face, it has the clear effect of allocating an inappropriate share of the resource to the non-treaty fishermen in violation of the treaty right.[436]

The state court decree operates to, and was designed to, obstruct the implementation of the remedies granted by the District Court in *United States v. Washington*. As the United States Supreme Court held in *Green v. County School Board*, 391 U.S. 430, 437-38 (1968), once a district court's order becomes final within the federal system, state

436. *See also Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958); *Bush v. Orleans Parish School Board*, 187 F. Supp. 42, 45 (E.D. La. 1960), *aff'd* 365 U.S. 569 (1961); *Bush v. Orleans Parish School Board*, 190 F. Supp. 861, 864 (E.D. La. 1960), *aff'd sub. nom. City of New Orleans v. Bush*, 366 U.S. 212 (1961); *Bush v. Orleans Parish School Board*, 194 F. Supp. 182 (E.D. La.) *aff'd sub nom. Tugwell v. Bush*, 367 U.S. 907 (1961) and *Gremillion v. United States*, 368 U.S. 11 (1961); *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (D. Ala.), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649, 652 (E.D. La. 1961), *aff'd* 368 U.S. 515 (1962); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 837 (E.D. La. 1967), *aff'd* 389 U.S. 71 (1968); *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809).

officials become "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. *Accord, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Cooper v. Aaron*, 358 U.S. 1, 7 (1958).[437]

In conclusion, if this Court looks to the substance of the state court decisions they must be overruled since "no state legislature or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), relying on the Supremacy Clause.

C. *Neither Puget Sound Gillnetters v. Moos nor Washington State Commercial Passenger Fishing Vessel Association v. Tollefson Presents a Justiciable "Case or Controversy" Reviewable Under Article III of the Constitution of the United States, Because of the Lack of Adversity Between The Parties.*

If this Court is inclined to review any aspects of the federal court interpretation of the treaties as adjudicated in Final Decision No. 1,[438] the Washington State Supreme

437. *See also Jackson County Board of Commissioners v. United States*, 308 U.S. 343 (1939), where this Court stated in dictum that a federal court was not precluded from ordering a county to pay interest on taxes unlawfully assessed against Indian lands, notwithstanding state law to the contrary:

> Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated. . . . The State will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. Nor are the federal courts restricted to the remedies available in state courts in enforcing such federal rights.

308 U.S. at 350. *Cf., West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). *See also Amicus Brief* of the American Civil Liberties Union, discussing these matters in somewhat more detail.

438. The tribes contend that these issues are *res judicata* in both the state and federal courts. *See* Section I, *supra*.

Court decisions do not provide a suitable vehicle to do so. Neither decision is a justiciable "case or controversy" within the meaning of art. III because of the lack of adversity between the parties. *See generally, Flast v. Cohen*, 392 U.S. 83, 94 *et seq.* (1968).

The requirements of a constitutionally justiciable "controversy" have been stated by the Court as follows:

> A 'controversy' in this sense must be one that is appropriate for the judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937).

The fundamental barrier to the justiciability of the Washington State Supreme Court cases is their collusive nature and lack of adversity. Not only are the State of Washington and the non-treaty fishermen not adverse to one another, but as made clear by the previous section, they are identified in legal interest. The Washington State fishermen are represented by the State of Washington in a *parens patriae* sense, and, as licensees of the State of Washington, they derive their privilege to fish solely from the State. As discussed above, the State of Washingthon and the Associations have taken exactly the same position regarding the interpretation of the treaties and continue to make the same arguments before this Court.

The tribes do not suggest that the State cases are collusive in the sense that an actual conspiracy existed between the Associations and the State to bring the actions, or that one side is paying the attorney fees for the other. Rather, the cases are collusive in the sense that the parties are not adversaries because they desire the same result. As the State's petition in No. 77-983 quite clearly demonstrates, the State of Washington, although it has petitioned for review, seeks not a reversal but an affirmance of the state Supreme Court decisions. Where, as here, both litigants desire precisely the same result there is no case or controversy within the meaning of art. III. *See* Wright, *Law of Federal Courts*, §13 at 40 (3d ed. 1976), citing *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971). *See also Chicago Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1882); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 254 *et seq.* (1850).

The State Supreme Court, in effect, decided *Puget Sound Gillnetters* and *Tollefson* in a legal vacuum. There was no adversary development of a factual record or vigorous presentation of the relevant legal arguments.[439]

In *United States v. Johnson*, 319 U.S. 302, 305 (1943), this Court, in a *per curiam* opinion, succinctly stated the reasons for the prohibition on litigating such collusive lawsuits:

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439. The tenor and vigor of the State's arguments that the State courts should give recognition to the prior decision of the federal courts can be gleaned from the State's Brief in Response to Application for Writ of Mandamus, *Puget Sound Gillnetters Association v. Moos* at 2-3:

> At the outset, it must be known that Fisheries and the undersigned counsel do not believe some of [their] arguments to be correct on the law. . . . Again, Fisheries remains hopeful that some of these issues may be argued with more conviction by the tribes and the United States Government than can be done by Fisheries here.

> Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensible to adjudication of constitutional questions by this Court.

The state cases possess all of the attributes of a collusive lawsuit and none of a justiciable "case or controversy" within the meaning of art. III. The case was tried on a statement of facts stipulated by the State and the non-treaty Associations. Virtually all of the arguments raised by the Gillnetters have been relied upon by the Department of Fisheries in *United States v. Washington.* Although these procedural defects were specifically called to the attention of the Washington Supreme Court by the tribes as *amicus curiae, see* Brief of *Amicus Curiae,* October 25, 1976, in *Puget Sound Gillnetters Association v. Moos,* No. 44401 at 12-16, they received no mention by the Court in either opinion.[440]

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440. Ironically, the state court did not even follow *State,* much less *federal* law. In *Fishing Vessel Association v. Tollefson,* 87 Wn.2d 417, 553 P.2d 113, 114 (1976), the Court noted that it did not issue advisory opinions because of the risk that the question may not have been adequately developed or argued. *See also State ex rel. O'Connell v. Dubuque,* 68 Wn.2d 553, 558, 413 P. 2d 972 (1966) where the state court, in outlining the elements of a justiciable controversy, stated:

> [t]he proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution.

D. *The United States and the Tribes Were Indispensable Parties to the State Court Litigation but, Because Of Their Sovereign Immunity Could Not be Joined. The State Court Adjudication of the Issues Concerning The Scope and Meaning of the Treaty in the Absence of The Tribes and the United States Denied Them Due Process of Law.*

The Indian tribes and the United States could not have been joined in the state court proceedings without their consent. *See Puyallup III, supra,* 433 U.S. at 172-73. *See also Turner v. United States,* 248 U.S. 354, 358 (1919); *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). In their *amicus curiae* brief filed with the state Supreme Court in *Puget Sound Gillnetters v. Moos,* No. 44401, the tribes pointed out that they could not be joined and were "indispensable" parties within the meaning of State Rule of Civil Procedure 19(b), which is identical to Federal Rule of Civil Procedure 19(b).

The Washington Supreme Court made no mention of this argument. While the state court is presumably free to interpret State rules of civil procedure, the failure to join an indispensable party obviously presents federal due process issues. In the state Supreme Court cases, the state court denied the tribes due process of law by proceeding to judgment in the absence of the tribes and the United States. *See generally Shields v. Barrow,* 58 U.S. (17 How.) 130, 139 (1854); *Western Union Telegraph Co. v. Commonwealth of Pennsylvania,* 368 U.S. 71, 80 (1961); *Hanson v. Denckla,* 357 U.S. 235 (1958). *See also Lomayaktewa v. Hathaway,* 520 F.2d 1324 (9th Cir. 1975), exploring the applicability of the indispensable party rule to sovereign Indian tribes.

Federal and State Civil Rule 19(b) set out four factors to be utilized to determine if a party who should but cannot be joined is "indispensable" so that the action should be dismissed in his absence. These four factors focus on the same considerations that are relevant in determining whether failure to join an indispensable party would deny him due process of law. As to the first factor, the extent to which a judgment rendered in the person's absence might be prejudicial to him, it is clear that the tribes and the United States would be severely prejudiced by the action proceeding without them. Their interest in the case was completely distinct from that of the State of Washington and the non-treaty Associations. The State cannot and did not adequately represent the interests of the tribes and the United States in the litigation.

The second factor in the rule is the extent to which, by protective provisions in the judgment or otherwise, prejudice to the non-present parties could be avoided. Since the issues presented, as perceived by the state court, included not only the "state law" issues regarding the power of the Department of Fisheries but also the scope and meaning of the treaty right itself and its constitutionality, prejudice to the tribes could not be lessened or avoided in their absence.

Relative to the third factor, the adequacy of the judgment rendered in the person's absence, it is clear that in the instant case the state court was not in any position to decree any adequate relief because of its lack of jurisdiction over the parties primarily affected by its judgment, the Indian tribes.

The final criterion is whether or not the plaintiff will have an adequate remedy if the action is dismissed for non-

joinder. Several points are relevant here. First, although the petitioning associations were not originally joined as parties in the federal litigation, they have participated in that litigation as *amicus*. In addition, as noted at length above, the State of Washington has vigorously represented the interest of the non-treaty associations throughout the litigation in the federal court. The State, as representative of the non-treaty fishermen, had vigorously raised all of the issues it could concerning the validity of the District Court's interpretation of the treaty right before the federal tribunals.

In light of these factors, the conclusion is inescapable that the tribes and the United States were "indispensable" parties to the state court actions; since they could not be joined, the state court should have dismissed the actions.

E. *The State Court Improperly Failed to Give Res Judicata Effect to the Final Judgment of the District Court In United States v. Washington*

Final Decision No. 1, *United States v. Washington*, became a final judgment for *res judicata* purposes when the United States Supreme Court denied certiorari in 1976. *Puget Sound Gillnetters* came before the Washington Supreme Court in June, 1977, well after the federal court decision became final.[441] As Justice Utter succinctly stated in dissent in *Tollefson*:

> The allocation ordered against the State by the District Court in *United States v. Washington, supra*, has been held to be within the trial court's discretion under the fair portion rule by the Ninth Circuit and the Supreme Court has denied certiorari, making that judgment final and binding upon the State as a party to that action.

441. *Tollefson* was decided by the State Supreme Court in November, 1977, and unlike *Puget Sound Gillnetters*, was decided *after* this Court's decision in *Puyallup III*, rendered June 23, 1977.

89 Wn.2d at 303, 571 P.2d at 1387-88, Petition No. 77-983, App. B-28.

Although the tribes do not contend that a federal district court or court of appeals has *appellate* authority over a state court, it is clear that in a situation where a state is a *party* to the lower court federal judgment, the judgment is binding upon the state as a matter of *res judicata* notwithstanding the fact that the judgment has not been reviewed by the United States Supreme Court. *See United States ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Stoll v. Gottlieb,* 305 U.S. 165, 170-72 (1938).

In addition, in the instant case, the State of Washington is estopped to litigate the question of its power under state law to allocate fish to treaty fishermen in order to implement the treaty by its concession made early in the litigation. In *United States v. Washington,* the District Court entered the following Finding of Fact:

> The Department of Fisheries has authority to impose limitations on the time, place and manner of sport and commercial fishing for salmon in the offshore areas within the three-mile limit, the Strait of Juan de Fuca and Puget Sound which will effectively increase the size of salmon runs through the usual and accustomed fishing places of the plaintiff tribes.

FF 204, 384 F.Supp. at 390, Joint App. at 174. The District Court's Finding of Fact was founded upon the stipulation of fact by the State of Washington in the Final Pre-trial Order, §3.615 [Admitted Facts], Docket No. 353. That stipulation still binds the State.

F. *The Question Whether the Federal District Court May Require State Officials to Perform Acts That The State Supreme Court Has Held to be Beyond Their Authority as a Matter of State Law is Moot.*

In their brief, the Associations argue that the question "whether the federal court could lawfully direct State agencies to implement the treaty by performing official functions that they lacked authority to perform under state law" is directly presented in No. 77-983. Associations' Br. at 49-50. This is false. As explained in detail in Part IV, *supra,* after the decision of the state Supreme Court in *Puget Sound Gillnetters v. Moos,* the District Court itself performed the function of allocating the resource and removed that responsibility from the State of Washington. Consistent with its policy of avoiding direct conflicts with the state courts when possible, the District Court took over the allocation function and removed it from the state courts rather than directly enjoining the state Supreme Court. Since August, 1977, therefore, no issue has been presented as to whether the State may be required to perform acts necessary to implement the federal right, which the Washington Supreme Court holds to be beyond their state law mandate.

VI. The Lower Court's Decisions Have a Positive Net Effect.

In this section the tribes analyze the State's and the Associations' accusation that the lower courts have "precipitated an economic upheaval" (State Br. 7) and their implication that the malaise of Washington's fishery can be attributed entirely to recognition of reserved treaty fishing rights. The petitioners' thesis is utterly insupportable.

In fact, the federal court's remedies have stimulated scientific research, have promoted technical cooperation, and have been consistent with congressional and state policy.

A. *Petitioners' Economic Analysis Is Wrong*

The Associations' accusation that interpretation of the Stevens treaties has "virtually destroyed" their livelihood, (Association Br. 6) is largely based on a document cited by Washington, J. Richards, *The Economic Impact of the Judge Boldt Decision* (National Marine Fisheries Service Mar. 3, 1975). (State Br. 7-8). The document cited is only a preliminary draft which was revised before release on August 1, 1975.

In reality the "report" is simply a pamphlet prepared at the behest of a state congressman[442] to support a state grant application. Federal funds were sought to reduce the number of non-treaty fishermen by buying their boats and licenses.

The petitioners' "report" states that two million dollars worth of salmon "landings" were "transferred" to treaty fishermen between 1973 and 1974. This is undocumented speculation. The facts are that between 1973 and 1974 the entire Puget Sound harvest suffered a 40% decline, while the number of non-treaty gillnet fishers pursuing those

442. *See* J. Richards, *supra* at 1. Apparently the data was used in a Washington application for $4.92 million from the U.S. Department of Commerce pursuant to 42 U.S.C. §3121 *et seq.*, *see* Implementation Grant attached to Reply Brief, July 13, 1976, Docket No. 2271. When the Washington Director of Fisheries was asked whether Mr. Richard's report analyzed the effect of the lower court's decision on the 1974 fishing season he responded, "That was the purpose I believe of that document, but as you agreed it comes quite subject to controversy." Moos deposition, April 29, 1976 at 93, Docket No. 2216.

salmon increased by over 50%.[443] These factors, not Indian fishing, explain the transfer of income away from state-licensed commercial fishers.

What petitioners do not tell this Court is that in 1973, Puget Sound gillnet fishers had a banner year, with a total catch of nearly 2,000,000 fish, (compared to the 12-year average of 1.2 million fish).[444] In 1974, the catch dropped to approximately 1.2 million, close to the 12-year average. This represented a 40% drop in fish available. This difference in catch alone could account for a substantial drop in fishermens' income.

Furthermore, 1973 was a "pink year." Pink salmon run only in odd-numbered years, and therefore were not available in 1974. This leads to great catch fluctuations between years as illustrated in the State salmon statistics, Joint App. 638. The State harvest of pink salmon was 1,000 in 1974, 1,418,000 in 1975, 2,000 in 1976, and 2,283,000 in 1977. This again would account for a significant decrease in the number of fish available for non-treaty fishermen.

Finally, petitioners failed to indicate that between 1973 and 1974 gillnet *licenses* on Puget Sound increased from 1,303 to 1,989.[445] This is an increase of 50 percent in the number of non-treaty fishermen in just one year. Thus, average catch per license due to run size and license changes alone fell from 1,566 salmon to 633 salmon, some 60 percent, between the two years.

Another way of showing the fallacy of the Associations'

443. *See* Regional Team of the Federal Task Force on Washington State Fisheries, *Settlement Plan for Washington State Salmon and Steelhead Fisheries*, Table 5-1 at 165 (1978).

444. *Id.*

445. *Id.*

argument[446] is to examine the real impact of the $2,000,000 reduction in income. The National Marine Fisheries Service Report notes that for 1974 the average income for full-time gillnet fishers was $2,630.[447] If we assume that the 686 new licensees in 1974 were full-time fishers and received the average income, their total income would account for $1,804,000 transfer away from 1973 non-treaty fishermen. Clearly as large a part of the reduced landings can be accounted for by the catches of the new non-treaty fishers who joined the chase for the salmon in 1974, as by the catches of treaty fishermen.

The petitioners' attempt to show significant dislocation and burden resulting from the decision falls flat. Their reliance upon the draft National Marine Fisheries Service report is misplaced. Even accepting the figures contained therein, the result is that the shift of income has been primarily from the fishers in the fishery in 1973 to those non-treaty fishers allowed to enter in 1974.[448] The report further

446. We choose not to belabor the obvious likelihood of bias in the National Marine Fisheries Service report. Data relied upon for the report came essentially from 622 responses by commercial non-treaty fishermen to 2,509 questionnaires sent out to all non-treaty commercial fishermen. It is surely possible, that those that suffered most were the ones that responded, or knowing the purpose of the questionnaire some of the political animosity might well have spilled over and influenced the otherwise objective and honest responses.

447. J. Richards, *supra, The Economic Impact of the Judge Boldt Decision* (Table 9).

448. Washington also calls attention to substantial drops in *net* earnings per fisherman between 1973 and 1974 (State Br. 7). Multiplied by the number of gillnet fishermen alone, they show a total decrease in *net* earnings of $9.2 million in one-year. Obviously even Richards does not suggest that a $2 million loss in *gross* revenue caused a net $9.2 million loss. The report states:

> . . . increased expenses. . . . (particularly for fuel, see Table 9), sharply lower salmon prices during 1974 compared to 1973, and possibly reduced numbers of fish for some areas and species all contributed to poorer net earnings by fishermen.

Id. at 9.

fails to accurately consider the numerous factors which may have contributed to a decline. There was a significant increase in license holders coupled with a significant decrease in the number of fish available in 1973 and 1974. Furthermore, the decline in the fishery generally,[449] the increase in the number of license holders, and environmental degradation, all have played a substantial role in bringing the non-treaty fishermen to their present position. That position or "plight" cannot be blamed upon the treaty right or the decision below. In short, petitioners' economic argument is a classic example of the *post hoc ergo propter hoc* fallacy, (after the fact, therefore *because* of the fact). It is fundamentally specious.

Then-governor Daniel Evans gave a calmer explanation of the effect of the federal court decisions:

> It is too easy for some to suggest that recent events—the Boldt and Belloni decisions on Indian fisheries, or some of the other single management decisions of recent years, have been primarily responsible for today's difficulties. I think that *any objective observer would recognize that many decisions made one by one over several generations, have led us to today's point.*[450]

The destructive forces at play in the non-treaty commercial fishery were even more precisely identified by the then Washington Director of Fisheries:

> Like the famous ecologist, Pogo of the comic strips, we have met the enemy and in many cases, he is us. *We have had a history of issuing far more commercial licenses out of our department,* and possibly the other states and their departments have too, *to harvest a resource that is limited.*[451]

449. *See* Ex. JX-2z at 20 and n. 122, *supra.*

450. Address reported in "Columbia River Salmon and Steelhead—Proceedings of a Symposium," Mar. 5-6, 1976, Ernest Schwiebert, ed. special publication #10, Am. Fisheries Society, Washington, D.C., 1977, Lib. of Cong. Catalogue No. 77-88465, at 14.

451. *Id.* at 109.

This is the crux of the problem, the source of the very real plight of Washington's commercial fishing industry. If the federal court decisions were a factor in causing Washington finally, in 1974, to freeze the number of commercial fishing licenses and, in 1975, to create a program to buy back and permanently retire licenses, then the consumers and fishermen owe the courts a debt of thanks. After ignoring for 40 years calls to limit entry the State finally realized that the alternative was "Ravishing poverty to the fishermen. . . . [t]oo much gear for too few fish."[452] A moratorium on issuing commercial licenses[453] became effective on May 6, 1974, RCW 75.28.450.

The tribes do not deny that protecting treaty Indian fishing opportunities requires limiting non-treaty fishing opportunity, *see* 573 F.2d 1130. However, since the average treaty tribal harvest between 1974 and 1977 is only 14.7% of the total Washington salmon harvest, *see* Table 6, Joint App. 640, and has only gradually risen to the level of 18% of the harvest in 1977, it is simply untrue that the difficulties of the fishing industry as a whole can be attributed to the exercise of treaty fishing rights, or the lower courts' decisions.

452. Deposition of Donald Moos, Director of Fisheries, April 29, 1976 at 29. Docket No. 2616.

453. The moratorium on licenses also demonstrates the hypocrisy in petitioners' argument that an equal share of fishing opportunity is inequitable as it reserves a tribal share which is disproportionate to the tribal percentage of the State population. Because of the license moratorium only a small fraction of the State's population can engage in commercial fishing in any event. The lower courts' decisions, therefore, simply prevents one small portion of the State's population (commercial fishermen holding licenses in 1974) from achieving an absolute monopoly over the harvest of Washington salmon, and forces them to share the harvest with the treaty tribes. Petitioners' argument made little sense in any event. Obviously, regardless of which fishermen harvest the salmon, the fish themselves become available to the general public and move in interstate commerce after sale.

B. *Positive Effects of the Lower Courts' Decisions*

The decision in *United States v. Washington* has been followed by an astronomical increase in public awareness of the serious ecological problems of the Pacific Northwest. The number of professional fisheries biologists engaged in salmon research has increased enormously, in large part through efforts of the tribes. Finally, the end to discrimination against traditional tribal fisheries has led to strengthening of tribal self-government and rejuvenation of tribal life.

As the former Director of Fisheries stated,

> The impact of the Indian problem has been overemphasized, but I believe the fact that it has been overemphasized can make it possible to use that exaggeration in some areas where we can constructively help the industry we are dedicated to serve.[454]

Fisheries management, in fact, has been greatly improved in the past five years, with the assistance of professional biologists and fisheries managers employed by the Indian tribes.[455] As a result, the sophistication of salmon management has increased markedly. As the Department of Fisheries recently concluded,

> The terminal area management practice of the past several years is making it possible to make estimates of the total run size returning to *each* Puget Sound river system.[456]

454. *Proceedings of a Symposium*, note 450 *supra*, at 108.

455. Tribal management, of course, long predates the District Court's decision, *see e.g.* FF 124, 125, 159, 384 F.Supp. at 375, 381, Joint App. 146, 158. The marked increase in available public and private grant funds and fish tax revenues since the lower court's decisions, however, has enabled the tribes to greatly expand their professional staffs. As of August 6, 1976, 32 professional fisheries biologists were working for or with treaty tribes. *See* Tribal Amicus Br., *Puyallup Tribe v. Department of Game*, No. 76-423, at A-8.

456. Wash. Dept. of Fisheries, *1977 Puget Sound Summer-Fall Chinook Methodology: Escapement Estimates and Goals, Run Size Forecast, and In-Season Run Size Updates*, Technical Report 29. (1977) (emphasis added).

The stream surveys and field work necessary for accurate estimates of escapement and run size estimation are largely prepared by tribal biologists. Tribal fisheries staff develop an intimate familiarity with the river systems in the tribes' usual and accustomed places because, unlike the Fisheries and Game Departments, tribes' efforts are focused on the terminal areas which are the location of the tribes' traditional fisheries and interest, not spread thin across the entire State.

Since the District Court decision the State and the tribes have cooperatively taken measures to increase the productivity of the fishery. Obstacles have been cleared from spawning aras and new tribal hatcheries rear and release spawning areas and new tribal hatcheries rear and release non-treaty fisheries.[457] Technical teams composed of state and tribal biologists operating under the auspices of the court's Fisheries Advisory Board have performed studies and produced valuable technical reports which were never before possible.[458]

The close relationship between state and tribal technicians has been enhanced by use of remote computer terminals with access to a central computer at the Univer-

457. *See* Tribal Amicus Br., *Puyallup Tribe v. Department of Game* No. 76-423, p. A-10-14 listing fish plants in 1975 and 1976.

458. For example, in the December 12, 1977 report of the Fisheries Advisory Board, Docket No. 5312, the parties unanimously agreed that existing Washington Department of Game methods for predicting the harvestable number of steelhead in the Green-Duwamish Rivers were inadequate. In response, a technical team was appointed to develop a new methodology. This was successfully completed and was approved by the Fisheries Advisory Board. *See,* Fisheries Advisory Report December 19, 1977, Docket No. 5312. Other technical reports have dealt with the effects of mixed stock fisheries, Fisheries Advisory Board Report 78-54, Docket No. 5313, implications of new hatchery programs, Fisheries Advisory Board Report 78-48, Docket No. 5313, and a host of other previously inadequately researched matters.

sity of Washington where catch data developed cooperatively are stored. Under this system, recently approved by the Court, all parties can obtain immediate printouts of catch data by telephone line at any time, *see* Docket Nos. 5117, 5118, and 5134. The computer terminals are increasingly being used for instantaneous communication of potential conservation problems, draft regulations, and other technical data. This harmony between the tribes and the State is simply unprecedented in Washington. It is a direct result of the District Court judge's recognition that the governmental entities have shared rights in the resource. Without the District Court's patient efforts to promote communication between the State and the tribes, the salmon resource would almost certainly have continued its characteristic modern decline.

Finally, the lower court's decision has strengthened Indian tribal government and has addressed the serious underlying problems of poverty which characterize the Indian population in Washington. The research arm of the Washington House of Representatives recently reported:

> While the number of Washington Indians may have increased in the past 100 or so years, it is a fact that the Indians living in Washington today suffer from a standard of living far inferior to that of the state's non-Indian population . . . . [I]n terms of health care, life expectancy, educational level achieved, unemployment, alcoholism, suicides, and a host of other indicators of standards of living, the *state's Indian population lags far behind its non-Indian* population.[459]

More specifically, the State legislature's data included fig-

459. Office of Program Research, House of Representatives, *The Legal Relationship Between Washington State and Its Reservation Based Indian Tribes* at 12 (Olympia, Washington 1977) (emphasis added).

ures on unemployment and the number of low income tribal members living on or adjacent to reservations of 17 of the treaty Indian tribes involved in this litigation. These figures show an average unemployment rate among the tribes' potential labor force of *40.3 percent with an additional 23.9 percent of the potential labor force earning less than $5,000 per year.*[460] This devastating unemployment graphically portrays the effects of Washington's exclusion of treaty Indians from a meaningful share in the fishery. The Indians of the Pacific Northwest have always been fishermen. "Fishing," as Dr. Lane reported, "was the universal male occupation."[461] Although there are other factors, enforcement of State fishing regulations, seizures of gear, and preemption of the fish runs are clearly factors in this result. *See* FF 193-94, 217-18, 384 F. Supp. 388, 393, Joint App. 170-71, 179-80.

The District Court's decision has presaged a dramatic change in reservation standards of living. It has also restored the "basis for [Indian] cultural identity and [provided] a cohesive force in Indian society."[462] Fishing in the usual and accustomed places has resumed. A tax base has developed for the tribes enabling them to hire additional fisheries biologists, law enforcement officers, tribal court judges and staff. This, the tribes suggest, is the result contemplated by the treaty negotiators. Dr. Lane concluded,

> [T]here was no intention of creating a class society with Indians on the bottom economic rung. The treaty commission clearly undertook to provide the Indians the means of participating and prospering. . . . The contribution was seen to be primarily in the fisheries.[463]

460. *See Id.*, at 26-45.
461. Ex. USA-20, Joint App. 365.
462. Ex. USA-20, Joint App. 394.
463. Ex. USA-20, Joint App. 396.

It is also the result most consistent with national policy. The Indian Financing Act of 1974, for example, states,

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources *and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.*

25 U.S.C. §1451 (1978) (emphasis added).

In summary, it is unfortunate that the Petitioners have chosen to cast aspersions on the federal courts, blaming the courts for problems which responsible officials attribute to ill-advised, long-term State policies. Of course, any District Court disposition of a complex case requires the litigants to make adjustments. But, analysis of the record in this case, particularly the technical reports of the parties and the Fisheries Advisory Board, shows that the lower court's decisions have promoted cooperation and focused attention on the real problems of the fishery, while assisting in fulfillment of our country's strong policy to restore and protect the rights of the treaty Indian tribes.

VII. Selected Rebuttal

The State and Fishing Associations have raised a variety of other issues. This section deals with four of them: (A) The International Fisheries Case (sockeye fishery); (B) Equal Protection; (C) Hatchery fish; and (D) Self-executing treaties.

A. *The "International Fisheries Case"*

1. Regulatory background

The State of Washington appeals 1975 District Court orders which, consistent with the court's primary decision, provided some additional fishing opportunity to treaty fishermen who fish for sockeye and pink salmon.

This is a major fishery for the tribes. We are puzzled by the State's implications that the sockeye fishery is of minimal importance to them. The State says that only a "*small number* of the Indian tribes" have accustomed fishing places" in sockeye waters; (State Br. 26-27); and that "only a small number of treaty Indians, relative to the total number of Indian fishermen, participate in the harvest of Fraser River stocks," (State Br. 27-28). These statements are wrong and misleading.[464]

464. In the first place the sockeye fishery takes place waters in which eight of the nineteen tribes with recognized fishing rights fish or 42% of the total – hardly a "small" number.

Secondly, these eight tribes comprise several of the major fishing tribes in the case area. Between them they possess most of the Indian gear of the type involved in the marine sockeye fishery; i.e. 78% of the troll gear, 69% of the marine gillnet gear and 90% of the purse seine gear. *See* Regional Team of the Federal Task Force on Washington State Fisheries, "Settlement Plan for Washington State Salmon and Steelhead Fisheries", June 1978, at 284.

Further, in 1977, in those State catch reporting areas generally covering the major sockeye runs (*i.e.*, State areas 4B, 6, 5, 6C, 6A, 7, 7A and Puget Sound terminal areas) the tribes caught 538,000 sockeye and pink salmon as opposed to only 112,000 chinook salmon in the same areas. (Ex. PLM-3 "Washington Salmon Harvest Statistics" Joint App. 635-638). Of course, chinook are substantially larger and more valuable. Still, however, to categorize the sockeye fishery as somehow a minor fishery is misleading. Nor is it accurate to say that many treaty fishermen "choose to fish" for Chinook *rather than sockeye* (State Br. 28). The entire context of the witnesses' remarks quoted in support of that allegation make it clear that they were stating that the "big" boats would definitely fish for sockeye and that fishermen with smaller gear would be able to do so if the extra days requested by the tribe were granted, but would probably fish for chinook if those extra days were denied. *See* Tr., June 20, 1975, pp. 68-79.

Fishing for these two species of salmon is controlled in certain waters by an international treaty between the United States and Canada (Convention of May 26, 1930, 50 Stat. 1355, 8 U.S.T. 1060)[465] and federal law. Sockeye Salmon Act, 61 Stat. 512, 16 U.S.C. §776 *et seq*.

The treaty basically provides that the United States and Canada will agree to conserve the sockeye and pink fishery resource and share any harvestable numbers on a 50-50 basis between the two parties.[466] It established a joint commission known as the International Pacific Salmon Fisheries Commission, (hereafter "IPSFC" or "Commission") consisting of six members, three from each country. The convention provided (Article X) that the parties agreed to enact and enforce legislation for the purpose of implementing the convention and any orders and regulations adopted by the IPSFC together with appropriate penalties for violations.

Congress implemented the convention by enacting the Sockeye Salmon Fishery Act of 1947 (61 Stat. 512, 16 U.S.C. §776, *et seq*). This Act contained comprehensive enforcement provisions including provisions for seizure, forfeiture, fines and imprisonment, all under federal authority and under jurisdiction of the United States courts. (16 U.S.C.A. §§776c, 776d). It directed the President to designate a federal agency for enforcement responsibility, but also authorized the designated federal agency to dele-

465. These waters are basically the Strait of Juan de Fuca and the Strait of Georgia through which the major sockeye and pink stocks pass on their way to the Fraser River in Canada.

466. Article VII of the convention provides that ". . . the High Contracting parties . . . [shall] share equally in the fishery." This article was modified by Article IV of the "Pink Protocol" to provide an "equal portion" of pink as well as sockeye runs. 8 U.S.T. 1057.

gate enforcement authority to officers and employees of the State of Washington. It then provided in §776d(b)):

> . . . when so authorized such officers may function as federal law-enforcement officers for the purposes of this chapter.

Subsection (d) of §776d provided that officers or employees of the State of Washington authorized by the designated federal agency were to operate in accordance with the provisions of the section governing arrests, searches, seizures and prosecutions.

The President originally designated the United States Fish and Wildlife Service as the federal agency responsible for the enforcement of the Act. (Exec. Order No. 9892). The duties of that agency were subsequently transferred to what is now the National Marine Fisheries Service of the Department of Commerce (Reorg. Plan No. 4 of 1970, 84 Stat. 2090).

However, neither the Fish and Wildlife Service nor its successor agency ever designated or authorized the State of Washington to act as its enforcement arm. Instead, a different procedure was apparently adopted, though without any statutory authority or official action on the part of the United States.

In 1949, the Washington State Legislature enacted, as part of a comprehensive fisheries code, a provision merely authorizing the Director of Fisheries to, "adopt and enforce the provisions of the convention between the United States and the Dominion of Canada . . . and the regulations of the Commission promulgated under authority of said convention." (RCW 75.40.060, L. '49, Ch. 112, §83 at 300)

After 1949, and until 1975, the Washington State Department of Fisheries each year considered the recommendations of the IPSFC, held hearings thereon, and adopted them as State regulations. All violations were treated as violations of state law and prosecuted in state courts. The State officers did not purport to be acting as federal officers under delegated authority. No federal agency entered in to the function of enforcement of the recommended regulations of the IPSFC prior to 1975, and the United States left the field generally to State action.

2. Implementation of sockeye fishing in 1975

On February 24, 1975, the IPSFC sent its recommended 1975 regulations to the United States State Department for United States approval, with the request that on approval, a copy of these regulations be forwarded to the Washington Director of Fisheries for implementation by him under Washington law. (Record in 9th Circ. Cause No. 76-1042 R. 16) On April 11, 1975, the State Department approved the recommendatons for the United States, conditional, however, on implementation by the State of Washington in conformity with the principles of the *United States v. Washington*. The recommendations were transmitted to the Washington Department of Fisheries by letter dated April 11, 1975, stating in part:

> In light of the decision in *U.S. v. Washington*, regulation in conformity with Indian treaty rights as set forth in that decision is now required. It is understood, in view of this decision, that the State will regulate in a manner consistent with Indian treaty rights.

Id. at 14, 15.

On May 20, 1975, the Fisheries Department adopted regulations which made no provision for treaty fisheries.

(*Id.*, at 14, 24) and on June 10, 1975, the United States sought injunctive relief against the State of Washington in the District Court. The State vigorously resisted the efforts of the United States to secure any separate or additional fishing opportunities for Indians (Memorandum in Opposition to Motion for Preliminary Injunction, *Id.* at 33-39).

On June 10, 1975, the District Court issued a preliminary injunction prohibiting the State from allowing any non-treaty fishing until the Department of Fisheries adopted regulations affording Indians their treaty opportunity. The injunction directed the Department to file such regulations by July 1, 1975. (*Id.* at 56, 57). On July 1, 1975, the Defendant petitioned for a stay of the injunction to July 10, 1975, which was subsequently extended until July 21st.

In the meantime, on July 3, 1975, the Director of the State Fisheries Department wrote to the Chairman of the Commission requesting authorization to adjust fishing times to accommodate Indian rights. (*Id.* at 72, Exhibit B) the Chairman replied on July 8, 1975, that the Commission had decided that the subject of division of catch between Indians and non-Indians in the United States waters "was not a proper concern for the International Pacific Salmon Fisheries Commission, whose areas of responsibility are defined by the Sockeye Salmon Convention." (*Id.* at 72, Exhibit C)

On July 19, 1975, the United States notified the Commission that by reason of the requirements of United States law as decided in *U.S. v. Washington,* the United States had withdrawn approval of "those parts of the regulations which allocate open fishing time among the various types of gear within U.S. convention waters." (*Id.* at 151) The

letter referred to the official withdrawal of approval on July 19, 1975, by Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries Affairs. (*Id.* at 154).

On July 21, 1975, the Washington Fisheries Department formally adopted the regulations prescribed by the United States District Court authorizing an Indian fishery, and the next day, July 22, 1975, filed a notice of appeal. The following day, July 23, 1975, an action was commenced in Thurston County Superior Court by the Purse Seine Vessel Owner's Association and the Puget Sound Gill Netters Association challenging the authority of the Department of Fisheries to enact such regulations. A state superior court judge issued a preliminary injunction that same day enjoining the State from promulgating any regulation which granted Indians special fishing rights and that day the State Fisheries Department repealed the regulation and suspended all of its regulations for the subject area. Neither the United States nor any of the intervenor appellees were parties to that proceeding.

On July 30, 1975, the United States District Court entered an order dissolving its previous stay of injunction and the temporary injunction, which had been stayed since July 21, 1975, went back into effect. (*Id.* at 138) The following day, July 31, 1975, the State adopted regulations prescribed in the Court's injunction. However, those regulations were scarcely in effect when the State superior court again, on August 1, 1975, enjoined the Department from enforcing those regulations. The State promptly repealed the regulations and suspended all regulatory action.

At a hearing held on August 6, 1975, the United States District Court again enjoined the State Superior Court and directed the State to repromulgate the regulations as provided in its Order of July 16, as amended on July 30. (*Id.* at 163-164)

The State however, did not thereafter promulgate the regulations mandated by the federal court but instead stood on its position that it was not capable of complying with the Federal District Court injunction, and appealed the August 6 Order.

3. Implementation during the 1977 and 1978 seasons[467]

In March 1977, the United States secured the Canadian government's agreement to a proposal for the 1977 IPSFC regulations which would have provided extra fishing time for treaty Indians. The IPSFC, however, refused to adopt this proposal. Instead, the IPSFC passed its staff recommendation for a two-day per week fishery for all United States fishermen, with no provision for the Indians' treaty rights. Accordingly, the United States, through the Department of State, advised the Government of Canada that the United States would consider achieving the same result contemplated by the government-to-government agreement through the exercise of its authority under Article VI of the Convention, as amended, to approve the IPSFC's proposed 1977 regulations only as applied to non-Indians. Fishing by treaty Indians would be governed by separate federal regulations providing the Indians with extra fishing time.[468]

467. There is no issue before this Court concerning the validity of the 1977-1978 regulatory system. We describe it here only to indicate that peculiar pattern of 1975 will not likely recur.

468. This is quite similar to the Canadian government's regulation of subsistence fishing by Canadian Indians, which has always been excluded from IPSFC coverage. In recent years, this Canadian Indian subsistence fishery has grown substantially, amounting in 1976 to approximately 300,000 fish. American Indian fishermen, both commercial and subsistence, that year caught a total of 80,000 fish. Indeed, the reservation by the high contracting countries in the Pink Protocol (8 U.S.T. 1057) of the power to approve Commission regulations before they become effective insures that such domestic adjustments can be made.

On June 1, 1977, the IPSFC forwarded to the Department of State for United States approval its proposed 1977 regulations. On June 17, 1977, the Department of State announced United States approval of the IPSFC's 1977 regulations "except as to U.S. Indians who are entitled to exercise fishing rights by virtue of treaties with the United States in U.S. Convention waters and are fishing in accordance with federal regulations providing for the exercise of such fishing rights." The Department of State advised both the Canadian Government and the IPSFC that treaty Indians would fish pursuant to regulations of the Department of the Interior and that such regulations would ensure that the Indian fishery proceeded in a manner consistent with the basic objectives of the Convention.

On June 17, 1977, the Department of Commerce adopted as federal regulations the IPSFC's 1977 regulations for United States Convention waters, with a caveat stating that the regulations would not apply to Indians exercising treaty-secured fishing rights (42 Fed. Reg. 30841). On June 21, 1977, the Department of the Interior, pursuant to its authority over Indian affairs (25 U.S.C. §§2 and 9), published separate regulations for treaty Indians fishing in IPSFC waters (42 Fed. Reg. 31450). Structurally, Interior's regulations for treaty Indians were virtually identical to Commerce's (i.e., the IPSFC's) regulations for non-

Indians; however, Interior's regulations authorized extra fishing time for treaty Indians. Unlike the situation in prior years, the United States did not ask the State of Washington adopt the 1977 Commission regulations as state law. Moreover, the National Marine Fisheries Service did not delegate its enforcement powers under the Sockeye Salmon Act to the State. Instead, the regulations for both treaty and non-treaty fishermen were enforced by the National Marine Fisheries Service and the United States Coast Guard.

4. The international fishery case was properly decided since the district court's 1975 orders are moot.

The "International Fishery Case" was properly dismissed by the Ninth Circuit as moot. The District Court's 1975 orders challenged by the State in that case are no longer in effect. Those orders were designed solely to remedy the problem existing in 1975, when the state insisted on enacting IPSFC recommendations (over objection of the United States) even though these recommendations made no provision for treaty fisheries. The orders issued were preliminary injunctions that applied only to the 1975 season, and Washington's allegations (Br. 65) that the orders are still in effect are simply erroneous.

The situation leading to the challenged orders will not recur. For the past two fishing seasons, the United States has simply refused to approve proposed IPSFC regulations that neglect to provide for treaty fisheries, thus obviating any need to return to the District Court for remedial orders. Thus, neither the court nor the State have been involved in the sockeye fishing during either 1977 or 1978. Instead, the United States has assumed direct regulatory

and enforcement control, as it is entitled to do under the Sockeye Salmon Fishery Act of 1947, 16 U.S.C. §776 *et seq*. In addition, the tribes have filed tribal regulations paralleling federal regulations so that tribal authorities may regulate the fishery through tribal courts. These changes in the regulatory pattern make this case moot. *Environmental Protection Agency v. Brown*, 431 U.S. 99, [illegible]-104 (1976). Thus, the Court of Appeals correctly held that the controversy is not one that is "capable of repetition, yet evading review." (573 F.2d at 1120, Pet. No. 78-119, App. A-30 to A-31.)

Washington's argument that the International Fishery orders should be examined on their merits because they raise the equal sharing principle vis-a-vis the IPSFC fishery is erroneous. The issue of 50-50 sharing is already present in the main litigation (*See* 384 F. Supp. at 411, A. 214) Thus, it may be resolved without resort to review of the expired temporary injunctions.

5. The District Court properly required the State of Washington to provide a special treaty fishery in IPSFC waters during the 1975 season.

Assuming that a live controversy still exists with respect to the District Court's 1975 IPSFC orders, we submit that those orders should be affirmed.

Washington's principal argument is one that was rejected by the courts below in Final Decision No. 1. The State argues (Br. 74-78) that the Convention with Canada abolished Indian treaty rights as to Fraser River salmon, notwithstanding the undisputed presence of several usual and accustomed fishing places within IPSFC waters. In advancing this argument, Washington merely sweeps aside

the repeated decisions of this Court holding that Indian treaty rights may not be abrogated by implication. *E.g., Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968); *United States v. Payne,* 264 U.S. 446, 448 (1924); *see also United States v. Lee Yen Tai,* 185 U.S. 213, 221 (1902); *Whitney v. Robertson,* 124 U.S. 190, 194 (1888). In the present case, there is not the slightest hint, let alone any express evidence, of congressional intent to diminish or eliminate Indian treaty rights. Further, there is no justification here for even an implied abrogation. It is, of course, axiomatic that the courts must attempt to construe two treaties, or statutes, harmoniously, so as to give effect to both. *Whitney v. Robertson,* 124 U.S. at 194. Here, the Convention with Canada deals only with the division of the harvest between the United States and Canada. It says nothing with respect to disposition of the American share. The Indian treaties, on the other hand, speak only to domestic allocation. Thus, there is no reason whatsoever that the two treaties cannot be harmonized by providing the Indians with the opportunity to harvest their fair share of the United States' portion of the fishery. The treaty fishery is being regulated properly both as to conservation and allocation between the two parties. Accordingly, the Convention with Canada cannot be said to have modified or superseded the Indian treaties.[469]

This position in no way conflicts with the holdings of the lower courts that Indians must comply with IPSFC regulations. Quite clearly, the courts could only have

469. This apparently, is also the view of the Commission. In 1974, the chairman stated that regulations to accommodate Indian treaty rights were "a matter for determination by the two parties to the Convention" (Ex. USA-89, p. 5.) Likewise, on January 24, 1975, the Commission resolved that the matter "was not a proper concern" for the Commission. Record in 9th Circuit Cause No. 76-1042, at 72. Ex. C.

been referring to *valid* Commission regulations—that is, regulations that have been approved by the United States under Article VI of the Convention, as amended. Just as clearly, neither court could have been intimating that the United States is bound to approve all regulations proposed by the IPSFC, even if they make no provision for treaty fisheries.[470] That question simply was not present in the original litigation. Thus, when the United States declines to approve the proposed regulations or (as happened during the 1975 season) revokes its prior approval, there simply are no IPSFC regulations applicable to treaty Indians. Hence, there is no conflict between the Indian treaties and the requirement that Indian fishermen comply with the Commission's regulations.

Washington's argument that the District Court exceeded its jurisdiction by impermissibly interfering with the conduct of foreign affairs is thus misplaced. On the contrary, the District Court deferred completely to the State Department, and only issued its orders after first receiving assurances from the State Department that the orders would not jeopardize the United States' treaty commitments to Canada. It was only after the United States had withdrawn its approval of that portion of the IPSFC's 1975 regulations which allocated fishing time among various gear types that the District Court ordered extra time to be provided for treaty gear. The District Court thus accepted the action of the State Department and concluded that the withdrawal was a valid exercise of United States' rights and responsibilities under the Convention. We submit this conclusion was inescapable.

470. For example, no one would argue that the Commission could force the United States to approve regulations allowing "whites" only to fish.

The question of the legal sufficiency of the withdrawal is a matter to be settled by the political departments of Canada and the United States; it is not a matter capable of judicial resolution. *See, e.g., Baker v. Carr,* 369 U.S. 186, 212 (1962). Thus, the District Court correctly deferred to the State Department's position on the withdrawal. And, clearly, it is the State Department's position that was properly accorded deference by the court, rather than the Commission's as argued by Washington. Under Washington's view of the law, the Commission would have greater power than either of the governments that created it. That result is at odds both with the express language of Article VI, as amended, and with common sense.

6. The current regulatory scheme is under active litigation.

Finally, we note that to the extent there are any unresolved issues involving the current regulatory scheme, those matters and being raised in two pending cases.

On June 24, 1977, suit was brought to enjoin the United States from providing extra fishing time for treaty Indians fishing in IPSFC waters. *Purse Seine Vessel Owner's Ass'n. v. United States Department of State, et al.* Civil No. C-77-471M (W.D. Wash.). The State of Washington was not a party to the litigation, nor did it seek to participate in the case. The District Court denied Plaintiffs' Motion for a Preliminary Injunction on July 5, 1977, holding that the grant of a preliminary injunction would harm the treaty Indians far more than the denial of such relief would harm the Plaintiffs and that Plaintiffs had failed to demonstrate that the balance of hardships tipped sharply

in their favor. The court also concluded that the public interest was best served by permitting the government to honor its treaty obligations to the Indians.[471]

Plaintiffs appealed. By Order dated September 27, 1977, the Court of Appeals refused to grant injunctive relief. (9th Cir., No. 77-2968). On October 26, 1978, the Court issued an opinion, unreported, holding that the District Court had not abused its discretion by denying injunctive relief. The Court declined to address the substantive issues in the case, noting that the underlying dispute concerning allocation of fishing opportunity is pending before this Court.

The same parties who brought suit in 1977 filed a second suit in 1978, in which they raised the same challenges to the United States' action. *Purse Seine Vessel Owners Association, et al v. Bureau of Oceans et al.,* Civ. No. C78-578. (W.D. Wash.). No action has been taken in that case. It, as well as the merits of the 1977 suit, is still pending in the District Court.

B. *The Allocation of Fishing Opportunity Does Not Violate Equal Protection.*

Petitioners argue that the District Court's allocation of fishing opportunity violates the equal protection guarantee of the Fifth Amendment to the United States Constitution (State Br. at 89-90, Associations' Br. at 27-30). Their argument is patently without merit. As Washington's Justices Utter and Horowitz stated in dissenting from the state court's interpretation of the Equal Protection Clause:

> The Supreme Court [of the United States] has expressly rejected this theory on at least two occasions.

471. Later in the 1977 season, Plaintiffs filed a second motion for a preliminary injunction. Holding that no new issues had been raised, the District Court denied this motion on August 10, 1977.

> Continued adherence to this discredited doctrine should be embarrassing to this court and is particularly unproductive in this case.

Passenger Fishing Vessels Ass'n v. Tollefson, 89 Wn.2d 276, 288, 571 P.2d 1373, 1379 (1977), App. B-13, Petition in No. 77-983.

The United States Constitution itself makes special provision for enactments relating to Indians, giving to Congress the power "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, §8, and to the Executive the power, with Senate concurrence, to make treaties, U.S. CONST. art. II, §2. Under the Associations' argument the United States could not constitutionally exercise either of these powers with respect to Indians.

The decisions of this Court have uniformly upheld federal laws which make special provision for Indian tribes as long as the special treatment is rationally tied "to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (employment preference within the BIA); *see Fisher v. District Court*, 424 U.S. 382 (1976) (exclusive jurisdiction of tribal court over adoption proceedings involving Indians on-reservation); *United States v. Antelope*, 430 U.S. 641 (1977) (constitutionality of the Major Crimes Act as applied to Indians); *Morton v. Ruiz*, 415 U.S. 199, (1974) (special eligibility of Indian people for welfare benefits); *Antoine v. Washington*, 420 U.S. 194 (1975) (exception of tribal hunting from state regulation); *see also McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959).

Petitioners' specific attack on allocation to effectuate the Stevens treaties is foreclosed by this Court's decisions first requiring, then upholding, such allocation in *Puyallup II*, 414 U.S. 44, 48-49 (1973) and *Puyallup III*, 433 U.S. 165, 177 (1977). In *Puyallup III* the Court said that allocation was "precisely what we mandated," *Id* at 177.[472]

Furthermore, the distinction between treaty and non-treaty fisheries is not based on race. As this Court said in *Morton v. Mancari, supra*, speaking of an employment preference provision,

> The preference. . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

417 U.S. at 554.

In this case, the Indians' right to distinctive treatment of their fishing rights is the *quid pro quo* obtained by them in return for their agreement to cede vast areas of land to the United States.[473] Recognition of that right is based upon

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472. At the heart of the equal protection challenge is the argument that Indians, either singly or collectively, have no claim to a greater share of fishing opportunity than the population fraction represented by their numbers. But federally-reserved treaty fishing rights cannot be quantified through comparison of population statistics, *Cf. United States v. Winans*, 198 U.S. 371, 380-81 (1905). A similar argument was advanced and rejected in *Arizona v. California*, 373 U.S. 546, 600-01 (1963). This Court implicitly rejected a similar equal protection challenge in *Minnesota v. Forge*, 262 N.W.2d 341, dismissed for want of a substantial federal question, 435 U.S. 919 (1978). In *Forge*, the state court had approved a special license fee required only of non-Indians fishing on-reservation. Certain non-Indians challenged the special license fee. This Court, in dismissing the appeal for want of a federal question, recognized the frailty of the equal protection claim. No different result is warranted here.

473. Indeed the tribes' power to exclude others who seek to take advantage of the tribal reserved right is an essential part of the property rights which the tribes retained.

the governmental status of the tribes and the special commitment of the United States to protect those rights. Non-treaty fishermen have no similar entitlement. Just as important, *Indian* fishermen who are not members of treaty tribes enjoy no special rights; their fishing is subject to the same limitations placed on all non-Indian fishermen.

Finally, the non-treaty fishermen never do explain why it is not a denial of equal protection for *them*, as a small minority of the non-Indian population of the State as a whole, to monopolize the commercial fishery. The State of Washington now limits the number of its citizens who may participate in commercial fisheries. *See* RCW 75.28.455 (Gear Limitation), and RCW 75.28.500 (Gear Buy-back). Indeed, this small minority of non-Indian fishermen seems to maintain that they should continue to virtually monopolize the fishery rather than share it with a broader spectrum of treaty fishermen. They would, of course, argue that they have "property rights" in their commercial licenses which entitle them to special treatment.

C. *Hatchery Fish Cannot be Distinguished From Wild Fish Without a Fact Finding Trial.*

Petitioners allege that the District Court's allocation fails to consider the equities surrounding artificially propagated fish. (State Br. 83, 91-92; Associations' Br. 39). This is untrue. The court has merely acted to maintain the status quo, pending full trial of the hatchery fish issue now scheduled for June 4, 1979; in the meantime, the court's orders provide that hatchery fish shall not be distinguished from other free swimming fish.[474] Washington filed notice of

474. Memorandum Order Granting Preliminary Injunction, Aug. 13, 1976, Docket No. 2347 1/2.

appeal from the court's preliminary injunction but failed to perfect it. The Court of Appeals dismissed the appeal stating:

> The [State's] failure to move promptly is inexcusable. Dismissal will not result in irreparable harm. The district court will be independently reviewable.[475]

The State did not raise the issue of inclusion or exclusion of hatchery-reared fish prior to, or during the trial in *United States* v. *Washington*.[476] Since the trial, the State has invoked the jurisdiction of the District Court to resolve the issue whether artificially propagated fish can or should be distinguished from other fish in the allocation process. The matter is pregnant with genuine issue of material fact which have never been adjudicated.[477] Indeed, the lower

475. Order dated April 5, 1977, 9th Circuit Cause No. 76-3757, Docket No. 2840 1/2.

476. Indeed, Washington mentioned the contribution of hatchery fish to the resource prior to trial only in pointing out that both the treaty and non-treaty fishermen benefitted from such hatchery programs. FPTO §3-612, 6-3, 7-96, 7-109, Record in 9th Circuit Cause No. 74-2414, R. 843, 851-52, 893, 894.

477. No hatchery fish issues relating to salmon, or to steelhead outside the Puyallup River, were adjudicated in *Department of Game* v. *Puyallup Tribe*, 86 Wn.2d 664, 548 P.2d 1058 (1976), *vacated* 433 U.S. 165 (1977). The District Court found that the state court had systematically excluded any evidence dealing with species of salmon and had dealt solely with steelhead on the Puyallup River. Memorandum Order, *supra*, Docket No. 2347 1/2. The Department of Fisheries did not even participate in the *Puyallup III* litigation. *Id.*, FF 30. The testimony dealing with other rivers and watersheds was systematically excluded, *id.*, FF 26, as was the contribution of federal funding to Western Washington hatchery facilities for steelhead. *Id.*, FF 26. Finally evidence concerning the effect of environmental damage on natural steelhead was excluded. *Id.*, FF 28. The District Court identified at least nine factual issues material to the resolution of the steelhead and salmon hatchery issue, as it applies generally. *Id.*, FF 37, 51. Furthermore, in the parties' Joint Statement of Issues presented to District Judge Orrick below, six specific factual questions relating to hatchery fish were identified. Statement of Issues, June 23, 1978, 2, Docket No. 4597. There, as elsewhere, the State concedes the need to develop a full record. *See* Reply of State of Washington Re: Motion to Modify Judgment, Nov. 16, 1977, 2, Docket No. 3687. Indeed, on remand from this Court in *Puyallup I*, the state court held a *10-day trial* solely to determine the factual issues related to the Puyallup River steelhead.

court specifically held that the hatchery issues could "only be properly and finally determined in an open court trial on the merits."[478]

The seemingly straightforward notion that anadromous fish can be artificially propagated is, in reality, a highly technical matter. Fisheries biologists cannot agree upon which fish are artificially propagated and which are not. Actions which promote or enhance fish rearing cover a huge range of activities. For example, debris removal in rivers often aids spawning. Placing suitable spawning gravel in spring-fed creeks also increases salmon production. Further along the continuum, simple riverside boxes are constructed in which salmon eggs may be incubated for a few weeks before the tiny fish fry swim free. Finally, the federal, State and tribal entities have constructed sophisticated hatchery stations in which salmon eggs are fertilized, hatched, penned and fed until desired release dates. In short, scientists disagree on the point along this continuum beyond which fish are considered artificially propagated or hatchery fish.[479]

For all of these reasons this Court should not address the question until after the lower court has developed a record, on the many factual questions identified by the parties, in the trial scheduled for June 4, 1979.

478. Memorandum Order, *supra*, Docket No. 2347 1/2, at 1.

479. Equally complex factual questions are involved in measuring federal, State and tribal contributions to hatchery programs, as well as in determining the relationship between artificial and natural fish populations in any specific river or lake.

D. *The Treaties are Self-Executing and are Being Implemented By the Parties.*

The Associations' argument that the Stevens treaties are non-self-executing (Association Br. 42-49) proves too much and therefore warrants little attention by this Court. The fundamental premise of this Court's decisions in *United States v. Winans, supra, United States v. Seifert Brothers, supra, Tulee v. Washington, supra, Puyallup I, supra, Puyallup II, supra* and *Puyallup III, supra* is that the treaties are enforceable. The petitioners offer no cogent reason for asking this Court to overrule such well-settled law.[480]

It cannot seriously be doubted that the Stevens treaties are self-executing. The clear intention of all parties was to create binding agreements which would explicitly protect the tribes' fisheries and reservation homes while passing title to certain land to the United States. These circumstances call for application of the rule that

> A treaty made on behalf of the United States that manifests an intention that it shall become effective as domestic law of the United States . . . is self-executing.

Restatement (Second) Foreign Relation Law of the United States §141 at 432 (1965).[481]

The absence of explicit language in the treaty detailing

480. If the treaties are non-self-executing then the United States has not yet extinguished Indian title to Washingthon west of the Cascade Mountains, *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) and 25 U.S.C. §177. The tribes doubt that petitioners are wholeheartedly urging an argument which will cloud the title of most landowners in the State.

481. The Court of Appeals rejected Petitioners argument saying:

> "we do not know what more would be necessary to make the treaties effective and enforceable in federal court as the supreme law of the land."

523 F.2d 1123, App. A-13, Petition in No. 78-119; *see also* 520 F.2d 684, Joint App. 44-45.

the allocation does not render it non-self-executing. In *People of Saipan v. United States Department of the Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975), the court ruled that the Trusteeship Agreement with Micronesia, which it held as comparable to a treaty for this purpose, is self-executing:

> Admittedly, the substantive rights guaranteed through the trusteeship agreement are not precisely defined. However, we do not believe that the agreement is too vague for judicial enforcement. Its language is no more general than such terms 'due process of law,' 'seaworthiness,' 'equal protection of law,' 'good faith,' or 'restraint of trade,' which courts interpret everyday.

502 F.2d at 99.

The cases cited by the Associations are not probative of the enforceability of the Stevens treaties.[482] The non-self-executing argument should be disregarded.

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482. Some of the cases are individuals challenging the government's implementation of a treaty, *Z and F Assets v. Hall*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd* 311 U.S. 470 (1941); *Jensen v. National Marine Fisheries Services*, 512 F.2d 1189 (9th Cir. 1975); and even some of those cases are considered justiciable, *see Mellon v. Orinoco Iron Company*, 266 U.S. 121 (1924). Some are cases of foreign citizens trying to create a cause of action in the United States courts based on activities that took place in foreign countries, *Dreyfus v. Von Finck*, 534 F.2d 24 (2nd Cir.), *cert. denied*, 429 U.S. 835 (1976), or don't involve a treaty at all, *National Indian Youth Council v. Bruce*, 485 F.2d 97 (10th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), *see Robertson v. General Electric Company*, 32 F.2d 495 (4th Cir.), *cert. denied*, 280 U.S. 571 (1929).

Typically when courts rule that a treaty is not self-executing, they do so because they do not wish to interfere with the political conduct of foreign relations by the Executive branch. Here the Executive branch has itself invoked judicial relief seeking an injunction to prevent interference with its implementation of treaties. Thus the political question doctrine poses no obstacle to judicial enforcement of the Stevens treaties.

CONCLUSION

These appeals represent yet another effort to overturn or circumvent implementation of the treaties made between the United States and the Washington tribes. The dispute concerning the meaning of the treaties and the scope of the restrictions they impose on State authority has been before this Court on numerous occasions. Decisions rendered by this Court have determined the basic parameters of State authority and the issues presented in the present case are not novel. This Court has already denied review of the basic underlying decision, (*United States v. Washington*, 423 U.S. 1086 (1976)), and no new circumstances are presented which would call for an avoidance of the ordinary principles of *res judicata*.

Assuming, *arguendo*, that it is necessary to examine the basis of the underlying decision, it is clear that that decision construing the treaties to mean that each of the contracting parties is entitled to an equal share of the fishery was mandated by the established evidence concerning the circumstances surrounding the execution of the treaties and by the canons of construction laid out by this Court over more than a century.

The latest series of enforcement orders entered by the Court and affirmed by the Ninth Circuit Court of Appeals and appealed here have become necessary only because of the refusal of the State of Washington and the non-treaty fishing associations to comply with the original judgment:

> Except for some desegregation cases . . . the District Court has faced the most concerted official and private efforts to frustrate its decree in this century.

Puget Sound Gillnetters v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

In these proceedings, the State and Associations argue that the treaty provided treaty fishermen no greater rights than those enjoyed by non-treaty fishermen. This Court has already rejected their argument:

> This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.

United States v. Winans, 198 U.S. 371, 380 (1905).

It is clear that the treaties did promise more and give the word of the Nation for more. Those promises must be maintained. The federal cases should, therefore, be affirmed; the State cases should be reversed with instruction to comply with the federal court orders.

Respectfully submitted this 26th day of January, 1979.

ZIONTZ, PIETILE, MORISSET, ERNSTOFF & CHESTNUT
MASON D. MORISSET
STEVEN S. ANDERSON
Counsel for Lummi, Makah, Tulalip and Quileute Indian Tribes

EVERGREEN LEGAL SERVICES
THOMAS P. SCHLOSSER
ALAN C. STAY
Counsel for Certain Intervenor Tribes

NATIVE AMERICAN RIGHTS FUND
ROBERT PELCYGER
Counsel for Certain Intervenor Tribes

Of Counsel:
JANE CANTOR
JOHN CLINEBELL
JOANNE E. FOSTER
MOSHE J. GENAUER
ALEXANDRA HARMON

DANIEL A. RAAS
Of Counsel for Lummi Indian Tribe

WILLIAM H. RODGERS, JR.
Counsel for Puyallup Indian Tribe

APPENDIX

TREATY OF POINT ELLIOTT, JAN. 22, 1855

(12 Stat. 927. Ratfied March 8, 1859.)

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men and delegates of the Dwamish, Suḳuamish . . . . and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence around the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Shais-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indian being compensated for any damage thereby done them.

ARTICLE 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however,* That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two year, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each years; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so that as the same may be applicable.

Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 9. The said tribes and bands acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE 14. The United States further agrees to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens, Governor and Superintendent. [L.S.]

Seattle, Chief of the Dwamish and Suquamish tribes, his x mark.

. . . [There follows the names of other chiefs and headmen].

Executed in the presence of us—

M. T. Simmons, Indian agent.

C. H. Mason, Secretary of Washington Territory.

Benj. F. Shaw, Interpreter.

Supreme Court, U. S.
FILED
JAN 26 1979
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et el.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF THE INTERVENOR-RESPONDENT QUINAULT INDIAN NATION

Office and Post Office Address:
P. O. Box 1118
Taholah, WA 98587

MICHAEL TAYLOR
Reservation Attorney
Quinault Indian Nation

CRAFTSMAN PRESS SEATTLE, WASHINGTON

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF OF THE INTERVENOR-RESPONDENT QUINAULT INDIAN NATION

I.

QUESTION PRESENTED

May the Intervenor-Respondent Quinault Indian Nation, be permitted to regulate its own members fishing at treaty protected usual and accustomed fishing grounds and stations outside the Quinault Indian Reservation, free of assertions of police power by the State of Washington, absent a showing of necessity to regulate for conservation purposes by the State of Washington.

II.
INTRODUCTION

The District Court of the Western District of Washington in *United States v. Washington* (Joint Appendix at p. 63) held that Indian tribal governments meeting certain standards are entitled to regulate their own members fishing at usual and accustomed fishing grounds and stations, free of assertions of state police power, as long as the tribal government is specifically qualified to do so and meets certain conditions (Joint Appendix pp. 82-86). The Court of Appeals for the Ninth Circuit upheld the District Court's declaration of "self-regulatory" status for qualified tribes, finding that such status did not infringe on the State's power to regulate for conservation purposes and was within the equitable discretion of the Court. (Joint Appendix p. 48).

Only two tribal governments of the twenty now intervened in *United States v. Washington* have been found qualified for self-regulatory status. The Quinault Indian Nation is so qualified and has been operating its fisheries under the provisions of the District Court Decree since 1974. In order to qualify for self-regulatory status a tribal government must have:

> (a) Competent and responsible leadership.
>
> (b) Well organized tribal government reasonably competent to promulgate and apply tribal off-reservation fishing regulations that, if strictly enforced, will not adversely affect conservation.
>
> (c) Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations.
>
> (d) Well qualified experts in fishery science and management who are either on the tribal staff or whose services are arranged for and readily available to the tribe.
>
> (e) An officially approved tribal membership roll.
>
> (f) Provision for tribal membership certification, with individual identification by photograph, in a suitable form that shall be carried on the person of each tribal member when approaching, fishing in or leaving either on or off-reservation waters.

A self-regulating tribe, in order to retain its status, must comply with the following conditions:

> (a) Provide for full and complete tribal fishing regulations which, before adoption, have been discussed in their proposed final form with Fisheries and Game, and include therein any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation.
>
> (b) Permit monitoring of off-reservation Indian fishing by Fisheries and Game to the extent reasonable and necessary for conservation.
>
> (c) Provide fish catch reports, as to both on and off-reservation treaty right fishing, when requested by Fisheries or Game for the purpose of establishing escapement goals and other reasonable and necessary conservation purposes.

(Joint Appendix pp. 84-85)

The Quinault Nation has filed this separate Respondent's Brief specifically to present its own case for fisheries self-regulation under the treaties. The Quinault Nation is made up of the tribes and bands affiliated under the Treaty of Olympia, 12 Stat. 971; *Halbert v. United States*, 283 U.S. 753 (1931). The Bureau of Indian Affairs recognizes the Tribe as organized under the provisions of the Indian Reorganization Act in 1935 (25 U.S.C. § 461-483), but the Quinault Nation continues to govern itself under the

1922 tribal constitution, as amended 1965 and 1975. The enrolled membership of the Quinault Nation is approximately 2,000 persons.

The tribal homeland of the Quinault Nation, reserved by the treaty of 1856, consists of approximately 200,000 acres on the Olympic coastline, and is surrounded by the State of Washington. The Reservation includes within its boundaries the whole length of one coastal river, significant portions of three others, and the total surface and shoreline of a 20,000 acre lake. The Reservation remains virtually unpopulated by non-Indians. The waters of the Quinault Reservation are spawning and nurturing grounds of chinook salmon, chum salmon, sockeye salmon, and steelhead trout.

For untold centuries the people of the Quinault Nation have earned their livelihood by harvesting salmon and steelhead in the river and marine waters from the Olympic Peninsula south to the Columbia River. Much of the modern Quinault culture and economy, as in centuries past, is based upon harvesting, studying, protecting, propagating, preserving for future consumption, preparing for sale, commercial shipping, and sale[1] of the salmon and steelhead runs that enter Reservation waters and the off-reservation waters at usual and accustomed grounds and stations.

III.

SUMMARY OF BRIEF

This brief will describe: the modern existence of the Quinault people and how that existence is organized around the salmon and steelhead resources the farsighted

1. The ancestors of the Quinault Nation engaged in the commercial sale of salmon and steelhead before and at the time of the treaties. (Joint Appendix, pp. 370-372, 393-394, 398-406, 415.)

ancestors of the Quinault reserved for their use by federal treaty some one hundred and twenty four years ago; the reasons that the Quinault Nation was found by the District Court in *United States v. Washington* to be a self-regulating tribe, 384 F. Supp. 341, (Joint Appendix pp. 85-86); the powers of the State to regulate Quinault fisheries for conservation purposes; the practical consequences of self-regulation; the legal justification for self-regulating status.

IV.

THE QUINAULT NATION IS A COMPETENT, INDEPENDENT, FISHERIES MANAGER

The Quinault Indian Nation is the only tribe found to be self-regulating with an active fishery in the area covered by the Decision of the District Court.[2] The decision to affirm the self-regulatory status of the Quinault Nation was based in part upon the following factors:

(1) The Quinault Nation has a long history of effective fisheries regulation of its members, without interference by State or federal agencies.

(2) The Quinault Nation has a large University trained staff of fisheries scientists, supported by necessary technical equipment and data gathering systems.

(3) The Quinault Nation operates a substantial hatchery system which has planted more than forty-eight million salmon and steelhead on and off-reservation over the last four years, benefiting non-Indian fisheries to a greater degree than Indian.

(4) The Quinault Nation has an effective tribal court

2. The Yakima Indian Nation, also found to have met the qualifications and conditions imposed by the District Court, has adjudicated usual and accustomed fishing grounds and stations in the case area, but chooses to conduct all of its fisheries on the Columbia River System, outside the case area. (Findings of Fact No. 158 and No. 159, Joint Appendix p. 158.)

system, accustomed to fishing violation adjudication.

(5) The Quinault Nation has an effective fisheries law enforcement organization.

A brief description of each of these factors follow.

1. Historical and Modern Regulation of Quinault Fisheries

Prior to formal fishing regulations and patrolmen, the Quinault regulated their fisheries by customary means. (Joint Appendix pp. 377-379). In the year 1910, the federal Bureau of Indian Affairs attempted to impose regulations on Quinault fisheries. The Tribe was, however, successful in obtaining a federal court ruling that prohibited the Bureau from interfering in any way with Quinault fisheries. *Mason v. Sams,* 5 F.2d 255 (1925). Shortly after the victory in *Mason, supra,* the Business Committee adopted the first written Quinault Fishing Regulations, which contained for the time they were enacted, substantial provisions for conservation of the run. (Appendix A). Shortly thereafter, a fisheries patrolman and fishing court judge were appointed. (Joint Appendix p. 146, Finding of Fact #124). Since that time the Quinault Nation has regulated its fisheries without interference from federal or state agencies. *Pioneer Packing v. Winslow,* 294 P. 557 (1930). The present Quinault Tribal Conservation Code, Title 51, Quinault Tribal Code, runs to 38 pages (without the addition of specific regulations) and governs every aspect of fishing by Tribal members.

In addition, the Quinault Nation allows only a specified and limited number of fishermen to participate in each fishery. The "limited entry fishery" provides for effective management and enforcement. Each fisherman is assured a greater degree of economic success.

The "unlimited entry fisheries" encouraged until recently by the State of Washington have resulted in overcapitalization of the non-Indian fleet and the uncontrolled destruction of salmon resources.[3]

By tribal law the Tribe limits sale of all fish caught under Tribal license to the Tribal fish processing facility. This limitation aids biological management of Quinault fisheries by making species, catch, and location data immediately available to tribal scientists.

2. Fisheries Science on the Quinault Reservation

The Quinault Nation now employs five fisheries scientists and seven fisheries technicians in its Fisheries Division. (Appendix B; Fisheries Scientists Employed As Full Time Staff by Quinault Indian Nation 1970-78). These biologists have a number of duties including research and development, hatchery management, harvest management, stream rehabilitation, regulation of non-fisheries work in or near streams, data collection, state-tribal relations, advising tribal regulatory and enforcement agencies.

The Fisheries Division maintains its own computer system and laboratory on the reservation for collection, investigation, and analysis of data. The Tribal computer system is linked with those at the University of Washington School of Fisheries and the Washington Department of Fisheries, so that the exchange of data is a rapid and uncomplicated procedure.

---

3. In 1974, the State of Washington began to limit entry into its commercial fisheries. Revised Code of Washington 75.28.450-.480. These statutes would appear to prevent Indians, licensed by their tribal governments, from participating in State fisheries.

3. The Quinault Hatchery System

The Quinault Nation operates three Tribal salmon and steelhead production facilities (two on-stream hatcheries and one floating pen hatchery on Lake Quinault). In addition the Tribe cooperates in the running of the Quinault National Fish Hatchery on the Reservation with the United States Bureau of Sports Fisheries and Wildlife. Together these facilities have planted more than forty-eight million salmon and steelhead on the Washington Coast since 1974. (Appendix *C*, Salmon and Steelhead Hatchery Releases From Facilities On the Quinault Indian Reservation For The Period 1974-1978.) Tribal data show that 38% of the salmon and steelhead returning from Quinault Reservation facilities are taken by non-Indian United States fishermen, while only 30% are taken in Indian fisheries. (Appendix *D*, Estimated Contributions to Fisheries of Salmon and Steelhead Releases [1974-1979] From Enhancement Facilities on The Quinault Indian Reservation.)

4. Quinault Tribal Courts

The Quinault Tribal Court and Courts of Appeals evolved from the fishing court set up by the Tribal Business Committee subsequent to the ruling in *Mason v. Sams, supra*. As a result the Tribal Courts have been accustomed to enforcing Tribal conservation laws for over half a century and are well acquainted with the requirement that Tribal fisheries be properly managed.

5. Quinault Tribal Fisheries Enforcement

As stated above, formal tribal fisheries enforcement by tribal patrolmen at Quinault has a long history. Today ten regular and three specially assigned tribal officers patrol

the off-reservation fishing areas on a daily basis. This is a very high patrol ratio as Tribal statistics show that off-reservation fisheries consist of no more than forty (40) fishermen at any one time. Present statistics show that from the beginning of the Fall fishing season 1977, to December 1978, tribal police issued thirty-three (33) citations for violation of commercial regulations, and confiscated thirty-two (32) improperly used or unmarked nets (without citation). Of the thirty-three citations, nineteen (19) resulted in conviction or bail forfeiture and ten (10) were pending.

V.
PRACTICAL DEFINITION OF SELF-REGULATORY STATUS

The Quinault Nation has experienced four years of self-regulation under the requirements set out in the Decision, Orders, and Rulings of the District Court. The practical definition of self-regulation as it has been determined through that experience may be outlined as follows.

(1) The Quinault Nation (through its staff biologists and Fish and Game Commission) establishes its own fishing seasons and regulations. This must be, and is, done through consultation with State biologists and managers. The tribal regulations apply only to Quinault members and to the Quinault share of the run. Problems and disputes are generally resolved at the biologist level by reference to generally accepted data and methods of analysis. State regulations managing the non-treaty share of the run do not apply to Quinault Fisheries.

(2) The Quinault Nation enforces its own regulations and conservation closures. Tribal patrolmen make all ar-

rests of Indian violators,[4] and Indian violators are tried in Tribal courts. Quinault fishermen are not subject to arrest by State Fish and Game agents, and are not subject to being tried in State courts.

(3) The Quinault Nation is generally free of state regulation in fisheries research and propagation activities carried on within usual and accustomed fishing grounds.[5] The Tribe must and does consult with State biologists on all major matters.

Tribes that are not self-regulating are subjected to the jurisdiction of state police and courts, because the state is allowed to adopt tribal fishing regulations as its own; are subject to state conservation closures without prior hearing, and must obtain state permits for fisheries research and propagation activities.

4. In 1974, shortly after the District Court handed down its decision, the Quinault Nation offered to cross-commission certain state fisheries officers as Tribal patrolmen so that they might arrest Quinault violators for violating tribal regulations. The offer, though it has been repeated, has been refused by the State.

5. In 1977, subsequent to this Court's decision in *Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977), the Department of Game decided to prevent the Quinault Nation by force from planting steelhead in a river upon which usual and accustomed grounds were located. The Department had apparently concluded from *Puyallup Tribe*, *supra*, that if the Quinault Nation were allowed to plant the steelhead, the Tribe might have some proprietary right in the returning fish. The steelhead in question had been raised in a Tribal hatchery under a joint Game Department-Tribal planting program and had scores of thousands of Tribal dollars invested in them. The state action would have required that the fish be destroyed. During the incident State agents drew guns against Indian hatcherymen attempting to plant fish. The Quinault Nation moved under paragraph 25 of the District Court's Injunction for a determination that the fish could be planted. At the assigned hour for hearing the Department relented. (Record, Docket Numbers 2072-2077, April 30, 1976). Later the District Court held that the Quinault Nation, as a self-regulating tribe, was generally not subject to state fisheries jurisdiction in research and propagation matters as long as it acted responsibly and consulted on all major issues with state biologists. (Record, Docket Number 2459, September 14, 1976).

VI.

THE DISTRICT COURT AFFIRMED STATE POWER TO REGULATE QUINAULT TRIBAL FISHERIES FOR CONSERVATION PURPOSES

The State of Washington has the power to regulate Quinault off-reservation fisheries when a danger to conservation can be shown. The holding of the District Court regarding self-regulatory status does not infringe on that power. Despite the self-regulating status of the Quinault Nation, the District Court found that this Court had upon numerous occasions held that States have authority to regulate Indian harvesting of fish and game outside of a reservation when conservation of a species is threatened. (Joint Appendix, p. 82) The holding of the District Court is consistent with a concern for conservation this court has expressed on numerous occasions. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Washington Game Department v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165 (1977). It is also consistent, however, with the ruling in *Antoine v. Washington*, 420 U.S. 194 (1975). In that case this Court held that absent a showing by the State that State regulation of federally protected Indian harvesting of game was necessary for conservation purposes, the State would not be permitted to so regulate.

The District Court foreshadowed the holding in *Antoine*, *supra*, when it enjoined the State as follows:

> Defendants shall not interfere with or regulate or attempt to regulate the treaty right fishing of members of the Yakima Indian Nation or Quinault Tribe or any other treaty tribe during any period for which said

> tribe has been or is hereafter determined pursuant to Final Decision No. 1 to be entitled to self-regulate such fishing by its members without any state regulation thereof; provided however that monitoring by the state as stated as a condition for self-regulation may be exercised by the state and in case of a threat to the resource, the defendants may apply to the court for the exercise of regulatory authority;

(Joint Appendix pp. 219-220; see also, Question 8 of Rulings on Fisheries Questions, Joint Appendix p. 211)

The power of the State to protect the fishery is confirmed by the District Court. If it can be shown that a fishery conducted by a self-regulating tribe threatens the conservation of the resource, the State may assert its police power to halt the fishery. No void in regulatory power necessary to conserve salmon and steelhead run exists. If the self-regulating tribe fails to provide adequate protection through its own regulations and enforcement, the State after prompt, appropriate hearing can step in.

Additionally, failure of a self-regulating tribe to appropriately handle its responsibilities under the provisions of the District Court's decision could lead to a complete loss of self-regulatory status (Joint Appendix p. 228, paragraph 25c of the Injunction) or the complete removal by the District Court of the possibility of attaining self-regulatory status. (Joint Appendix p. 48, note 4)

Maintenance of self-regulatory status provides the tribe with a method for counterbalancing the biased judgments of state fisheries scientists; keeping themselves and their members free from the jurisdiction of biased and brutal State Fish and Game agents and from the judgments of biased state courts. (Joint Appendix p. 31; concurring opinion of Burns, District Judge, Joint Appendix p. 59;

Introduction to the Opinion, *Puget Sound Gillnetters Assn., et al. v. United States District Court, et al.*, 573 F. 2d 1123, at 1126). As a result, self-regulatory tribes are not likely to treat their fisheries management responsibilities lightly and the imposition of proper conservation measures is doubly assured.

VII.

PRACTICAL IMPACT OF SELF-REGULATING STATUS UPON REGULATION OF QUINAULT FISHERIES

Since the handing down of the decision of District Court in 1974, five Quinault off-reservation fishing seasons have come and gone. During each season as many as forty Quinault fishermen have been on the water at any one time. More than one hundred Quinault fishermen have participated in off-reservation fisheries. Throughout those five seasons, throughout all of the differing fisheries (Quinault harvest steelhead, chinook, coho, and chum outside their Reservation) the State of Washington has *not once* gone to the District Court against the Quinault Nation claiming that a State closure of a tribal fishery was necessary for conservation reasons.

In each and every case where a conservation problem arose on a fishery shared by Quinault and non-Indian fishermen, the matter was resolved between Tribal scientists and regulators and State scientists and regulators. Court action has never been necessary. (See: Quinault Tribal Fishery Closures And Adjustments To Meet Spawning Escapement Goals, 1974-78 Appendix E). There can be no doubt, given the enmity between the State and Quinault governments, that if there had been any occasion in which the state had felt that it could show that the

Quinault Nation was acting in a manner that would endanger a fishery it would have gone to the District Court seeking to close the Quinault fishery. Similarly, there can be no doubt that if the State and Tribal governments can work together as they have been required to do under these most trying of circumstances to preserve and protect the fishing resource, self-regulatory status poses no danger to salmon and steelhead fisheries.

VIII.

TRIBAL SELF-REGULATION IN FISHERIES MANAGEMENT IS APPROPRIATE UNDER THE LAW

The off-reservation fishing rights of the Quinault Nation, protected by treaty cannot be qualified by the State. *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at 398 (1968). The State of Washington, throughout this century has consistently used its police power to qualify and destroy off-reservation treaty fishing rights.[6] *United State v. Winans*, 198 U.S. 371 (1905); *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), *State v. Meninoch*, 115 Wash. 528, 197 P. 641 (1921); *State v. Wallahee*, 143 Wash. 117, 255 P. 94 (1927); *State v. Tulee*, 7 Wn.2d 124 (1941); *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963); *State v. Moses* 79 Wn.2d 832 (1971). The State continues to act against Indians fishing in usual and accustomed grounds. *State v. Petit*, 88 Wn.2d 267, 558 P.2d 796 (1977). Under the rule in the *Petit* case a treaty Indian charged with illegal fishing in a State court must prove

6. The State claims that the Quinault Nation has only a few off-reservation fishermen (Brief of State of Washington p. 88). This calculation was made at the time when every off-reservation Quinault fishermen was subject to arrest and jailing by the State. (Joint Appendix p. 147, Finding of Fact No. 126.)

beyond a reasonable doubt that he is not guilty of the offense because of his treaty protection in order to be acquitted. 558 P.2d at 799.

The exercise of discretion by the District Court in dividing regulatory power between the Tribe and the State over those harvestable fish not necessary for conservation has avoided the conflicts which would have inevitably developed had the State, which exploits every opportunity to limit or destroy treaty Indian fisheries, been charged with regulating Quinault fisheries.

The Quinault Treaty Fishing right is a tribal right. *Whitefoot v. United States*, 293 F.2d 658, 155 Ct. Cl. 127 (1961), *cert. den.*, 369 U.S. 818 (1962). The Quinault Nation has authority to regulate the use of a tribal right by its members. *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974); *United States v. Wheeler*, — U.S. ——, 98 S. Ct. 1079 (1978).

State regulation of tribal hunting and fishing is an unnecessary burden upon the tribal right and a qualification of the treaty right when the state has full and appropriate power to regulate if it can show that conservation is threatened (See section VI) and it has not made such a showing. *Antoine v. Washington*, 420 U.S. 194 (1975). State regulation would be an unnecessary duplication of an already effective system of managing Quinault fisheries operations.

The District Courts' emphasis on the congressionally approved policy of tribal regulation of its own resources has received further emphasis from Congress in the Indian Self Determination Act, 25 U.S.C. §450. In that Act the Congress specifically found that "the Indian people will never surrender their desire to control their relationships both

among themselves and with non-Indian governments, organizations, and person." 25 U.S.C. § 450(a)(2).

Self regulation, as limited by the holding of the District Court, provides first for protection of the resource by allowing only certain especially qualified tribes to exercise such powers and confirming the power of the state to step in if conservation of the run is threatened. Second, it clearly follows the holdings of this Court that do not allow state qualification or regulation of treaty hunting and fishing rights absent a showing of conservation necessity. Third, it doubly protects the necessary escapement because both the State and the Tribal governments must carefully monitor catches to protect the runs and their management powers. Fourth, it avoids unnecessary conflict between historic adversaries in the fishery, thus leading to more effective management. Finally, it furthers federal policy in upholding and strengthening tribal self government.

The Petitioners point to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Kake v. Egan*, 369 U.S. 60 (1962); and *Kennedy v. Becker*, 241 U.S. 556 (1916) to claim that the State has the absolute and unfettered right to regulate Indian fishing outside the reservation. This Court in *Mescalero* and *Kake* was careful to point out that no federal law prohibited or reserved to the Indians the right to be free of the State tax or fishing regulations imposed in those cases. See *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). Here a specific federally reserved treaty right protects off-reservation fisheries activities of the Quinault Nation.

In *Kennedy, supra*, this Court was confronted with a case in which it was claimed that the State had no right whatsoever to regulate Indian fishing. There this Court expressed its concern in terms of the need for states to be able to regulate for conservation. Here, the District Court specifically affirmed state power to regulate for conservation purposes, (See section VI). The District Court allowed the Quinault Nation to regulate its own fishermen only so long as it cannot be shown by the State that the tribal fisheries are taking any of the fish that have been biologically determined to be the optimal amount of fish appropriate to provide for a stable and increasing run.[7] If the Quinault overstep those bounds the state may step in and impose appropriate regulations.

It has been argued that the Fisheries Conservation and Management Act 1976, 16 U.S.C. § 1801, et seq, (hereinafter "FMCA") is somehow supportive of a "unified" management system for fisheries. Proponents of this theory appear to conclude that every government except a tribal government may regulate its own fisheries. While the FCMA may establish federal policy to conserve fisheries resources, it certainly does not establish anything like a unified management system. At least two of the *numerous* independent, management units set up by the FCMA, the Pacific Council and the North Pacific Council, 16 U.S.C. § 1852, have jurisdiction over salmon and steelhead orig-

7. Although this "escapement" number is usually phrased in terms of the amount of fish "necessary for the conservation of the run," Quinault Tribal and State biologists and regulators generally attempt to protect a larger number so that runs will increase rather than simply being perpetuated or conserved. Tribal fisheries in Grays Harbor have been managed to provide levels of escapement determined by joint agreement with the State. Quinault regulations provide for these levels of escapement through adjustments of fishing effort, late openings of fisheries and complete closures. The Tribe has repeatedly demonstrated sound technical management ability and taken unilateral action to close its fisheries without advice or request from the State.

inating in Quinault usual and accustomed fishing grounds. In addition, the FCMA recognizes that all the states have independent jurisdiction over their own internal waters and marine waters to three miles from shore. 16 U.S.C. § 1856. Under the provisions of the Act, Pacific salmon and steelhead are, thereby, regulated by the two federal councils, four coastal states: Alaska, Washington, Oregon, and California, and one state not even included in any of the federal regulatory units, Idaho. Finally, the federal regulatory units are made up of officers of all the states named in the Act, and members of the fishing and packing industries affected. 16 U.S.C. § 1852 (b)(1)(a). It appears to be overstating the case to claim that this structure is a unified management system. The response of the treaty tribes to the FCMA has been to continuously petition the appropriate officials for appointment of voting members to the Pacific Council. (Appendix F). When no Indians were appointed to the Pacific Council, the tribes were successful in obtaining membership on the non-voting advisory board to the Council. (Appendix G).

IX.

CONCLUSION

The District Court's declaration of self-regulatory status for qualified Indian tribes should be affirmed.

Respectfully submitted,

MICHAEL TAYLOR
Reservation Attorney
Quinault Indian Nation

APPENDIX A

QUINAULT FISHING REGULATIONS—1925

At tribal meetings of the different tribes and bands of the Quinault and Quilieute Indians held at Taholah, Washington, on the 28th day of April, 1925, confirmed on the 16th day of June, 1925, by a tribal meeting, the said Indians voted to adopt the following rules and regulations to govern fishing upon the Quinault Indian Reservation, and particularly in the Quinault River and Quinault Lake upon said reservation.

(1)—Fishing locations shall be on both sides of the Quinault River, 255 feet apart, and the locations on one side shall be directly opposite the locations on the other side, as shown in a drawing made by Special Agent Dorrington in connection with his report dated December 20, 1915, a photostatic copy of which is on file at the Taholah Indian Agency, Hoquiam, Washington.

(2)—The maximum amount of gear (cross nets, leads and pockets) that may be used on any location shall not be increased in any manner over that provided heretofore per the aforesaid drawing of Special Agent Dorrington except by the action of the Tribal Council called to consider such changes and except as hereinafter provided. Provided, however, that in locations 1 to 5 the entire net shall not exceed 18 fathoms in length.

(3)—An open channel shall be established and maintained as follows:

> Beginning with locations 1 and 2, and including locations 5 and 6, the open channel shall be 75 feet in width; between 7 and 8, to and including locations 39 and 40, the open channel shall be not less than 125 feet in width, for the remaining locations the open channel shall be not less than 100 feet. No fishing is to be permitted in channel, and the said open channel be kept free from stakes, nets, leads or other obstructions of any kind whatsoever at all times. Owners of location will be held responsible for the enforcement of this rule along the front of their respective locations.

(4)—A hook not exceeding 50 feet in length shall be permissible to those fishermen who have no pocket on their web; Provided, however, that in no case shall the hook extend into the open channel provided for in Section 3.

(5)—No nets shall be placed in front of the mouth of the river channel.

(6)—No splash rope or other device that will frighten the fish will be allowed in the river.

(7)—No person shall acquire, operate or control more than one fishing location upon the Quinault River, and the present fishermen now operating fishing locations upon said River shall continue to have the exclusive right to fish said location without the molestation or interference of any person. Any change in any person fishing said location must receive the consent and approval of the proper authorities, and when two or more persons jointly operate or control a fishing location in said River, only one of them shall be allowed to operate same at a time.

(8)—Fishing locations shall not be acquired, operated or controlled by any nonresident Indian, nor acquired, operated or controlled by any person other than a bona fide resident of the Quinault Indian Reservation, nor shall any fishing location be acquired, operated or controlled by any Indian or other person not having full rights upon the said Quinault Indian Reservation.

(9)—If any fishing location is abandoned, or forfeited for a violation of these rules and regulations, or if the operator of said location dies, a majority vote of the Quinault Business Committee shall designate the successor, subject to the approval of the Tribe. Provided, however, that in case of death, preference will be given to the members of the deceased's family, if they be bona fide residents of the Quinault Indian Reservation.

(10)—All nets shall be lifted and removed entirely from the River by 8:00 P.M. on Saturday from April 15th to June 30th, at all other times at 6:00 P.M. and shall not be returned to the River until 6:00 A.M. of the following Monday. No net shall remain on or in the locations during the

hereinafter mentioned closed season under any circumstances. This rule shall apply throughout the entire year.

(11)—All nets shall be lifted and the fish removed therefrom at least once in every 24 hours. Under no circumstances shall nets be allowed to remain is position without having been lifted and the fish removed therefrom for a greater length of time than aforesaid.

(12)—No person shall be allowed to fish in the Quinault Lake except with a hook and line, and no fishing tackle shall be used by any person fishing in said Lake, which tackle will cause the snagging of blue back or other salmon fish, it being our desire and intention that the snagging of blue back salmon, particularly by White people from Lake Quinault shall stop, and that irrespective of what fishing tackle may be used and when it shall appear to the Tribe upon competent proof that any person is intentionally snagging blue back salmon in said Lake even though that person be using but hook and line, all fishing privileges both in the Quinault Lake and the Quinault River heretofore granted such person shall be withdrawn and he or she will not be allowed to again fish in said Lake or River within the boundaries of the Quinault Indian Reservation.

(13)—No person, Indian or otherwise, shall be allowed to fish in any other manner, except with a hook, and line, in or upon the Quinault River at a point above what is called Chow Chow bluff, said Chow Chow Bluff being approximately 6 miles from the mouth of said Quinault River, and under no circumstances or conditions will any set net fishing be allowed above and beyond such Chow Chow Bluff. It being the intention and the purpose of the Quinault Indian Tribe to establish this point as a dead line in said Quinault River, beyond which no person will be allowed to fish accept as herein provided. Provided, however, that this shall not apply to the present fishing location of Bob Pope during his lifetime.

(14)—If any person shall fish illegally or shall violate the foregoing rules and regulations, and upon competent proof of such violation, such person will be suspended from all fishing rights on said Quinault River or Quinault Lake for one year. One violation of said rule or regulation shall be deemed sufficient to invoke this penalty.

(15)—The Quinault River shall be closed to all kinds of net fishing beginning January 31st up to April 15th. Provided, that a net not less than 8 inch mesh shall be used for the period July 1st to September 15th. After September 15th nets or gear of 6½ inches may be used for silver and steelhead.

For home consumption of the party fishing, net fishing will be also permitted during the closed season on Thursday of each week from 6:00 A.M. to 6:00 P.M. under the same limitations as above set forth.

(16)—All new applicants for fishing locations in the Quinault River shall present their applications to a committee of seven, now known as the Quinault Business Committee, the said Committee having been selected by the Tribe. This Committee of seven is authorized to consider all applications for new fishing locations and assign same when in their judgment it is proper to do so. In the event an applicant feels aggrieved or displeased with the ruling of the Committee, it is provided that the applicant shall have the right to appeal to a council meeting of all Indians of the Tribe for the purpose of finally deciding the matter, and then be guided by the action of the Tribe in the premises.

(17)—Violations of any of the foregoing rules except as hereinbefore provided, shall upon conviction therefore, be punished by withdrawal of fishing privileges as follows:

(A)—For the first such offense, the fishing privileges of the violator may be withdrawn for a period of not less than one week and not more than one month.

(B)—For the second offense, or for conviction of three or more violations at the same trial, all fishing privileges of the violator shall be withdrawn for not less than one month, nor for more than one fishing season.

(C)—For the third offense or for numerous flagrant or willful violations, all fishing privileges of the violator shall be withdrawn for the remainder of the season, and the fishing privileges of such holder at said location may be permanently forfeited.

(18)—The Court of Indian Offenses shall have cognizance of the aforesaid offenses, but the Superintendent shall have the right, upon the appeal of the defendant or upon his own motion, to review the case and to make such modifications of the sentence imposed by the Court as may to him seem advisable. The Superintendent shall also have the authority to commute the sentence of the Court of Indian Offenses or to direct a lesser sentence than herein provided when, in his opinion, good and sufficient reason exists therefor. The defendant shall have the right of an appeal to the Superintendent and the Commissioner of Indian Affairs in all cases.

(19)—In the interest of propagation, the Bureau of Fisheries will have sole jurisdiction over the streams entering Quinault Lake which are known as spawning grounds, and joint responsibility in enforcing the laws and policing the Lake, and the outlet of the Quinault River, however the Quinault Indian Tribe wishes at this time to go on record as opposing the fish weir now in use by the United States Bureau of Fisheries, it is our wish that this fish weir be abandoned, we see no useful purpose in maintaining same, we think it is destructive to the salmon and the propagation of same, as this weir destroys many salmon, and has been in operation for over 4 years. We grant the Bureau of Fisheries certain rights upon our reservation, and in return for these we ask that this weir be removed and take this opportunity of going on record against this weir.

(20)—That all of the foregoing rules and regulations be enforced by such officer or officers as the Secretary of the Interior or the Commissioner of Indian Affairs may designate.

We, the following named Indians, do hereby certify that we, and each of us are duly enrolled Indians and actual residents of the Quinault Indian Reservation, Washington, and that at a duly authorized tribal council held at Taholah, Washington, upon June 16, 1925, we and each of us were appointed, designated and elected by the entire vote of the Quinault and Quilieute Tribe and bands of Indians, to act as the Business Committee to represent the above named Tribes and Bands in any and all dealings which said Tribes and Bands may or might have with any person or persons, and that we, the following named committee have been

especially authorized to sign the foregoing rules and regulations upon the behalf of said Tribes and Bands, said Tribes and Bands having previously voted in favor of each and every one of the foregoing rules and regulations, and we the following named Committee are further authorized to submit same to the Secretary of the Interior, and the Commissioner of Indian Affairs for approval.

/s/ Harry Shale, President

/s/ William Mason

/s/ Chas. Strom

/s/ Oscar McLeod

/s/ Robert Sampson

/s/ Fred Pope

/s/ Johnson Waukeenas

/s/ W. J. Garfield

Quinault Business Committee

APPENDIX B

FISHERIES SCIENTISTS EMPLOYED AS FULL TIME STAFF BY THE QUINAULT INDIAN NATION 1970-78

Guy R. McMinds 1970-76	Bachelor of Science in Fisheries, University of Washington. Director, Quinault Department of Natural Resources. Responsible for setting and supervising over-all direction of the Quinault Fisheries Division.
Dr. Gary D. Stouffer 1971-72	Bachelor of Science in Fisheries, University of Washington. Master of Science in Fisheries, University of Washington. Doctor of Philosophy, Fisheries, University of Washington. Assistant Director, Quinault Department of Natural Resources. Responsible for development and supervision of fisheries program, especially projects related to environmental protection and logging practices.
Dr. Brian J. Allee 1971-73	Bachelor of Arts in Zoology, University of California. Doctor of Philosophy, Fisheries, University of Washington. Fisheries Manager, Quinault Fisheries Division. Responsible for harvest management and fishing resource restoration as well as technical planning and supervision of the Fisheries Division.
Norman H. Moe 1972-74	Bachelor of Science in Fisheries, Humboldt State College. Assistant Director, Quinault Department of Natural Resources. Responsible for planning and direction of Fisheries Division, especially tribal salmon and steelhead enhancement projects.

Terry L. Martin 1973-74	Bachelor of Science in Fisheries, University of Washington. Field supervisor, Quinault Fisheries Division. Responsible for resource studies related to salmon and steelhead juvenile abundance and environmental quality.
Terry E. Wright 1974-present	Bachelor of Science in Fisheries, University of Washington. Program Operations Manager, Quinault Fisheries Division. Responsible for operations of Fisheries Division including administration, resource enhancement, harvest management and environmental protection.
Dr. Jeffrey T. Fujioka 1974-75	Bachelor of Science in Fisheries, University of Washington. Master of Science in Fisheries, University of Washington. Doctor of Philosophy in Fisheries, University of Washington. Harvest Manager, Quinault Fisheries Division. Responsible for harvest regulations for all tribal fisheries. Also developed harvest management policies, such as limited entry fisheries, with the tribal Fish and Game Commission.
Cary L. Feldman 1974-78	Bachelor of Science in Fisheries, University of Washington. Master of Science in Fisheries, University of Washington. Resource Enhancement Manager, Quinault Fisheries Division. Responsible for planning and supervising all salmon hatchery and rearing activities.
Lynn Hatcher 1974-present	Bachelor of Science in Fisheries, University of Washington. Field Supervisor, Quinault Fisheries Division. Responsible for design and supervision of resource projects related to salmon and steelhead juvenile abundance, environmental quality and productivity of salmon and steelhead habitats.

Lawrence C. Lestelle 1974-present	Bachelor of Science in Fisheries, University of Washington. Master of Science in Fisheries, University of Washington. Environmental Manager, Quinault Fisheries Division. Responsible for over-all planning and supervision of studies related to environmental quality and natural production of salmon and steelhead.
Larry G. Gilbertson 1974-present	Bachelor of Science in Fisheries, University of Washington. Candidate for Doctor of Philosophy, Fisheries, University of Washington (will receive PhD. in Spring, 1979). Fisheries Manager, Quinault Fisheries Division. Responsible for planning, direction and supervision of entire Fisheries Division.
Phillip B. Roger 1975-present	Bachelor of Science in Fisheries, University of Washington. Master of Science in Fisheries, University of Washington. Harvest Manager, Quinault Fisheries Division. Responsible for supervision of all harvest management activities, including: preparation of regulations and data acquisition and analysis. Also responsible for data processing for entire Fisheries Division.
Paul B. Cunningham 1978-present	Bachelor of Science in Fisheries, Humboldt State University. Assistant Harvest Manager, Quinault Fisheries Division. Responsible for planning and supervision of activities related to harvest management of all tribal fisheries.

APPENDIX C

SALMON AND STEELHEAD HATCHERY RELEASES FROM FACILITIES ON THE QUINAULT INDIAN RESERVATION FOR THE PERIOD 1974-1978

Station	*Species*	*Year*	*No. Planted*	*Site (drainage system)*
Cook Creek Hatchery	Fall Chinook Salmon	1974	1,662,100	Quinault R.
		1975	643,306	Quinault R.
		1976	1,270,500	Quinault R.
		1977	2,240,200	Quinault R.
		1978	2,035,000	Quinault R.
			555,000	Sooes R.
	Coho Salmon	1974	1,294,000	Quinault R.
		1975	1,039,029	Quinault R.
			94,032	Queets R.
			100,000	Raft R.
			80,000	Moclips R.
			100,000	Copalis R.
			232,368	Humptulips R.
			330,000	Hoh R.
		1976	1,322,820	Quinault R.
			186,100*	Quinault R.
			109,865	Queets R.
			100,310	Raft R.
			50,000	Moclips R.
			144,667	Humptulips R.
			150,000	Hoh R.
		1977	1,402,450	Quinault R.
			225,000	Queets R.
			100,240	Raft R.
			155,000	Humptulips R.
			150,050	Hoh R.
		1978	1,100,000	Quinault R.
			265,000	Queets R.
			50,000	Raft R.
			50,000	Humptulips R.
			150,000	Hoh R.
	Chum Salmon	1974	193,000	Quinault R.
		1975	1,693,978	Quinault R.
			1,500,000	Sooes R.
		1976	3,121,900	Quinault R.
			998,577	Sooes R.
		1977	2,225,000	Quinault R.
			1,004,000	Sooes R.
		1978	2,000,000	Quinault R.
			630,000	Sooes R.

Station	Species	Year	No. Planted	Site (drainage system)
	Steelhead	1974	22,257	Quinault R.
		1975	48,500	Quinault R.
		1976	166,600	Quinault R.
		1977	49,500	Quinault R.
		1978	78,300	Quinault R.
Lake Quinault Rearing Station	Fall Chinook Salmon	1975	18,697	Queets R.
		1976	21,419	Queets R.
		1977	17,732	Queets R.
		1978	199,000	Quinault R.
			169,000	Queets R.
			1,927,475	Raft R.
	Spring Chinook Salmon	1976	68,288	Quinault R.
			72,953	Queets R.
	Coho Salmon	1975	98,581	Queets R.
		1976	37,550	Quinault R.
			32,106	Queets R.
			139,324*	Raft R.
		1977	334,000	Raft R.
	Chum Salmon	1977	105,000	Quinault R.
	Steelhead Trout	1976	74,715	Quinault R.
			26,345	Humptulips R.
			240,352*	Raft R.
		1977	44,291	Quinault R.
			109,314	Raft R.
			82,305	Humptulips R.
		1978	9,450	Quinault R.
			1,000	Queets R.
			7,186	Humptulips R.
			35,000	Hoh R.
	Sockeye Salmon	1974	154,730	Quinault R.
		1975	192,633	Quinault R.
		1976	937,476	Quinault R.
		1977	16,000	Quinault R.
		1978	388,778	Quinault R.
Ten O'Clock Creek Station	Coho Salmon	1975	27,155*	Quinault R.
			89,042*	Raft R.
			50,520*	Wreck Cr.
			147,645*	Camp Cr.
		1976	325,176*	Quinault R.
		1977	1,925,000*	Quinault R.

Station	Species	Year	No. Planted	Site (drainage system)
	Chum Salmon	1975	1,500,000	Quinault R.
			300,000	Queets R.
		1977	2,200,000	Quinault R.
			990,000	Queets R.
		1978	676,000	Quinault R.
			709,800	Queets R.
			676,000	Raft R.
	Sockeye Salmon	1975	148,410*	Quinault R.
		1976	300,000*	Quinault R.
	Steelhead Trout	1975	240,000*	Raft R.
Boulder Creek Station	Spring Chinook	1977	430,000*	Quinault R.
	Coho Salmon	1977	370,000*	Quinault R.
			579,397*	Raft R.
	Sockeye Salmon	1977	170,000*	Quinault R.
	Steelhead Trout	1978	25,000	Quinault R.

Total	Fall Chinook	Spring Chinook	Coho	Chum	Sockeye	Steelhead
On-Reservation						
Quinault R.	8,050,106	498,288	9,029,280	13,714,878	2,308,027	518,613
Queets R.	226,848	72,953	824,584	1,999,800		1,000
Raft R.	1,927,475		1,492,313	676,000		589,666
Other			328,165			
Off-Reservation						
Humptulips R.			582,035			115,836
Hoh R.			780,050			17,349
Sooes R.	555,000			4,132,577		
Other			100,000			
Grand Total	10,759,429	571,241	13,136,427	20,523,255	2,308,027	1,242,464

*Release of juveniles as fed-fry or fingerling. All other releases are smolt (downstream migrants).

APPENDIX D

ESTIMATED CONTRIBUTIONS TO FISHERIES OF SALMON AND STEELHEAD RELEASE (1974-1979) FROM ENHANCEMENT FACILITIES ON THE QUINAULT INDIAN RESERVATION

	Fall Chinook	*Spring Chinook*	*Fall Coho*	*Chum*	*Sockeye*	*Steelhead*	*Total*
Ocean Troll	3,120	331	117,958				121,409
Ocean Sport	2,259	428	33,020				35,707
Puget Sound Sport	753	514	890				2,157
Canadian Troll and Sport	53,474	13,921	121,364				188,759
Canadian Net	2,797	126	4,098				7,021
Oregon-California	215	0	36,307				36,522
Alaska	9,791	4,627	0				14,418
Puget Sound Net	108	143	0				251
Grays Harbor Net							
Non-Treaty	0	0	1,204				1,204
Treaty	0	0	4,815				4,815
River Net (treaty)	35,076	474	63,776	51,308	11,540	17,440	179,612
Steelhead Sport						17,440	17,440
Total							
Treaty Indian Catch	35,076	474	68,591	51,308	11,540	17,440	184,429
Non-Treaty Catch	72,517	20,090	314,841	0	0	17,440	424,888

12/12/78

APPENDIX E

QUINAULT TRIBAL FISHERY CLOSURES AND ADJUSTMENTS TO MEET SPAWNING ESCAPEMENT GOALS, 1974-78

I. On-Reservation

Quinault River

1974

Commercial net fishery reduced from seven to five days per week from October 10 through November 4.

Justification: Reduce high rate of exploitation on chinook salmon caused by unusual low flow conditions.

1976

Commercial net fishery closed Friday, June 18

Justification: Additional 24 hour closure necessary to meet escapement goal.

1977

Commercial net fishery reduced from seven days to four days per week from February 1 to March 1. River sport fishery reduced to two steelhead per fisherman bag limit for duration of season.

Justification: Reduce total rate of exploitation on steelhead to meet spawning escapement goal.

All non-guide river sport fishing closed on weekends from March 1 for duration of season.

Justification Reduce total rate of exploitation on steelhead to meet spawning escapement goal.

Commercial net fishery reduced from six to four and a half days per week from June 10 for duration of sockeye season.

Justification: Reduce total rate of exploitation on sockeye salmon to meet escapement goal.

Commercial net fishery reduced from seven to four and a half days per week from October 6 to No-

vember 1. Minimum mesh size increased from 6 to 7¾ inches.

Justification: Reduce total rate of exploitation on chinook and coho salmon to meet escapement goal.

Commercial net fishery reduced from seven to five and a half days per week from November 1 for duration of fall salmon fishery.

Justification: Reduce total rate of exploitation on coho salmon to meet escapement goal.

1978

Commercial net fishery closed from June 14 for duration of sockeye salmon season.

Justification: Total closure necessary to meet escapement goal.

Commercial net fishery reduced from seven to five days per week from October 12 for duration of fall salmon season.

Justification: Reduce total rate of exploitation on coho salmon stocks to meet escapement goal.

Queets River

1974

Commercial net fishery reduced from seven to five days per week from October 10 through October 30.

Justification: Reduce unusually high rate of exploitation on chinook salmon caused by unusual low flow conditions.

1975

Commercial net fishery for spring and summer chinook reduced from seven to five days per week from July 2 to August 1.

Justification: Reduce exploitation on depressed runs of spring and summer chinook.

1976

Commercial net fishery for spring and summer chinook reduced from seven to five days per week from May 1 to August 1.

Justification: Reduce exploitation on depressed runs of spring and summer chinook.

1977

Commercial net fishery for steelhead terminated on February 1, (1977) for the remainder of the season (through April 30).

Justification: Increase escapement on depressed runs of steelhead.

Commercial net fishery for spring chinook reduced from five days during week of May 1-7 to 2½ days.

Justification: Reduce exploitation on depressed run of spring chinook.

Commercial net fishery for blueback reduced from five days during week of May 1-7 to 2 days.

Justification: Minimize incidental catch of spring chinook.

Commercial net fishery for spring chinook reduced from five days per week from May 8-28 to 2½ days per week.

Justification: Reduce exploitation on depressed run of spring chinook.

Commercial net fishery for blueback reduced from five days per week from May 8-28 to 2 days per week.

Justification: Minimize incidental catch of spring chinook.

Commercial net fishery for spring chinook stopped on May 24 until June 6.

Justification: Reduce exploitation on depressed run of spring chinook.

Commercial net fishery for blueback reduced from five days during week of May 22-28 to two days and stopped during week of May 29-June 6.

Justification: Minimize incidental catch of spring chinook.

Commercial net fisheries for salmon and steelhead permanently changed from seven days per week to five days per week year round.

Justification: To establish a base fishing period per week at five days thereby assuring at least a two day per week escapement.

Drift net fishing declared illegal during summer months (to remain in effect during future years).

Justification: Reduce exploitation on spring-summer chinook.

Commercial seine fishery for smelt and perch reduced from a potential for seven days per week to two days per week during week of July 25-30.

Justification: Reduce fishing mortality on outmigrating juvenile chinook salmon.

Commercial seine fishery for smelt and perch terminated until further notice.

Justification: Reduce fishing mortality on outmigrating juvenile chinook.

Commercial seine fishery for smelt and perch restored to two days per week through remainder of summer.

Justification: Juvenile chinook outmigration over peak and fishing mortality reduced to low level.

Commercial net fishery closed from October 18 to October 21.

Justification: Complete closure necessary to meet escapement goal for coho salmon.

Commercial net fishery reduced from five days per week to two days per week and minimum mesh size increased from 6 to 7¾ inch from October 21 to November 29.

Justification: Reduce total exploitation on chinook and coho salmon to meet escapement goals.

1978

Commercial net fishery for spring and summer chinook reduced from five days per week from May 1 to August 31 to one day per week during May, two days per week during June, and three days per week during August.

Justification: Reduce exploitation on spring-summer chinook to increase spawning escapement.

Commercial net fisheries for salmon set at five days per week for period October 1 to November 30.

Justification: Provide mechanism for escapement and collect data for fishery evaluation.

Commercial net fisheries for salmon terminated on October 21 until further notice.

Justification: Complete closure necessary to meet escapement goal for coho salmon.

Commercial net fishery for steelhead began on November 20 for two days during the week of November 19-25.

Justification: Minimize incidental catch of coho while beginning winter steelhead fishery.

Commercial net fishery for steelhead established for 1978-79 winter season:

3 days per week from November 26 to December 2
4 days per week from December 3 to January 27
2 days per week from January 28 to February 24
3 days per week from February 25 to April 30

Justification: Regulate fishing effort according to run strength for each management period thereby assuring more even escapement.

Raft and Moclips Rivers

The Raft and Moclips Rivers have been closed by tribal law to commercial fisheries since 1962 due to logging damage on spawning grounds.

II. Off-Reservation

Grays Harbor and tributaries

1974

All commercial net fisheries closed October 11 to October 14 and October 17 to October 20.

Justification: Reduce unusually high rate of exploitation on chinook salmon caused by low flow conditions.

1975

Opening of commercial net fisheries in Areas 1, 1-A, and Chehalis River delayed from September 18 to October 3.

Justification: Complete closure necessary to meet chinook salmon escapement goal.

1976

All commercial net fisheries closed September 28 to October 7.

Justification: Closure necessary to meet chinook and coho salmon escapement goals.

Commercial net fisheries in Areas 1-C and Humptulips River closed December 23 for duration of season.

Justification: Complete closure necessary to meet escapement goals for steelhead.

Commercial net fisheries closed in Areas 2-A, 2A-1, 2D and Chehalis River closed December 22 for duration of season.

Justification: Complete closure necessary to meet escapement goals for steelhead.

1977

All commercial net fisheries closed October 10 to October 16.

Justification: Complete closure necessary to meet escapement goals for coho salmon.

All commercial net fisheries closed October 18 to October 25.

Justification: Complete closure necessary to meet escapement goals for coho salmon.

All commercial net fisheries closed October 26 to November 13.

Justification: Complete closure necessary to meet escapement goals for coho salmon.

All commercial net fisheries closed November 23 to December 6.

Justification: Complete closure necessary to meet escapement goals for coho salmon.

1978

Commercial net fishery closed in Areas 2A, 2A-1, 2D and Chehalis River from January 4 for duration of steelhead season.

Justification: Total allowable harvest taken. Closure necessary to meet escapement goals.

Commercial net fishery closed in Areas 2C and Humptulips River from January 20 for duration of steelhead season.

Justification: Total allowable harvest taken. Closure necessary to meet escapement goals.

Commercial net fisheries reduced from five to three days per week, all areas, for entire season.

Justification: Reduction necessary to meet escapement goals for chinook and coho salmon.

Commercial net fishery in all areas reduced from three days to one day per week, October 21 to November 1.

Justification: Reduction necessary to meet escapement goals for chinook salmon.

Commercial net fishery closed in all areas November 16 to December 18.

Justification: Complete closure necessary to meet escapement goal for coho salmon.

APPENDIX F

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
OLYMPIA

DANIEL J. EVANS
GOVERNOR

April 30, 1976

Northwest Indian Fisheries Commission
P. O. Box 2445
Olympia, WA 98507

Gentlemen:

All of you are aware that the President has recently signed the Fishery Conservation and Management Act of 1976. This landmark legislation establishes a 200-mile fishery conservation zone and, among other things, provides for U.S. management authority within this zone.

In order to facilitate management, the Act establishes Regional Fishery Management Councils with authority to develop and implement plans for specific fisheries.

For the Pacific Council, the legislation provides for 13 voting members, consisting of the State officials responsible for marine fishery management (State fishery directors), the regional director of the National Marine Fisheries Service, and eight appointments by the Secretary of Commerce from names submitted by the Governors of the constituent states. For each of the five possible positions on the Pacific Council, I am empowered to nominate at least three individuals. In addition, I am also required by the legislation to submit names of qualified individuals for appointment to the North Pacific Council (Alaska), on which Washington will have two appointments from list of six nominees, Thus, there will be a minimum of 15 nominees for the Pacific Council and six for the North Pacific Council.

The legislation requires that the "lists of qualified individuals" for membership be submitted to the Secretary of Commerce no later than 45 days after the date of enactment of the Act (April 13, 1976). These individuals should be knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest

of the fishery resources of the geographic area concerned.

I am seeking the names of such qualified individuals along with pertinent biographical data from the diverse fishing interests in Washington. In order to meet the time constraints provided for in the Act, these names and appropriate information should be submitted to me no later than May 15, 1976.

The Fishery Conservation and Management Act of 1976 provides an historic opportunity to conserve and develop our national resources and realize their full potential for all citizens. I urge you to submit names of individuals who meet the above qualfications and who can provide the effective leadership needed for the task ahead.

Sincerely,

Daniel J. Evans
Governor

DJE:nb

Northwest Indian Fisheries Commission
May 14, 1976

The Honorable Daniel J. Evans
Governor of the State of Washington
Public Lands Building
Room 101
Olympia, Washington 98504

Dear Governor Evans,

The Northwest Indian Fisheries Commission and all fishing Tribes of Washington wish to submit the names of three individuals, Charles Peterson, Guy R. McMinds, and William L. Smith as qualified Indian individuals for your nomination to the Secretary of Commerce for appointment to the Pacific Regional Council established by the Fishing Conservation and Management Act of 1976.

Enclosed please find the biographical data regarding these three individuals.

Sincerely,

William L. Smith
Executive Director,
Northwest Indian Fisheries
Commission

APPENDIX G

United States Department of the Interior
FISH AND WILDLIFE SERVICE
Box 36098
450 Golden Gate Ave.
San Francisco, CA 94102

November 29, 1976

To: Assistant Director ARDW

From: FWS Representative, PFMC

Subject: Salmon Advisory Panel

Here is the list of appointments to the Salmon Advisory Panel of the Pacific Fishery Management Council. The representatives were selected at the second meeting of the Council, at San Francisco on November 22-23.

There are 21 shown on the list. Actually, there will be 22 members on the panel. The Council voted to add another representative of Indian treaty tribes, increasing the Indian representatives from 2 to 3. The third representative is to be selected by the Puget Sound treaty Indians and is to represent the Indian *coastal* fishermen of that area.

The Council made this change on a motion by Donald Moos, Washington.

The 2 Indian representatives selected at the San Francisco meeting are:

Puget Sound — Guy McMinds, Quinault
Tahola, WA

Columbia River — Clifford Allen, Nez Perce
Lapwai, ID

Note that the Panel will hold its first meeting at Portland on December 14-16, though why it apparently will need two or three days for that escapes me.

William T. Davoren

Supreme Court, U. S.
FILED
FEB 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE
UNITED STATES
OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, et al.,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, et al.,
Respondents.

No. 78-119

STATE OF WASHINGTON, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,
Respondents.

PETITIONER STATE OF WASHINGTON'S REPLY BRIEF

SLADE GORTON,
Attorney General
EDWARD B. MACKIE,
Deputy Attorney General
JAMES M. JOHNSON,
Sr. Assistant Attorney General
TIMOTHY R. MALONE,
Assistant Attorney General
Counsel for Petitioner State

Office and Post Office Address:
Temple of Justice, Olympia, Washington 98504, (206) 753-6207

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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Office and Post Office Address:
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PETITIONER STATE OF WASHINGTON'S REPLY BRIEF

SUMMARY OF ARGUMENT

In the introduction (pp. 5-12) we examine the roots of the acrimony which has pervaded this controversy. By so doing, we focus upon the basic legal issue presented to this

Court for resolution: What are the treaty rights of the Indians with respect to the present commercial fishery — a fishery created well after treaty-time by non-Indian technology to supply a predominately non-Indian market?

The lower federal courts have ruled that the treaties require a 50% plus allocation of *this* fishery to the treaty Indians. That allocation is rigid; that is, it cannot vary according to the relative numbers of treaty Indian fishermen on the one hand and non-Indian fishermen on the other. For the State to manage the fishery in any way that does not result in that division of the resource has been found to be a violation of the treaty. Thus, the non-Indian fishermen are deprived of a fair opportunity to compete with the tribal fishermen. Hence, the acrimony.

This result, we show, is completely inconsistent with the Puyallup series of decisions, wherein the Court made it clear that the treaty language incorporates equal protection principles. Accordingly, all fishermen, no matter which group they belong to, have no more than a fair opportunity to compete with each other under a nondiscriminatory system of state regulation.

The central questions in this controversy are the meaning of the "in common" language of the treaties and the correctness of the lower federal courts' 50% plus allocation formula, based upon their reading of that language. Before discussing those questions further, we take up the threshold question: Should this Court consider these central questions on the merits at all? (pp. 13-20) The assertion of the tribes that res judicata prevents this Court from addressing these questions is, we show, without substance, as is likewise the assertion of the Solicitor General that principles of finality and comity require a like treatment. We show that a final resolution of this controversy — and elimination of the acrimony — can be best attained by this Court's addressing the merits.

Before we examine the merits in detail, we show how the lower court's formula works in operation, and how it entitles the Indian fishermen to "fifty percent plus" of the fish. (pp. 21-25) We also show that, although the Indian

fishermen are not yet harvesting their full entitlement in all areas, there is every reason to believe that they soon shall be.

Turning to merits, the Puyallup decisions are discussed in detail. (pp. 26-33) Two questions are here addressed: First, do those decisions require any numerical allocation or apportionment for the salmon fishery? We show that they do not. For the steelhead fishery involved in Puyallup, an allocation was the only available alternative for avoiding discrimination against the Indian fishermen; and it was just such an alternative which was ultimately adopted. For the salmon fishery, there are other nondiscriminatory alternatives available; an "equal opportunity fishery" which is feasible.

Secondly, if we are wrong in our submission on this first question, and if some allocation is required by the treaties, must it be the allocation decreed by the lower federal courts? We show that in *Puyallup II*, 414 U.S. 44 (1973), any allocation formula must take into account many variables, including the relative numbers of fishermen in each group, Indian and non-Indian. Any accommodation of the rights of these fishermen, based upon the equal protection principles embodied in the treaties, must take this all-important variable into account.

The Solicitor General and the tribes argue, of course, that this variable cannot be taken into account; basing their argument upon the supposed *tribal* nature of the fishing right. We examine that claim in detail, (pp. 24-39) and show that the claim is supported neither by the text of the treaties nor by the history of the treaty negotiations. Furthermore, the 50% plus percent allocation cannot be applied logically and consistently in practice.

Both the Solicitor General and the tribes rely upon the history of another set of treaties involving fishing rights and containing "in common" language. Those are the 1818 and 1854 treaties with Great Britain, involving the North Atlantic fishery. After showing that there are indeed close parallels between these treaties and the

Indian treaties of 1854 and 1855, we show that the history of these British treaties support the position of the State not that of the Solicitor General and the Tribes (pp. 40-45).

Finally, we take a look ahead (pp.49-55, Parts VIII and IX). We show that the Indian fishermen now have the fishing gear and technological capability to compete with the non-Indian fishermen. They have this capability in large part because of federal assistance received after the District Court's decision. The decision thus precipitated a type of "affirmative action" program, assisting Indian fishermen to acquire the technological capability to increase their fishery harvest. That program has been beneficial by helping remove the real root of the Indian fishing problem, the inability to compete because of the lack of modern gear.

This, however, does not in any way validate the lower federal courts' definition of the Indians' treaty right — and it is that definition which is the core of the controversy.

ARGUMENT

I.
INTRODUCTION

The duration and the complexity of this controversy seem to be matched only by the tenacity with which the competing fishing groups have asserted their conflicting positions. A newer element, the bitterness with which the non-Indian commercial fishermen have received the district court decision, is based on the fact that the decision will bankrupt many of those commercial fishermen and drive them out of their traditional calling.[1] These attitudes have understandably made it difficult to confront and to resolve the basic legal issues presented in this controversy. Yet, those issues cry out for a resolution.

The acromonious effect of the litigation is starkly reflected by the overall tone and the specific charges of treaty violations which fill the tribal and supporting amicus briefs. Those briefs characterize the state of Washington as the last bastion of a deliberate program to deprive the Indian population of clear and explicit treaty rights.[2] Not only do we deny that allegation but; How can any objective observer say that we are here involved with "clear and explicity" treaty rights? The questions is how very general treaty language should be construed.

---

[1]The primary non-Indian marine fishing areas in Puget Sound for Puget Sound stocks are Areas 6B, 8B, 8C, 9, 9A, 10 and 11. In those areas prior to the district court decision (1970-1973) there was an average of 45 days of fishing for gillnet and purse seine commercial fishermen. Since the decision (1974-1978) the average has been reduced to 5 days per year with only one day in 1975.

Those areas generally begin in Discovery Bay near Port Angeles and run southerly through Admiralty Inlet to Everett then by Seattle and down the East and West Passes.

[2]Those amicus briefs do show how unrealistic it is to characterize the tribes as a politically impotent minority. In fact, the tribes are supported by a legion of powerful social and political forces which have but one common trait: They have not interest which will be adversely affected by the decision which they seek; they can occupy what they assert to be a lofty moral ground at absolutely no cost to themselves. That cost will be exclusively borne by the non-Indian commercial fishermen and their communities.

The charges of racial discrimination are not supported by the exhaustive findings and conclusions of the trial court in its 1974 decision. The State of Washington has historically done no more than to manage its fisheries on the premise that the "in common with" language of the treaties reflects and incorporates equal protection principles comparable to those embodied in the United States Constitution. (See U.S. v. Wash. 520 F.2d 676 at 685 (9th Cir 1975) and F.F. 213; Joint App. 177 hereinafter cited as JA).[3]

When this court decided *Tulee v. Washington*, 315 U.S. 681 (1942), the State promptly acquiesced, and since then has not required treaty Indians to acquire a state commercial license nor to pay a landing tax while engaged in their treaty fishery. (F.F. 32, JA 114) In addition, the State Department of Fisheries had undertaken efforts to increase the volume of fish available to treaty Indians prior to the decision in this action and had a cooperative relationship with several tribes. (F.F. 210, 212; JA-176, 177) Prior to the decision, the State had provided a number of special off-reservation Indian tribal fisheries not available to non-Indians. (F.F. 210, JA-176) And finally, when this Court first decided in *Puyallup II*, 414 U.S. 44 (1973), that a specific allocation of steelhead was necessary under certain circumstances in the Puyallup River fishery, the Washington Department of Game, which manages steelhead, promptly promulgated regulations for a special Indian net fishery. That allocation was explicitly approved by this Court in *Puyallup III*, 433 U.S. 165 (1977).

[3]In the district court's opinion, 253 Findings of Fact and 26 Conclusions of Law, there are only 10 Findings of Fact which might be construed as reflecting any discriminatory pattern directed against treaty Indians. F.F. Nos. 33, 70, 117, 158, 193, 194, 195, 222-224 (JA 114, 128, 144, 158, 170, 171, 181-182). With the exception of a single reference to non-Indian lawlessness in F.F. 70, these findings simply show that the State made arrests and seized Indian fishing gear in response to violations of State fishing regulatins. Those state actions applied the same set of rules to Indian off-reservation fisheries as to non-Indian fisheries. The fact that similar citations of non-Indians were much more numerous is not noted by the court because, of course, they were not relevant to the construction of the treaties.

In stark contrast, *after* this Court had rendered its decision in *Puyallup II, supra*, the district court criticized this Court's rationale in that decision,[4] and ignored the factors which this Court instructed the State to consider in any allocation of the fishery. The district court determined, of course, that the treaty mandated a single allocation, 50% plus for the tribes, no matter what the circumstances or the equities in any given situation.

Contrast also the position of the State with that of the United States which here represents the Indian tribes. The United States has exclusive control over most of the ocean fishery,[5] a fishery profoundly affecting the return of anadromous fish to Puget Sound. Federal regulation of that fishery barely recognizes the existence of the tribes or the treaties, much less the construction of those treaties for which it argues here. The United States, with its management control of the ocean fishery, have sought to place the primary burden of providing for an Indian allocation on the non-Indian commercial fishermen who have historically fished on Puget Sound, far from the open ocean.

Both the United States and the tribal briefs criticize our characterization of the Indian's share under the district court's decision as being "50% plus." In fact, for many of the non-Indian fishermen that description greatly understates the Indian share. The actual allocation of the commercial coho net fishery in Puget Sound which is reflected in a regulation of the State Department of Fisheries for 1977 required by the district court's

[4]The district court, after discussing the decisions of this Court culminating in *Puyallup II, supra* (JA 75-80) declared,

> "* * * To the present time there never has been either legal analysis or citation of a nondictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties * * *" *U.S. v. Washington*, 384 F.Supp. 312, 338 (1974 USDC, W.D. Wa.) (JA-80)

[5]Pursuant to 16 U.S.C. 1801, federal jurisdiction commences three miles offshore. Most of the ocean fishing activity occurs in that "federal area." W.D.F estimates that 90% and 85% of the troll-caught coho and chinook salmon, respectively, are taken outside the three-mile limit.

allocation, and enjoined by the State court in *Puget Sound Gillnetters v. Moos*, 88 Wn. 2d 677, (1977), Ex. G, was 557,000 fish for treaty fishermen and 146,000 fish for nontreaty commercial fishermen.

The primary reason for this extraordinary disproportionate allocation was the substantial harvest in the federally controlled commercial fishery in the open ocean.

The practical effect of the 50% plus allocation is an extraordinary economic windfall to the treaty Indian fishermen in a commercial fish market which developed nearly 40 years after the treaties.[6] They are not required to compete on an equal basis with the non-Indian commercial fishing industry. They have a huge "leg up" on their competitors. They have a guaranteed catch, protected from the hazards of bad luck or aggressive competitors. To be precise, they are protected from having to compete at all with non-Indian fishermen; for the non-Indian fisherman must frequently stay off the waters completely while Indian fishermen catch their court decreed allotment.[7]

This is, of course, the major source of the bitterness of the non-Indian fishermen; instead of competing with the Indians, they must often stay in port, losing the opportunity to pursue their livelihood, while the treaty Indians are permitted to harvest the available fish. The non-Indian fishermen do not have, to use Judge Kennedy's phrase, "the right to a fair opportunity to compete."[8] The denial of that right to the non-Indian fishermen is the direct and inevitable consequence of the

[6]See footnote 11.

[7]For example, in the 1978 IPSFC fishery by purse seiners, Indians received 18 days compared to 11 for non-Indians. During the four weeks upon which the Indians' extra days were added at the beginning of the harvest period the Indian purse seiners averaged 2,500 salmon for those particular weeks. That translates into in excess of $40,000 at wholesale fish prices, a substantial portion of which was caught while non-Indians were required to stay on shore.

[8]Puget Sound Gillnetters Ass'n v. U.S. Dist Court 573 F. 2d 1123, concurring opinion at 1136 (9th Cir 1978) (Pet. No. 78-119, A-28).

lower court's allocation of the fishery. Ironically, even under such a discriminatory system, and even in 1978 while the allocation was being enforced exclusively by federal agencies, one-third of all the arrests for illegal fishing were of treaty Indians, who still represent considerably fewer than one-third of all of the fishermen.[9]

The roots of the bitterness can be understood only by focusing upon the principal issue in this case. The United States and the tribes to the contrary, that issue is not the failure of the State to recognize the right of treaty Indians to fish for subsistence and ceremonial purposes.[10] That right exists and was within the reasonable expectations of the Indians at treaty times. Any State regulatory system must accommodate this catch. It is only when these and substantial reservation catches are effectively added to the Indian 50% allocation does it contribute to the problem.

Nor is there at stake in this litigation a challenge to the right of the Indian tribes to participate, in some manner and to some extent, in commercial fisheries. That right, too, is beyond question. *Puyallup II, supra.* The core of the controversy is the extent of that treaty right. Do the treaties give the tribes or their members the right to a separate non-competitive commercial fishery? What division of the present commercial fishery, if any, is mandated by the treaties? What were the reasonable expectations of the Indians at the time the treaties were

[9]A representative of the United States National Marine Fisheries Service enforcement branch and a United States Coast Guard representative each testified to this proportion, citing specific numbers of violations by each group. The specific reference was that 55 of the total 177 violators were Indians. (Tr. November 3, 1978, pp. 14, 25)

[10]The suggestion that non-Indian fleet takes home "as much as 5% of the run" (U.S. Br., 76) is false. That would amount to approximately 400,000 fish per year. The "citation" of authority for that statement (Tr. April 6, 1978, p. 183) discloses that the tribal witness testifying had no basis for his simple guess of 5%.

signed with respect to the present commercial fisheries, which did not even exist at treaty time.[11]

The single most important question in this controversy can be stated simply: Is the present huge commercial fishery harvest[12] to be divided on some basis other than an

[11]At trial, the chief anthropological witness for the United States, Dr. Barbara Lane, could make no quantitative comparison between the commercial Indian catch at treaty time, and the present commercial fishery. (Sept. 5, 1973, Tr 1779 and F.F. No. 7, JA 102) An economist for the tribes, Dr. Robert Thomas, though providing estimates for the Indian subsistence catch, shows no commercial catch at all until approximately 1865. For the reasons explained by Dr. Thomas, one can only surmise that the Indian commercial catch was very small. As stated by Dr. Thomas:

> "* * * any expansion of the fishery was limited by primitive techniques of food preservation available. Salmon could be dried, salted, smoked in the style of the Indians, or pickled in brine. Although there is evidence of shipments to South America in the late 1840's and to the Hawaiian Islands during the 1850's, *most long distance transport left the fish unappetizing. Due primarily to the sparse settlement of the Western states in the mid-nineteenth century, any large development of the industry awaited more rapid transportation facilities and, far more important, better means of preservation.*"
>
> The development of the vaccum sealed metal can fulfilled the latter requirement, and in doing so revolutionized the perishable food industry. (Ex. MLQ 1, p. 1) (Emphasis supplied.)

Dr. Thomas further observed that the large scale development of canning fish in Puget Sound did not commence until the mid 1890's.

[12]From the briefs and record in this case, one might form the impression this controversy involves only salmon and steelhead. It must be noted, however, that the district court has extended its orders to other species of fish, such as herring roe. That fishery, now worth millions of dollars, was developed exclusively for a recently created market, primarily in the Orient, where the roe is sold as caviar. Such a market did not, of course, exist at treaty times.

open, nondiscriminatory fishery? What are the treaty rights of the Indian tribes with respect to *this* fishery?[13]

This court provided the starting point for answering this question in *Tulee v. Washington*, 315 U.S. 681, 684 (1942), in which it stated:

> * * * the treaty leaves the state with power to impose on Indians *equally with others* such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. (Emphasis supplied.)

This proper starting point, "equally with others," was even more explicit in *Puyallup I*, 391 U.S. 392 (1968), when the case was remanded to the State Supreme Court for a determination of *"the issue of equal protection implicit in the phrase 'in common with' as used in the Treaty."* (*Supra*, at 398) (Emphasis supplied.)

It was on this equal protection standard which the Court applied in *Puyallup II*, *supra*, to strike down Washington's ban on all net fishing for steelhead. As stated by the Court:

> "Whether that [ban] amounts to discrimination under the Treaty is the central question in these cases." (*Supra*, at 47)

The State rests its case on the equal protection principles inherent in the treaties themselves and not on

[13]Admittedly, while increasing population and technological advances created a market for a substantial commercial fishery, that technology has increased the cost for necessary equipment. The State banned commercial fish traps which were owned by large companies and designed its regulatory pattern to encourage a fishery by small private entrepreneurs. While Indians have always had legal access to this fishery, for some Indians economic considerations have made it difficult to participate fully. But the record clearly shows that notwithstanding those economic considerations there were a number of Indian fishermen at the time of the trial. (F.F. No. 188, JA 168) Some of these fishermen had commercial boats in excess of 36' in length. (F.F. No. 67, JA-126) To the extent that economic considerations have restricted Indian participation in the fishery, that problem can be, and to a certain extent has been, met by the United States fulfilling its trust responsibility by supplying Indians with fishing gear effective enough to make them truly competitive.

either the Fifth or Fourteenth Amendments. It is the treaty language itself which incorporates these equal protection principles as shown in the *Puyallup* series.[14]

Decisions of this Court commonly have settled even the most divisive of controversies, and thereby commenced a healing process. The issue of the meaning of the treaty language is now squarely before this Court, and it should be decided here. This Court's decision on the merits is desperately needed in order to restore the public consensus necessary to protect the fishery resource, to implement an effective fishery management system, and adequately to protect the interests of all fishermen, both treaty Indians and others.

Nevertheless, both the United States and the tribes seek to avoid a decision by this court on the basic issue. And understandably so. An examination of their submissions, we believe, will indicate clearly that the lower court's reading of the treaty language, and the division of the fishery based upon that reading, cannot withstand this Court's scrutiny.

[14]To the extent we suggested in our opening brief (Wash. Br. 89) that the Fourteenth Amendment may have direct application in this controversy, we were incorrect or at least imprecise. If the treaty language had explicitly said: "The Indians are secured the right to half of the fish harvestable in their usual and accustomed fishing grounds," that language would have been immune from a constitutional equal protection challenge. But the language does not say that; instead, its terms incorporate the equal protection principles of the Fifth and Fourteenth Amendments.

II.

NEITHER THE DOCTRINE OF RES JUDICATA NOR ANY OTHER DOCTRINE OF FINALITY PRECLUDES THIS COURT FROM CONSIDERING THE CENTRAL ISSUE, THE MEANING OF THE "IN COMMON WITH" LANGUAGE

In his submission to this Court on the question of whether the writ of certiorari should be granted, the Solicitor General stated:

> "The central issue in these cases is the proper interpretation of the treaty language guaranteeing the tribes the 'right of taking fish, at all usual and accustomed grounds and stations, * * * in common with' other Washington citizens." (U.S. Br., on Pet. for Cert. 21)

We agree.[15] The proper interpretation of that provision is the key to determining whether the District Court's formula for dividing the fish is proper. That division is the foundation from which all of the other problems involved in this controversy flow, including IPSFC fishery and the myriad of enforcement problems. As the Solicitor General correctly observed, it is "the basic allocation decision underlying all of the subsequent proceedings in the case." (U.S. Br. in Response to Pet., 46) The Solicitor formulated six broad questions, encompassing the full merits of this controversy (U.S. Br., *supra*, 3-4), and supported certiorari on all of those questions except the IPSFC fishery (U.S. Br., *supra*, 27). He summarized his position: "* * * in the hope that this controversy may be finally resolved without years of continued litigation, we suggest that the Court should *consider and decide* the enforcement questions as well as *the underlying question of treaty interpretation.*" (Emphasis supplied)(U.S. Br. *supra*, 25)

[15]We do not agree, however, that the guarantee runs to the tribes as such rather than to their members. See, *United States v. Winans*, 198, U.S. 371, at 381 1904), and pp. 34-39, infra.

In granting certiorari, this Court did not limit or restrict the questions presented and presumably intended to review this central issue fully, at the urging of both the Petitioners and the Solicitor General, and against the contrary urging of the tribes. The Solicitor General has changed his mind. The Solicitor General is now saying in effect: "Consider and decide only the enforcement questions. Just affirm the lower court's division of the fishery; but do not consider or decide the underlying question of treaty interpretation." (U.S. Br., 46-53) It is clear from the Solicitor's brief that the decision to seek to avoid the merits of the controversy is dictated by his discovery of a paucity of authority to defend that 50% plus allocation decision on its merits.

A. The Unsuccessful Judicial Quest for a Rationale Supporting the District Court's Formula for Dividing the Fish

This court is presented here with an unusual situation—a clear result, but no clear rationale for that result.

As we have noted (State Br., 54), the district court based its conclusion exclusively on a portion of Webster's dictionary definition of the word "common." The result was a specific formula for dividing up the fish according to the 50% plus allocation. As we have also seen, the Court of Appeals abandoned the district court's rationale for that result and found a new one; i.e., exercise of discretion by the trial court. (State Br., 39) No brief filed in these cases defends that dictionary definition rationale. Neither the United States nor tribal brief even quote it.

In its first decision, the Circuit Court analogized the rights of the Indian and non-Indian fishermen to those of co-tenants. (U.S. v. Wash. 520 F.2d 676 at 687-88 (9th Cir 1975)) (JA 49, 50) The court, however, went on to treat the actual 50% plus allocation as an exercise of *discretion*, concluding that "* * * the [district] court's apportionment was well within its discretion." *Supra* at 688 (JA 52). But the district court, of course, had not exercised any form of discretion.

In the decisions which are the immediate subject of this appeal (573 F. 2d 1118 and 1123, App. Pet. for Cert. No. 78-119, A-1 and A-29), Judge Goodwin, while reemphasizing the co-tenancy analogy as the basis for apportionment, also relied on the discretionary nature of the apportionment. He approved the district court's division—for 1977 only—of 55% for non-Indians and 45% for Indians. *Supra* at 1129 (Pet. No. 78-119, A. 12)[16]

Defining the limits of this judicial discretion is impossible. The exercise of that discretion was apparently activated by the district court finding that the State violated the treaties. But how, according to the lower courts, did the State violate the treaty? Apparently by failing to give the Indian fishermen at least the 50% plus division found by the district court to be mandated by the treaties. Thus, the division is not simply a remedy; it defines the right as well and is the standard by which State action is to be measured. Yet the lower courts felt that they—though apparently not the state—in the exercise of discretion, could disregard the 50% plus formula.

Small wonder that Judge Kennedy, in his concurring opinion, stated:

> "* * * the court undertakes to restate the rationale for the apportionment rule of our earlier decision, and I find it necessary to suggest that the explanation of

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[16]Even the District Court wavered on the question of whether its division was legally required, or discretionary. When it stated:

> "* * * economic disruption associated with implementing the 1974 decree is not legally cognizable." (C.L. No. 4, June 6, 1978, Pet. 78-139, C-10)

it obviously viewed the division as nondiscretionary. Yet, for the 1977 fishing season—but only for that season—it had allowed a 55%-45% division. The controlling factor seems to be whether the United States requests the exercise of discretion. In 1977 the United States did request in 1978, it did not.

this critical point remains somewhat obscure."[17] 573 F. 2d *supra* at 1134.

After reading the various briefs submitted by the Solicitor General and the Tribes, the explanation still remains obscure.

For the Solicitor General, that explanation seems to be found in yet another source—the concept of the "reasonable needs of the several Tribes." (U.S. Br., 72; cf., U.S. Br., 65-72)

The tribes likewise appeal to argue a "reasonable needs" standard (Tribal Br. 150-160)[18] while sprinkling in a good dose of the co-tenancy theory. (Tribal Br. 161, 168)[19] The tribal brief at 159 refers to the average income derived by participants in the Indian fishery. Are the tribes contending that if the Indians participating in the fishery increases in the future, then the Indian share of the total allocation must be correspondingly increased?

We shall examine in detail the explanations offered by the Solicitor General and the Tribes, *infra*, at pp. 34-39 . Here we simply note the obvious: There is a result—the District Court's division—vainly searching for a legal rationale.

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[17]Judge Kennedy then proceeds to an analysis of the concept of co-tenancy, noting that "* * * the concept * * * does not help the court determine what share of the disputed rights should be allocated to each of the parties." *Supra* at 1135 (Pet. No. 78-119, A-26) He further concludes (*supra* at 1136, Pet. No. 78-119, A-28) by recognizing the critical difference between "the right to a fair opportunity to compete" and the "rule of fifty percent apportionment," clearly indicating his preference for the former, but his reluctant acceptance of the latter under the principle of "law of the case." Judge Wallace shared Judge Kennedy's difficulties with the underlying rationale, but likewise felt bound by the Circuit Court's previous decision. (See, *573 F.2d supra at 1126*) Thus, only Judge Goodwin was left to support the co-tenancy rationale.

[18]The Tribes use the term " 'fair needs of the tribes" to express the standard. (Tribal Br. 160)

[19]The Tribes are somewhat ambivalent in their use of the co-tenancy theory; although they rely on it, they believe that "both the Petitioners and Judge Kennedy took the Ninth Circuit co-tenancy analysis *much too literally.*" (Emphasis supplied) (Tribal Br. 167, noted 394)

Yet the Solicitor General and the Tribes urge this Court simply to affirm the result,[20] without examining its correctness and without addressing the meaning of the "in common with" language. That they should urge such avoidance is understandable: It reflects the shakiness of the various rationales which they and the courts below have offered to date. To argue that the district Court's division should be upheld, without examining the legal basis for the division, is itself an indication that the legal basis is unlikely to withstand scrutiny by this Court.

B. The Res Judicata Argument of the Tribes.

In attempting to preclude review of the central question, the Tribes and the Solicitor General take different approaches. The Tribes argue that the doctrine of res judicata bars an examination of this question by reason of this Court's previous denial of certiorari. The Solicitor General, in contrast, does not rely on this doctrine—and for very good reason: The Tribe's reliance on the doctrine is completely misplaced; and the Solicitor General tells us why:

> Neither the doctrine of *res judicata* nor law of the case would appear to prevent this Court from making a determination on the merits of the treaty issue in the Washington Fishery case. *See Mercer v. Theriot*, 377 U.S. 152, 153-154; *Reece v. Georgia*, 350 U.S. 85, 87. As stated in *Reece v. Georgia, supra*, 350 U.S. at 87, this Court has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation,' notwithstanding the fact that such questions became the law of the case, insofar as the lower courts were concerned, upon denial of the first petition for certiorari filed by the State. (U.S. Br. on Pet. for Cert., p. 22, n. 17)

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[20]We are not unmindful that we recently presented an argument somewhat similar to that made by the Tribes. See, *Washington v. Yakima Indian Nation*, Slip Op., Janaury 16, 1979, pp. 12, 13, n. 10. Our argument was that the principle of stare decisis precluded this Court from considering the merits of an issue which had previously been decided by the Court in other cases, through summary affirmances or dismissals. However, this Court, recognizing the importance of the issue, examined the merits fully. The same approach should be taken here where the court has never previously decided the issue.

Procedurally, *Mercer v. Theriot*, 377 U.S. 152 (1964) is indistinguishable from the Washington Fishery case, *Washington v. United States*, No. 78-119. The procedural setting in *Mercer* was described as follows in *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365-366 (1973):

> * * * Similarly, in *Mercer v. Theriot*, 377 U.S. 152, * * * a diversity action for wrongful death, certiorari was initially denied after the Court of Appeals had set aside the jury verdict on the grounds of various trial errors and insufficiency of the evidence. On remand, the District Court denied a motion for a new trial and the Court of Appeals affirmed. We then granted certiorari and reversed because the trial errors did not affect substantial rights and the evidence at the trial was sufficient to sustain a verdict in petitioner's favor. * * *

We turn, then, to the assertion of the Solicitor General that this Court in the exercise of its discretion should not review the central question.

C. The Finality and Comity Argument of the Solicitor General.

The Solicitor General asserts that "reopening the basic decision" would be "wasteful and potentially disruptive," and would imperil "the precarious accommodation now achieved." (U.S. Br. 58) The accommodation is indeed precarious; the "working plan" which the Solicitor General wishes to preserve (U.S. Br. 58) is not working at all, as it admitted in the very next paragraph of the Solicitor General's brief. For the paragraph assails what it characterizes as "* * * flagrant disobedience of outstanding orders and the irresponsible intervention of the state courts."[21] (U.S. Br., p. 58) That is hardly a description of a "working plan" or of any "accommodation."

[21] As previously noted, infra, p. 9, even in 1978 when enforcement of the allocation was by federal officials, one-third of the violators were Indians even though substantially fewer than one-third of the fishermen are Indians.

All parties desire an end to these proceedings. Only a full consideration of the central question is likely to achieve that finality.

Further, full consideration of the merits will promote finality in other important respects, as well. For example, in order to avoid protracted litigation of the sort which has occurred in this controversy, the State entered into a five-year settlement agreement for the Columbia River fishery. (*United States v. Oregon*, 302 F. Supp. 899 (Ore. 1969). That five-year period reflected the hope that by the time the agreement expired, this Court would have resolved the present controversy on its merits, and would thus facilitate a resolution of the Columbia River controversy. Clearly, if the merits are not addressed now, the same question will have to be dealt within the context of the Columbia River fishery.

As the tribes have pointed out (Tribal Br. 248), the question of whether hatchery fish are to be included in the division has not yet been resolved by the district court, although in the interim such fish are being included in the division. If this Court determines that an allocation of fish is not required by the treaties, that decision will render unnecessary further consideration of the status of hatchery fish because there would then be an equal opportunity fishery upon all fish, whatever their source. Conversely, a decision by this Court that some form of allocation is required will provide guidance to the lower courts in resolving the hatchery fish question—guidance which is lacking now. And, like the Columbia River question, the hatchery question may provide another request to have this Court review the central issue in this litigation if it is not considered now.

The Solicitor General asserts that the state, along with the non-Indian fishing associations, "cannot remotely suggest that they have not had their day in court." We make no such assertion. Every litigant in this Court has already had a day in court elsewhere. We simply agree with the Solicitor General's position in the United States brief on petition for certiorari. There, he supported certiorari because of the fundamental conflict between the

state and federal courts and the resulting breakdown in the enforcement of fishing regulations. U.S. Br., in Response to Pet., p. 19. That conflict is best solved by dealing with what the Solicitor General recognizes as "the underlying treaty issue." (U.S. Br. *supra*, p. 19) Only such a decision will truly promote finality.

The Solicitor General also suggests that giving us a day in this Court would "reward illegality.[22] But of what "illegality" does the state stand accused, as contrasted with some individual private fishermen? None. The record clearly shows that the state's executive agencies promptly adopted regulations to implement the district court's decisions, only to be frustrated by state court decisions which we, and not the United States, have brought before this court.[23]

Finally, the acts of "illegality" of which the Solicitor General speaks are manifestations of the polarization and bitterness which has developed in this long controversy. Only a full consideration of the merits can break through that polarization and start the healing process of bringing the parties together.[24]

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[22]The whole thrust of the Solicitor General's argument seems to be that by reason of the state's efforts to bring this controversy to this Court for its resolution, that the State has rendered itself in some way unworthy of receiving a decision from this court. This suggestion, in our view, is unworthy of our federal government.

[23]Indeed, when faced with the state court actions, the state requested the United States and the tribes to intervene and finally sought to interplead them. They resisted, successfully, on immunity grounds.

[24]For the foregoing reasons, the merits should be addressed even if the Solicitor General is correct in his assertion that under the doctrine of res judicata "the state court judgments now here on certiorari ought never have been entered." (U.S. Br. 59) Accordingly, in our view, it is unnecessary to determine whether that assertion is correct.

III.
THE ACTUAL TREATY INDIAN HARVEST

Some briefs have observed that treaty Indian fishermen are harvesting less than the "50% plus" division which we have previously criticized. (U.S. Br., p. 72, et. seq.; Tribes Br., p.72). Those observations are accurate.[25] The percentage of salmon landed in Washington, reported as caught by treaty Indians, is less than the 50% plus. The calculation of present share asserted in those briefs, however, includes the ocean catch of fish from Washington, Oregon, Idaho, California and Canadian streams in the base to which the Indian catch is compared. The Indian treaty entitlement, as enunciated by the 9th circuit, does not extend to many of those fish which would not return to Indian fisheries if they were not caught by Washington fishermen in those waters. The percentage references in those briefs, therefore, are so underestimated as to be meaningless.

We readily concede that the Indian fisheries have not yet taken all fish to which the District Court has held them entitled. The reasons are many-fold. The size of the Indian fleet is smaller than the non-Indian, though growing. The United States' regulation of the IPSFC fishery, as we indicated, State's Br., p. 71, targets an Indian catch of 10-15%, rather than 50%. Tribal restrictions on fishing activities by tribal members also reduce catch. Some tribes even prohibit the use of purse seines, the most effective gear. Nevertheless, the impact of the decision on the Puget Sound fishery has been overwhelming.

It is important to note that the "usual and accustomed fishing grounds" as defined by the district court are so extensive as to include all case area waters of the State of Washington in which commercial fishing

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[25]However, treaty Indian fishermen have caught their 50% plus from Puget Sound origin stocks in 1977 and 1978.

occurs. See; *U.S. v. Wash.* 459 F. Supp. 1020 at 1048, 1058 and 1067 (1978). The district court also has been lenient in allowing tribes to establish or expand their usual and accustomed grounds and stations:

> "In determining usual and accustomed fishing places the court cannot follow stringent proof standards because to do so would likely preclude a finding of any such fishing areas. Little documentation of Indian fishing locations in and around 1855 exists today." (*U.S. v. Washington,* 459 F. Supp. at 1059.

Indeed, the District Court does not require the tribes to establish usual and accustomed grounds and stations. Rather the state must disprove them:

> The absence of a determination that a specific fishing area is a usual and accustomed fishing place of a particular tribe shall not preclude the tribe or its members from exercising treaty fishing rights at such location if opened under a tribal regulation filed pursuant to paragraph 1 of the Interim Plan, subject to the state's authority to contest the location consistent with prior judgment and orders of this court. (459 F. Supp. at 1042)

The importance of the extent of these areas is that the treaty rights, whatever they may be, effectively extend to all areas within the Washington waters embraced by this litigation in which commercial fishing occurs.[26] We are not contesting the broad determination as to usual and accustomed grounds; such breadth simplifies the complicated legal issues and management problems. But, by virtue of that determination, the only governmental entity which has control over the fish before they reach the usual and accustomed grounds is the federal government pursuant to the Fishery Conservation Management Act.

[26]The breadth of the geographical areas found by the court to be usual and accustomed grounds belies the suggestion of the Solicitor General that this case primarily involves fishing rights in rivers and river mouths. (U.S. Br. 62) The Solicitor's suggestion may reflect the common concept that such grounds were limited areas, but that is not the understanding of the District Court.

As we have previously noted, the Indian harvest is being incrementally increased to reach the full entitlement of the 50% plus allocation. The tribes, of course, would never argue that by failing to take the entire entitlement they would somehow legally lose it.

The lower court's allocation of the fish resource is cast as a right which will continue to exist even if all Indian fishermen retired from fishing to become lawyers. The entitlement would exist and could be reasserted at any future date. In determining the extent, as well as the existence of entitlement, the amount of actual fishing by Indians at any given point of time was considerd by the court to be irrelevant. It is thus irrelevant in defending the court's rationale in arriving at the allocation formula.

The district court, moreover has provided that the tribes can obtain an increase in their allocation for a subsequent fishing year when they have not caught their full share in a preceding year. (JA 593) Such requests have been made and are now pending with the district court.

Let us examine how the division has actually operated.

Before the state courts became involved in the controversy, the District Court's division was implemented through Department of Fisheries' regulations. Such a regulation is found in Exhibit G in *Puget Sound Gillnetters v. Moos,* 88 Wn. 2d 677, here under review in No. 77-983. As also shown in the record in that case,

> Those regulations, based upon anticipated returns, were developed to provide *nontreaty fishermen* fishing in Puget Sound commercial fisheries with *146,000 fish and treaty fishermen* with *557,000 fish* to be harvested in Puget Sound commercial net fisheries. (JA 27)

After the state courts effectively deprived the Department of the authority to implement the District Court's order, this function shifted to the court created Fisheries Advisory Board.

That Board starts with initial estimates, as shown in the table for "1978 Puget Sound Coho" found at JA-613.

Once the ceremonial and subsistence catch is set aside the application of the district court's formula is simple. Using that table with the Straits of Juan de Fuca as an example, the Indian entitlement is half of the total harvestable number of coho; i.e. half of 43,600 or 21,800. However, under the court's formula, the prior troll and sport interceptions of the equivalancy of 16,000 adult fish are subtracted from the non-Indian entitlement, so that only 5,800 fish (21,800 less 16,000) are available to the non-Indian Puget Sound fishermen. Thus, of the fish available for a Puget Sound net fishery, (27,600) 21,800 are reserved for the Indian fishery and only 5,800 for non-treaty fishermen.

Using another example from the same table; Hood Canal run of Coho, the total available for harvest is 56,100 which is divided 11,500 for the non-Indians and 44,600 for the Indians. The court uses those figures to set the numbers of fishing days for the Indian and days for the Non-Indian fleets.[27]

Thus, the non-Indian fishermen in Puget Sound are caught in a vise, with the District Court providing one arm of the vise and the United States executive branch the other. By virtue of the District Court's orders, the number of fish they can catch is directly dependent upon how many fish the United States executive branch allows to be caught before they enter Puget Sound waters. To the extent that the executive branch allows a substantial ocean fishery, the impact is borne, under the District Court's order, solely by the non-Indian fishermen in Puget Sound. By application of the vise, non-Indian fishermen can be squeezed off the Sound, and have been totally removed from some fisheries already.

As refelected by the tribal brief, Indian fishermen are not yet catching their full entitlement in some areas, but there is every indication that it will happen. The mechanisms for bringing it about are already in place. The

[27]These figures, and the numbers of allowable fishing days, are continuously readjusted. An example is found in the September 21, 1978 report from the Chairman of the Board to Judge Boldt. (JA 614-616).

number of Indian fishermen and the amount of their gear is growing. In 1974, there were fewer than 800; by 1978, this had grown to over 1,200.

We are not suggesting that this growth is bad; indeed, for reasons we shall discuss subsequently, it is a welcome development. For it gives the Indians the capability to compete effectively with the non-Indian fishermen. And lack of this capability has been the root of the whole problem all along. (Cf., pp. 49-52, infra.)

Rather, our point here is simply this: To the extent the Indians are not catching their full entitlement in certain areas, there is no reason to believe that they won't be catching it in the foreseeable future.[28]

[28]The most obvious example of an area where the Indians are not catching their full entitlement is in the IPFSC fishery. (Cite)

IV.
FAR FROM SUPPORTING THE 50% PLUS DIVISION OF THE LOWER FEDERAL COURTS, THE PUYALLUP DECISIONS SHOW WHY THAT DIVISION IS WRONG

The Puyallup decisions are the most recent by this Court on the subject of Indian fishing rights. All parties, not surprisingly, use them to justify their position. Thus, they require a full examination.

Such an examination will show that the proper standard against which the State's management of the commercial fishery should be tested is not the 50% plus standard. Rather, it is a much more flexible standard, based upon conservation needs and — most importantly — equal protection principles. It is a standard which can take relative numbers of fishermen into account, and can allow for a truly competitive fishery.

Our examination involves two questions. We here take up the first.

A. Do the Puyallup decisions require a numerical allocation or apportionment for the salmon fishery?

The Solicitor General contends that the Puyallup decisions require a numerical allocation or quota system for the marine salmon fishery.[29] Such a system was, of course, found appropriate in the river fishery involved in those decisions. Let us see if it is likewise required here, as the Solicitor General contends.

The Puyallup decisions involved steelhead, which the Washington legislature had placed in a special category. It had classified steelhead as a game fish, and it had forbidden both the use of nets for catching game fish and the sale of such fish once caught. (See RCW 77.08.020 and

[29]As the Solicitor General put it: "These precedents would seem to foreclose the debate whether *some* form of apportionment between Indian treaty fishermen and other fishermen is appropriate in the conditions." U.S. Br., p. 69.

77.16.060) Steelhead, in short, were to be treated like trout — of which they are a species.

This Court overturned that legislative decision as applied to Indians. The reasons for doing so cast light on the present problem.

In *Puyallup I, supra:*

> "We found the state court decision had not clearly resolved the question whether barring the "use of set nets in fresh water streams or at their mouths" by all, including Indians, and allowing fishing only by hook and line in these areas was a reasonable and necessary conservation measure. The case was remanded for determination of that question and also "the issue of equal protection implicit in the phrase 'in common with'" as used in the Treaty. (*Puyallup II, supra,* at 45)

In treating both the conservation question and the equal protection question in *Puyallup II*, this Court found the unique facts of the steelhead fishery to be critical. The facts were these: The non-Indian sport fishery was catching all the available steelhead; i.e., all that could be caught without cutting into the number needed for escapement. The State Supreme Court had used these facts as justification for the closure of the Indian net fishery. In the words of this Court:

> The Supreme Court of Washington * * * held * * *
>
> "that the prohibition of net fishing for steelhead was proper because the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in that river. Id., at 573, 497 P2d, at 178-179." (*Puyallup II, supra,* at 46)

But the very fact pattern which, in the view of the state court, justified the prohibition, supplied this Court's reason for overturning it:

> The ban on all net fishing in the Puyallup River for steelhead *grants in effect the entire run to the sports fishermen.* Whether that amounts to discrimination under the Treaty is the central question in these

cases. (*Puyallup II*, *supra*, at 46, 47) (Emphasis supplied.)

In finding just such discrimination under the treaty, this Court in *Puyallup II* took into account another obvious fact: the state had available another alternative for conserving the steelhead run and providing the necessary escapement — an alternative to placing upon the Indian fishery alone the entire burden of providing the necessary escapement while permitting the continuation of the non-Indian river fishery. It could divide that burden.

Though neutral on its face, the Washington steelhead system had a severely discriminatory *effect*. The state had an available alternative for taking care of conservation needs, while eliminating that discriminatory effect: apportionment. Hence, conservation needs could not justify the Washington system and it was accordingly struck down. The state promptly made such an apportionment, and it was approved by this Court in *Puyallup III*, 433 U.S. 165 (1977).

Three points should be noted here. First, in managing a fishery, the state typically has available to it various alternatives to meet conservation needs. The Puyallup factual pattern provides an example in its simplest form. In choosing between alternatives, the controlling legal consideration is, as shown again in *Puyallup II*, the principle of equal protection or nondiscrimination. The critical question is: In order to meet escapement needs, has the state chosen a discriminatory alternative when a nondiscriminatory alternative is available to meet those same needs?

Secondly, *Puyallup II* shows the special nature of the Indian treaty right, which is, as determined in *Puyallup II*, one which embodies equal protection principles. Surely, neither a non-Indian nor, for that matter, a nontreaty Indian, could successfully challenge the state's decision to prohibit a net fishery for steelhead. If such a person were to invoke the equal protection provisions of the Fourteenth Amendment, the "rational basis" test would

undoubtedly be applied, and the challenge would fail. But the treaty Indians' challenge in *Puyallup II* was not based on the Fourteenth Amendment. It was based on the treaty. Their challenge was successful because the impact of the state's action in prohibiting net fishing for steelhead was to exclude them from the fishery entirely even though a less discriminatory alternative which would allow them to share in that fishery was available.[30]

Thirdly, the approach taken in *Puyallup II* is, we suggest, essentially the same as that taken by this Court in contexts in which governmental action is challenged as violating a constitutional guarantee. A recent example is *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The Court struck down North Carolina's system of regulating the marketing of apples on the grounds that it violated the commerce clause. The statutory system was facially neutral — as was the regulatory system for steelhead in *Puyallup*; but the Court closely examined its practical effects and found them discriminatory.

> When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and *the unavailability of nondiscriminatory alternatives* adequate to preserve the local interests at stake. Dean Milk Co. v. Madison, 340 US, at 354. (432 U.S. at 353) (Emphasis supplied.)

North Carolina could not show "the unavailability of nondiscriminatory alternatives," and hence its system was struck down. Nor could Washington make such a showing in *Puyallup II*; and hence a similar result. For, in *Puyallup II*, a nondiscriminatory alternative was clearly

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[30]So, too, in *United States v. Winans*, a non-Indian could not have successfully challenged, on Fourteenth Amendment grounds, the effective monopoly which the state had licensed the Winans Brothers to operate in the Columbia River. But a treaty Indian (or the United States) could, asserting the equal protection principles embodied in the Treaty.

available; i.e., a system of apportionment. This was the alternative ultimately adopted — and later approved by this Court in *Puyallup III, supra.*

But in *Puyallup* a numerical apportionment was, as a practical matter, the *only* alternative, because of the nature of the fishery and the fishermen. The only fishermen were Indian net fishermen and non-Indian sports fishermen. And for both groups, the fishery was exclusively a river fishery.[31] The only means of eliminating discrimination was to allocate the fish numerically between the two groups.

There are, however, two vital factors distinguishing the salmon fishery in these cases from the steelhead fishery in the *Puyallup* cases. First, unlike the regulatory pattern for steelhead, the state has always had a commercial salmon fishery on Puget Sound open to all, including treaty Indians, on at least equal terms.[32] Second, there have always been treaty Indians participating in that fishery.[33]

Even if that share is regarded as too small, or as having been reduced by state action, recently the Indian fishing fleet has expanded substantially because of the effect of the district court decisions and federal subsidies for new and more effective Indian fishing vessels and gear.[34]

The thrust of our argument so far should be made as precise as possible. We are not asking this Court to decide here that a nondiscriminatory system for the marine

[31]In marine waters, one catches steelhead only accidentally, while fishing for some other fish such as salmon.

[32]Licenses are not required of treaty Indians fishing in their usual and accustomed places pursuant to *Tulee v. Washington*, 315 U.S. 681 (1942).

[33]Even the tribal brief, at p. 54, concedes that Indian fishermen, *before* the trial, took some 5% of the salmon caught at their usual and accustomed off-reservation fishing places, places including almost all of Puget Sound. Even allowing for ocean catches, that is a greater share of the fishery per capita than that taken by non-Indians.

[34]See discussion at pp. 49-52, infra.

salmon fishery *has* or *can* be devised, without the use of allocation or quotas.[35] Rather, we are arguing that it should refrain from deciding that such a system *has not* or *cannot* be devised. That is, this Court should not eliminate the opportunity for the state to demonstrate to a lower court that such a system is in place or can be devised. The *Puyallup* decisions in no way require that this opportunity be foreclosed. We suggest that, to the contrary, they require that it be left open.

We would, of course, urge that the system be one in which all fish, as well as all fishermen, are treated equally; i.e., in which the management system does not have to take into account whether the fish are hatchery fish or natural fish.[36] The only system which can do this is one which does not use quotas or numerical allocations of fish.

We turn now to the second question. If there must be an allocation, must it be the one devised by the lower courts?

[35]Nor are we arguing that the system used for managing the salmon fishery has never adversely affected the Indian fishery in the past in violation of the treaties. No trial on that subject, based on an "equal opportunity" theory of the treaties, has even taken place. What we do know, and believe we can demonstrate to a lower court, is that the effects of any such discrimination, if it ever existed, have been effectively eliminated through the "affirmative action" program resulting from the lower court's decrees and the recent federal interest in Indian fishing. As a *temporary remedy* for such discrimination, the district court's decision has clearly been effective. It has helped remedy the real problem, a lack of Indian fishing capability. But the core of this controversy involves the correctness of the court's decision in defining a *permanent right* to a fixed share of the catch.

[36]In any system based on numerical allocations or quotas, the question of whether hatchery fish should be included or excluded from the calculations will inevitably arise, just as it did in the *Puyallup* decisions. And, just as inevitably, it must be decided. The treaty allocation before this Court in *Puyallup III*, excluded hatchery fish. 433 U.S. at 177. Strangely, the Indians did not contest this exclusion in their appeal to this Court. See, 433 U.S. at 177, n. 17.

B. If there is to be a numerical allocation or quota system for the salmon fishery, does the treaty require that the allocation be the 50% plus division decreed by the lower courts?

Again, we must emphasize that the lower court's allocation was not just a remedy; it was a definition of the treaty right as well. Can this definition stand, in light of the *Puyallup* cases? We believe that it cannot.

We have already examined this question, at pp.11-12, *infra*. The principal point of that discussion can be summarized very briefly.

In *Puyallup II, supra*, this Court stated:

> "What [allocation] formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." (*supra*, at 48, 49)

But if "rights of Indians under the Treaty" embody a right to 50% of the fish, why did not this Court just say so? Why was it deemed appropriate that all of these "variables" be considered?

The answer is simple. This Court viewed the rights of the Indians under the treaty to be based on equal protection principles, as it had previously stated in *Puyallup I, supra*, and reaffirmed in *Puyallup II, supra*. In applying equal protection principles, these variables become important. And in applying these variables, the relative number of fishermen becomes important as well.

Our argument is no more complicated than that.

The Tribes and the Solicitor General argue that the relative numbers of fishermen are irrelevant because the Indian fishing right is *tribal*. Under their submission the

right of the Puyallup Tribe, for example, to 50% plus of the fish is in no way dependent upon the number of tribal fishermen. That number can be five or five hundred. If there are only five Indian fishermen, this only means that each Indian fisherman can take 100 times as many fish as he could if there were five hundred tribal fishermen. The non-Indian share is in no way affected.

As the Solicitor General asserts:

> "The tribal share cannot fluctuate according as it is harvested by many or few." (U.S. Br., p. 66)

That statement appears in a seciton of the Solicitor General's brief entitled: "The Standard for Apportioning." (U.S. Br., 65-72) But any standard for apportioning which completely fails to take into account the relative numbers of fishermen cannot be squared with the equal protection standard adopted in the Puyallup decisions. Thus, it is not surprising that in discussing his proposed standard, the Solicitor General ignores that equal protection standard entirely, and focuses on a different subject, the asserted tribal nature of the fishing right.

Let us see if the supposed tribal nature of the right provides a way around the *Puyallup* decisions.

V.
THE TREATY FISHING RIGHT IS INDIVIDUAL, NOT TRIBAL

Respondents, in defending the 50% plus allocation, rest most their rationale for the defense on the assertion that the treaty fishing right is tribal and not individual. The Solicitor General, for example states:

> "Recognition that the fishing rights now in dispute were reserved by, and guaranteed to, the Tribes, as such, forecloses any argument for a *per capita* allocation of the fishery." (U.S. Br., 67)

But the respondents provide little basis for the assertion beyond their own *ipse dixit*. See U.S. Br., 66, Tribal Br., 197-208. Because this assertion is so critical to the respondents' position, it requires close examination.

Clearly all of the Stevens treaties reserved specific tracts of land "for the present use and occupation of the said tribes."[37] Ownership was to be in the tribes, as such, rather than in individual members. An individual member, as such, could own a portion of the land only through operation of the allotment process.[38]

Fluctuating tribal membership would not affect the amount of land which the tribe owned; that amount would remain the same[39] whether the membership changed from 500 to 5,000 or vice versa.

Respondents claim that fishing rights were intended to be treated identically. Not so.

The first problem with respondents argument is textual. There are six Stevens treaties[40] involved in this controversy. With only one material variation, they all

[37]See, e.g., Treaty of Medicine Creek, Article II, 10 Stat. 1132.

[38]See, e.g., the General Allotment Act of 1887 (24 Stat. 338)

[39]A fluctuating tribal membership with a constant amount of land in the Tribe, presents, of course, no equal protection problems. For Judge Goodwin, this property analogy neatly took care of any equal protection problems in dividing up the fishery. (Pet. No. 78-119, A6-9)

[40]See U.S. Br. 6 for a listing of these treaties.

follow in structure and wording the Treaty of Medicine Creek, 10 State. 1132. Thus, the textual problem can be seen by examining the structure and wording of that treaty.

In Article I, "* * * *said tribes and bands of Indians* hereby cede, relinquish, and convey to the United States * * *" (emphasis supplied) all right and interest in the lands described thereinafter.

In Article II, as already noted, certain specified lands are then reserved "* * * for the present use and occupation of the *said tribes and bands.*" (Emphasis supplied)

In Article III, however, the right of taking fish is secured to "*said Indians,*" (emphasis supplied) not to "said tribes and bands."

And then, in Article IV, the United States agrees to pay a specified sum of money "*to said tribes and bands.*"

If the reference in Article III were to "*said tribes and bands,*" just as it was in Article I, II, and IV, the argument of the Tribes and the United States would have a strong textual basis. But that is not how Article III reads.[41]

Further, as shown by Articles I, II, and IV, when the treaty draftsmen wanted to secure rights to the tribes and bands, as such, they knew exactly how to do it. Far from indicating the fishing right to be tribal, as such, the text indicates just the opposite.

There are other problems as well, best illustrated by focusing again on the land analogy. Since the lands belong

[41]There is one exception: Article III of the Treaty with the Yakimas *does* secure the fishing right to "said confederated tribes and bands." But the conclusion that in the case of the Yakimas the fishing right is tribal does not inevitably lead to the conclusion that the treaty carries with it a 50% plus allocation. The Yakima Reservation is east of the Cascade mountains, one hundred miles or more from Puget Sound. Most of the Yakima fisheries were, and are, on the Columbia River, outside of the area involved in this case. Some Yakimas did, however, fish on tributaries of Puget Sound with the consent of the Indians living there. F.F. 153-54 (JR 156-57). To assert, under those circumstances, that the Yakima treaty secured to the tribe 50% plus of all the salmon returning to any of the stations on which any members of the tribe customarily fished is simply to highlight the absurdity of the construction of the treaties presented by the tribes and the United States.

to the Tribe, as such, the Tribe can, as is the case with any landowner, use it in any manner it wishes without losing any of its rights to the land.[42] The tribe can lease it to non-Indians for farming, as happens on the Yakima reservation; or sell coal mining rights to non-Indians, as happens on the Navajo reservation; or enter into oil and gas leases with non-Indians, as has happened in Oklahoma. The Tribe can do all these things precisely because it owns the land.

Can it deal with its purported tribal fishing rights in the same manner? Specifically, can it license non-Indians to harvest the tribal entitlement? Such a licensing scheme would, of course, make a great deal of economic sense both for the licensing tribe and the licensed non-Indian fishermen, especially in those cases in which the tribal fishermen are not harvesting their full entitlement. If, as asserted by the Tribes and the Solicitor General, the Indian entitlement is truly tribal, each tribe certainly should be able to engage in such licensing, just as the state licenses non-Indians to harvest the non-Indian entitlement. If the land analogy is to be applied at all, it certainly should be applied here.

In fact, it is not so applied, even by the District Court. After Final Decision No. 1, a number of questions were posed to the District Court, including the following:

> 20. Can a person who is not an enrolled member of a particular treaty tribe exercise, or assist in the exercise of, the treaty fishing right of, or on behalf of, a member of such tribe? 384 F. Supp. *supra* at 412 J. A. 214

[42]Since the land is presumably held in a trust status, of course, any tribal decision is subject to federal approval.

The answer was essentially "No."[43] But if the right is truly tribal, the answer should logically be an unqualified "Yes." The fact that the District Court was unwilling to take this logical step shows the lack of foundation for the whole "tribal right" argument.

There is yet another difficulty. Just as it is not profitable "* * * to indulge the pretense that those [Indians] who executed the treaties of 1854 and 1855 had in mind the rules of the English common law" (U.S. Br. 58) neither is it profitable to indulge the pretense that those same Indians understood the legal distinction between tribal rights and individual rights. After all, the blunt fact is that the various tribes were essentially the creations of Governor Stevens, who combined villages and bands together for the administrative convenience of the United States. The District Court itself recognized this fact:

> "Governor Stevens was directed that in making the treaties, he should endeavor to unite the 'numerous bands and fragments of tribes into tribes * * *'". (Final decision No. 1, F.F. No. 17, JA-107)

And again, in Finding of Fact No. 18:

> "No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, deliberately created political entities for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and sub-chiefs. [Ex. USA–27a, pp. 14-29; Ex. USA–20, p. 28]" 384 F. Supp. *supra* at 355, JA 108.

[43]The full answer was as follows:

A. A treaty right fisherman may secure the assistance of *other tribal fishermen* with off-reservation treaty fishing rights in the same usual and accustomed places, whether or not such fishermen are members of the same tribe or another treaty tribe. A treaty right fisherman may also be assisted by his or her *spouse* (whether or not possessing individual treaty rights), *forebears, children, grandchildren and siblings.* (Emphasis supplied) JA 214 384 F. Supp. *supra* at 412

However murky the history of the treaty negotiations may be, one indisputable fact stands out: Both Governor Stevens and the Indians were concerned that the food supply on the newly created reservations might be insufficient. Absent the right to fish at their usual and accustomed fishing grounds, many Indians might go without sufficient food. And so those Indians were secured the right to fish off reservation. (See Wash. Br., 32.)

It is difficult to imagine that either Governor Stevens or the newly appointed Indian chiefs and subchiefs of the newly created tribes had anything else in mind; and if they did, there is no evidence to show it.[44]

There is one final difficulty with the tribal right theory, as support for the lower courts' division. The theory cannot be logically applied, even in the context of fishing. To show this, one of the District Court's key holdings should first be noted. It reads:

> Therefore, this court finds and holds that the amount of fish of each species from which the harvestable portions shall be determined for the purposes of allocation consistent with this opinions shall be:
>
> 1. The total number of fish within the regulatory jurisdiction of the State of Washington which, *absent harvests en route*, would be available for harvest at the treaty tribes' usual and accustomed fishing places; (emphasis supplied) 384 F. Supp *supra* at 344, JA 90

But how is "harvest en route" by Indians, fishing in their usual and accustomed grounds, to be treated? The question is far from academic.

As already noted, there are six treaties. Five are with tribes or groups of Indians who fished in Puget Sound, its tributaries or the Straits of Juan de Fuca. Each of the Indian groups was treated as independent of the others, entitled to its own lands and other rights, including the right to fish.

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[44]The Indians, of course, are entitled under the treaties to more than a subsistence fishery. See pp. 9-101 *supra*. The question here is whether the newly created tribes, as such, were to be the owners of that entitlement and, whether the supposed tribal ownership tells us anything about the extent and nature of that entitlement.

Some of the salmon migrating from the Pacific Ocean to their spawning grounds pass through the "usual and accustomed fishing grounds of all five of the groups of treaty Indians; almost all of the fish pass through more than one.

The most westerly of the treaty tribes are the Makahs, whose usual and accustomed grounds include all of the most westerly portion of the Straits of Juan de Fuca under the sovereignty of the United States. Under the theories of the lower courts, the Makahs are entitled to 50% plus share of all of the salmon passing through their usual and accustomed grounds. Fully exercised, that would leave less than half of the resource to reach the grounds of the Indians signatories to the Point No Point treaty whose homes are next to the east along the straits and Puget Sound. The Point No Point Indians could then take 50% plus of that remainder.

By the time the few remaining salmon reached the grounds of the Indian beneficiaries of the Medicine Creek Treaty, the most southerly group on Puget Sound their 50% plus share would be of a tiny return—and next to nothing would be available to nontreaty citizens.

In short, the "tribal right" theory provides no legal basis for the division decreed by the lower courts; and further, the division itself cannot be consistently applied.

VI.
"IN COMMON" IN AN INTERNATIONAL TREATY

The tribes (Tribal Br. 142-50) and the United States (U.S. Br. 68) have referred to other United States treaties containing "in common" language. While, we disagree with the conclusions drawn in those briefs, we do agree that treaties are extremely helpful in resolving this controversy.

In 1818 a treaty was made between the United States and Great Britain providing for participation by United States fishermen in certain fisheries in British waters off the coast of Newfoundland, Labrador and neighboring islands. That treaty (Convention with Great Britain, 8 Stat. 248, proclaimed 20 October 1818) provided:

> The inhabitants of the said United States shall have forever, in common with the subjects of his Britannic Majesty, the liberty to take fish * * *"

These fisheries had previously been enjoyed by the inhabitants of the American colonies prior to the Revolutionary War, when they had, of course, been British subjects.

There are substantial similarities between this 1818 Treaty and the Indian treaties giving rise to the present controversy. Not only are the fishing provisions in the 1818 Treaty similar to those in the Indian treaties, but the subsequent Treaty of 1854 (10 Stat. 1089), revising the 1818 Treaty, is contemporaneous with the negotiations of the Indian treaties.[45] In light of those similarities, the decision rendered by the Permanent Court of Arbitration at the Hague, concluded on September 7, 1910 (Sen. Doc. No. 870, 61st Cong., 3rd Sess. 1910, Vol. 1 at 64, et seq.) is highly pertinent in this case, and supports the contentions made by the state respecting the proper construction of the Indian treaties.

[45]The Treaty of June 5, 1854, also described the fishing rights in terms identical to those used in the 1818 treaty, that is, both established a liberty of taking fish in common with others.

The similarities between the two sets of treaties are as follows:

(1) The treaties with Great Britain and the Indian treaties both provide for a right, in common with others, to take fish in certain geographic areas. The 1818 treaty in Article I states:

> "The inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part [geographic description of designated Canadian waters]* * *"

The Indian treaties provide:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the territory, * * *" [Treaty of Medicine Creek, 10 Stat. 1132, Article III, Pet. for Cert. A-131]

While the word "liberty" is used in the 1818 treaty and the word "right" is used in the Indian treaties, in context their meaning is identical.[46]

[46]The British negotiators requested that the word "liberty" be used, rather than "right" in negotiating the predecessor to the 1818 treaty, the Treaty of 1783, (Sen. Doc. No. 870, Vol. 2, at 23-24) which preserved in Article III the Americans' "liberty to take fish of every kind" in certain Canadian waters. This provision was repeated in the 1818 treaty. John Adams, speaking for himself and the other 1783 negotiators, explained in a letter dated August 10, 1822, how the word liberty, rather than right, was chosen. (Sen. Doc. No. 870, Vol. 2, at 318):

> "We demanded it [Article III, which preserved the American liberty to fish in certain Canadian waters] as a right and we demanded an explicit acknowledgement of that as an indispensable condition of peace; and the word *right* was in the article as agreed to by the British Ministers, but they afterwards requested that the word *liberty* might be substituted instead of right. They said it amounted to the same thing for liberty was right and privilege was right; but the *word* right might be more unpleasing to the people of England than *liberty*, and we did not think it necessary to contend for a word."

Consistent with John Adams statement, the United States in its argument to the Court of Arbitration at the Hague, stated:

> "* * * The United States submits confidently that the word *liberty* when employed alone or in a grant or concession is as broad and comprehensive a word as right, and conveys and assures the

By substituting the word "right" for "liberty" the parallel structure between the two sets of treaties is clear.

(2) Both sets of treaties reflected the need at that time to dry and cure fish which were the preservative methods. The 1818 treaty, Article I, provided:

> "* * * the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks * * *"

The comparable provision in Indian treaties provided for:

> "* * * erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." [Treaty of Point Elliott, 12 Stat. 927, Article V, Pet. No. 78-119, A-131]

(3) The revision of the 1818 treaty by the Treaty of 1854, specifically excluded shellfish from the treaty. Article I provides:

> "* * * inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shellfish, * * *"

A similar exclusion of shellfish is found in the Indian treaties:

> "* * * Provided, however, that they [Indians] shall not take shellfish from any beds staked or cultivated by citizens." [Treaty of Point Elliott, 12 Stat. 927, Article V, Pet. No. 78-119, A-131]

(4) The treaty fishing provision for United States citizens in the 1818 treaty is defined in terms of specific geographic areas in Article I. While the Indian treaties do not name the geographic areas available for the fishery, they do, by their terms, place geographical limitations upon such fishing areas by the reference in the treaty to "* * * the right of taking fish, at all usual and accustomed grounds and stations, * * *" [Treaty of

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faculty of doing the thing granted, upon as full and ample tenure without limitation or reservation, as if the word right had been employed." (Sen. Doc. No. 870, Vol. 8 at 35).

Medicine Creek, 10 Stat. 1132, Article III, Pet. No. 78-119, A-131]

(5) In neither the 1818 treaty nor in the Indian treaties is there any language expressly stating who would have the authority to regulate, if necessary, fishing activities by United States citizens or by Indians.

These are the parallels, in both language and approach, between the British treaties of 1818 and 1854 and the Indian treaties, both presenting parallel problems, i.e., determining the rights of fishermen of different nationalities to fish in the same geographic areas. In light of these parallels, the argument of the United States to the Court of Arbitration at the Hague is particularly relevant.

The tribes and the United States argue that the position taken by the United States in the Hague proceedings on the meaning of these British treaties supports their principal assertion here, i.e., that in the Indian treaties the United States intended to reserve to the tribes a 50% plus share of the fish.

Nothing in the history of the British treaties supports this argument. That history is recounted fully in the twelve volume report of the proceedings before the International Court at the Hague (Sen. Doc. No. 870, *supra*) Nothing therein even suggests that either the United States or Great Britain ever asserted that the "in common" language secured to either party a 50% division of the fish or, for that matter, any fixed share at all.

The tribes and the United States imply that the United States' reference in the Hague proceeding to the "equal measure and quality of the right" supported an even division or equal share of the fishery. (U.S. Br. 68, Tribal Br. 147-48) Nothing could be further from the truth.

Throughout those proceedings, the United States contended that American fishermen had a right to take part in a common fishery, i.e., one which was not subject to British regulations without United States concurrence. Sen. Doc. No. 870, Vol. 9 at 709, 717-19; Vol. II at 2017-18. The United States contended that if the British could

regulate American fishing without the concurrence of the United States then the rights of American fishermen would not be equal to the British. *Ibid.*; Sen. Doc. 870, Vol. 8 at 42.

In defining the words "in common" for the International court, the United States turned to the English lexicographer, Dr. Johnson, who defined the words "in common" in 1818 as follows:

> 1. Equally to be participated in by a certain number.
> 2. Equally with another; indiscriminately. (Sen. Doc. No. 870, Vol. 9 at 717.)

The United States' argument based upon these definitions, was as follows: "The first definition 'conveys no idea other than that which the lexicographer plainly states; no idea of it belonging to one more than to the other; no idea of one having any greater rights than the other; no idea save absolute equality.' " Sen. Doc. No. 870, Vol. 9 at 717.

The second definition of the words "in common," the United States argued, was controlled by the word "indiscriminately." The idea of equality had already been sufficiently covered by the first definition. Vol. 9, p. 717-19. The argument proceeded as follows:

> Therefore to say that the American fishermen 'shall have liberty to fish equally, that is to say, indiscriminately with British fishermen,' is to say that *fisheries shall be inter-mingled and thrown into hotch-potch between them to be enjoyed by them without order or arrangement between them, and as chance may enable each of them respectfully to resort to the fisheries and to enjoy them.* (Emphasis supplied.) Sen. Doc. No. 870, Vol. 9 at 718-19.

The United States insisted that the words "in common" conveyed "* * * the idea of a right to the exercise of the fishery equally and indiscriminately by the fishermen of the two nations, *as chance might enable them to exercise it, and without any superior right of the one over the other.*" *Ibid.*

Note once again precisely what the United States was attempting to accomplish by these arguments. It was not

attempting to garner 50% or any other fixed percentage of the fish for its fishermen; rather, it was attempting to make them immune from the regulatory power of a foreign country, so that American fishermen could catch all the fish they wanted, however and whenever they wanted. Hence the argument that the "in common" language created a fishing "free-for-all".

But even in this attempt, the United States failed, as the decision of the Hague court shows. The court concluded that the effect of the words, "in common" was, *inter alia*, as follows:

> * * * these words admit them [American fishermen] only as *members of a social community, subject to the ordinary duties binding upon the citizens of that community, as to the regulations made for the common benefit*, thus avoiding the bellum omnium contra omnes which would otherwise arise in the exercise of this industry; (Emphasis supplied.) Sen. Doc. No. 870, Vol. 1 at 79.

In short, the American fishermen were not immune from the regulatory power of a foreign country. And the Hague Court concluded that under the treaties Great Britain (and derivatively, Canada or its provinces) had the authority to regulate the fishery in a manner which was necessary or appropriate for the protection and preservation of the fisheries. (Sen. Doc. No. 870, Vol. 1, at 82, 83, 85) This regulatory authority extended to both American and local fishermen, provided that the regulatory pattern did not give unfair advantage to the local fishermen over the American. (Sen. Doc. No. 870, Vol. 1 at 85) And, most importantly, neither group of fishermen was given a fixed percentage of the fish.

Thus, the result of the Hague proceedings is completely consistent with the equal protection principles established in *Puyallup I* and *III*, *supra*, and with the result which we argue for here.

VII.
THE HISTORICAL CONTEXT OF THE TREATIES

To help this Court determine the nature and extent of the "in common" fishery secured for Indian and non-Indian alike by these treaties, the State drew this Court's attention to the historical context of the treaties in its opening brief. (State Br., 31-5; 42-56.) The United States and the tribes, however, uncomfortable with the lower courts' varied rationales for the 50% plus allocation, have now adopted a "reasonable needs" rationale for that division,[47] without any significant historical or textual basis for such a division. We return to that historical context briefly to help this court construe the treaty provisions in the light of the "* * * common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

Prior to the negotiation of these treaties in 1854-55, the United States claimed sovereignty over the area now known as the State of Washington by discovery, settlement and the treaty extinguishment of the conflicting claims of Spain, Russia and Great Britain. When the U.S. signed the treaty with Great Britain of June 15, 1846, 9 Stat. 869, its claim to sovereignty over the area was complete.

In 1854, the Indians of Western Washington did not have a formal political structure and were organized loosely, if at all. (F.F. 15, JA 106.) Therefore, it was necessary for Governor Stevens to create tribes and bands with leaders or chiefs in order to have political entities with which to negotiate. (F.F. 17, 18; JA 107, 108.) The treaty negotiations with those newly organized tribes involved but one sovereign, the United States.

The treaties were intended only to extinguish Indian claims of title to land in the Washington Territory. Neither the Act authorizing the negotiations of these treaties,[48] nor the letter of instruction to Isaac Stevens even mentioned

[47]U.S. Br., 62; Tr. Br., 160.

[48]Act of June 5, 1850, 9 Stat. 437.

Indian fishing rights as a subject of negotiation.[49] Non-Indians obviously already had the right to fish, a right derived from the sovereignty of the United States. The American negotiators were not authorized to treat away any U.S. governmental authority. (F.F. 19, JA 108, 109.)

In 1854-55, Western Washington was sparsely populated with 2,000 non-Indians and widely dispersed Indian settlements containing about 8,000 Indians. (U.S. Br. 55) While Indians caught most of the fish, including those consumed by non-Indians, non-Indians did fish for themselves as well. (F.F. 7, JA 102) Moreover, non-Indian commercial enterprises, although rudimentary, were in existence and in production during the 1840's and 1850's. (F.F. 8, JA 102) Those non-Indians obviously fished under a claim of right and not at the sufferance of the Indians. Non-Indians could not have been charged with a criminal offense in an Indian court for fishing. *Oliphant v. Suquamish Tribe, supra.* Nor could the Indians have enjoined non-Indian fishing in a United States court.

In short, Indian and non-Indian alike shared in a common fishery. The treaties did not change this situation. While Governor Stevens assured the Indians that he did not intend to stop Indian fisheries, he also made it clear that the Whites would also fish. (F.F. 20, JA 109; Ex. PL-16(b), JA 331; Ex. PL-22, JA-331-332)

Though there was no intent to exclude Indians from fishing for economic gain, the negotiators seem to have envisioned agriculture as the mainstay of the future Indian economy. (F.F. 21, JA 109) This is brought out most strikingly in Article X of the Treaty of Medicine Creek, 11 Stat. 1132:

> The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to

[49]Ex PL 1, 34 Letter dated August 30, 1854, from the Acting Commissioner of Indian Affairs, Charles Mix, to Isaac Stevens; the letter is reproduced as App. A in the Brief for Respondents filed in *Oliphant v. Suquamish Indian Tribe*, Oct. Term 1977, No. 76-5729.

> support, for a period of twenty years, *an agricultural and industrial school,* to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and *to provide the said school with a suitable instructor or instructors,* and also *to provide a smithy and carpenter's shop,* and furnish them with the necessary tools, *and employ a blacksmith, carpenter and farmer,* for the term of twenty years, *to instruct the Indians in their respective occupations.* (Emphasis supplied)

Cf., also, Article XI, Treaty of Point No Point, 12 Stat. 933. All of the instant treaties contained such provisions.

Consistent with that treaty provision, negotiators contemplated that Indians would become less dependent on fishing as they became increasingly westernized and successful in their agricultural pursuits. (Ex. D-1, p. 27-28)

The United States suggests that if an apportionment is not provided for in the treaties, then the Indians would be left with an empty right. (U.S. Br., 64, 66) The tribes suggest that if the State argument (that no apportionment was intended) is accepted, a virtual preemption of the treaty right would occur. (Tr. Br., 106) These suggestions ignore this Court's injunction to read treaties in light of the common notions of the day and the assumptions of those who drafted them. *Oliphant, supra,* at 206.

In the mid-1850's, Indians were not citizens of the United States. The Fourteenth Amendment had not yet been passed and the Fifth Amendment would not have protected Indians in the exercise of any off-reservation fishing activity. Without the treaty provisions for fishing at the usual and accustomed off-reservation places, the Indians would not have had the right to leave their reservations to seek fish. The treaty fixed an easement in off-reservation lands to assure them access to those places. It secured to them the same right to fish as that possessed by citizens. It gave them equal protection guarantees before the equal protection clause was written. It was far from an empty promise. But the right was to be exercised "in common with the citizens of the Territory."

VIII.
TREATY INDIANS WILL CATCH A SIGNIFICANT SHARE OF THE SALMON IN AN EQUAL OPPORTUNITY FISHERY

In *Puyallup II, supra,* this court found that the state regulatory system for steelhead on the Puyallup River, though neutral on its face, had a discriminatory effect and thus violated the treaty. The effect of that regulation was to reserve all of the steelhead for non-Indian sportsmen while prohibiting any Indian net fishery. It was that denial of any Indian net fishery which discriminated against the Indians and conflicted with the "in common with" language of the treaty. In the salmon fishery a regulatory system permitting an equal opportunity fishery is by its nature and effect non-discriminatory.

In 1973, Washington began legal efforts to limit the size of the non-Indian commercial fishing fleet. A "moratorium" law restricts the issuance of state licenses to fishermen who previously had been engaged in fishing during a qualification period. The original statute, RCW 75.28.420, applied only to the herring fishery for 1973 and subsequent seasons. The moratorium was subsequently extended in 1974 to all non-Indian commercial salmon licenses (RCW 75.28.455) and in 1977 to licenses for charter boats, RCW 75.30.020, (boats which take sports fishermen salmon fishing for a fee).

The moratorium has limited the size of the non-Indian commercial fleet. But treaty Indians are not required to purchase a state license for fishing in their usual and accustomed grounds (*Tulee v. Washington,* 315 U.S. 681 (1942)) so the expansion of the Indian fishing fleet is not affected by the state moratorium and the expansion of that Indian fleet has continued.

Since 1975 the moratorium program has been supplemented by a "buy-back" program. (RCW 75.28.500 et seq.) Using federal funds, commercial fishing boats and licenses are purchased by the state. The boats are then resold with a restriction that they can never again be used in Washington commercial fisheries, RCW 75.28.520. Licenses once purchased are retired so the number of

non-Indians who can participate in the fishery declines. The proceeds from the boat sales go into a revolving fund used to buy more boats, gear and licenses. Under the terms of a district court injunction (now on appeal), treaty Indians can buy these boats and use them for commercial fishing in Washington.

Under an "equal opportunity" interpretation of the "in common" language, treaty Indians will continue to enjoy the right to participate in the fishery without procuring a license. The continuation of the state's moratorium on issuance of licenses and the "buy-back" program will reduce the number of non-Indian fishermen and thus decrease competition for Indian fishermen. Treaty Indians will also continue to benefit from the state's enhancement program.

The state of Washington has historically been involved in fish enhancement programs and is now engaged in an expanded massive effort involving over forty hatcheries and related facilities. In 1977, the State authorized an expenditure of over 30 million dollars for fishery enhancement. To finance the costs of the program license fees taxes on fish processors were increased and a sports license was required for non-ocean fisheries. (ch. 327 1st ex. sess. Wash. Laws of 1977.)

The number of treaty fishermen has increased from 794 at the time of the *U.S. v. Wash.* trial to over 1,200 at the present time (Tribal Br. 59). Not only is there the potential for further increases, which is not available for non-Indians due to the moratorium, but more importantly there has been a qualitative increase in capacity of the Indian gear to harvest the resource. Indians have acquired a number of purse-seine vessels which are expensive, highly-effective fishing boats. Similarly modern gillnetters have proliferated in the Indian fleet as a result of assistance from the tribes and the United States government.

At the time of the original trial in *U.S. v. Wash.*, there were found to be few treaty Indian fishermen with boats and gear comparable to the non-Indian fleet. By contrast, in 1977, the number of boats owned by treaty Indian

fishermen, which were comparable to the non-Indian fleet, were 51 trollers, 10 purse seiners and 244 gillnet boats. In addition, the Indians have 313 marine gillnet skiffs (smaller boats) (Fed. Task Force Rept. 183).

As a result of all these factors the capability of the present Indian fleet has substantially expanded in recent years. That increased harvest capacity resulted in the Indian fleet harvesting 20% of the American share when the United States, in regulating the IPSFC fishery in 1978, had intended to provide the Indians with only 10-15% of the harvest.

Numerous tribes have established tribal enterprises for merchandizing of fish products. Profits that earlier would have gone to non-Indian "middlemen" are thus presently available to the Indian community.

As a result of all these factors, the number (and poundage) fo fish caught by treaty Indians under an "equal opportunity" interpretation of the "in common with" languge will continue to be many times what the Indian fishery could have been harvesting at treaty times, or even at the time of the district court decision.

To the extent that a historical low Indian fish harvest was caused by insufficient participation by Indian fishermen and gear, the remedy has been applied. The United States has recently commenced to fulfill its trust responsibilities by aiding Indians to acquire fishing gear. It should be recognized that the reduction of fishing gear by the buy-back program is funded by the United States.

The Federal Task Force recommends the continuation of the gear-up/gear-down program; that is increasing Indian gear while reducing non-Indian gear.

Not only do some of the treaty fishermen have modern commercial fishing boats and gear, but treaty fishermen also use the more effective types of stationary gear; numerous set gill nets and even several fish traps. For non-Indians, the use of "fixed" gear is barred by statute.

It is somewhat ironic that the treaty Indian fishermen assert a right to use potentially destructive devices such as fish wheels and traps which the Winans Brothers operated

to the exclusion of Indian fishermen. *U.S. v. Winans*, 198 U.S. 371 (1905). Such devices, along with all fixed gear (especially in streams) were prohibited in the State of Washington in the early part of this century. The target of that legislation was not (as some Indian counsel would have the Court believe) the Indian fishermen. Rather, the target was the big concerns such as the Winans Brothers, who were perceived as monopolizing and destroying the resource.

Further, the state has cooperative agreements with many of the tribes whereby the Fisheries Department provides fish eggs or fry, expertise, and, in some cases, food for the raising of fish. Some are reared in pens until they can be sold. Most, however, are released to return one or more years later. These fish raising programs have increased the Indian catch and will do so increasingly.

An equal opportunity interpretation of the treaties will also return order and certainty to the management (by the state) of the fishery with concomitant benefits to the resource itself. This will provide long-term benefits in the form of increased salmon runs available to all fishermen.

Finally, such an interpretation will largely remove the courts (state and federal) from continuous participation in technical aspects of the fish resource management. Fisheries management is sufficiently complicated and often requires emergent action. Court proceedings complicate the effective management of the fishery resource.

As to the harvest by the Indian community, the above factors combine with other recent events to assure a large and *increasing* harvest by treaty Indian fishermen. Not only do they have the advantage of participating in an increasing harvest with decreasing competition but the Indian fleet has dramatically increased both quantitatively and qualitatively in recent years.

IX.
THE RELEVANCE OF AFFIRMATIVE ACTION IN THIS CONTEXT

The State cannot overlook the fact that it is faced in these cases with literally hundreds of pages of briefs from the tribes and their amici[50] charging the State and its citizens with both deliberate violations of treaty rights and systematic racial discrimination directed at treaty Indians. The State vehemently denies those allegations and believes them to be unsupported by the findings and conclusions in the original district court decision.

The State must recognize, however, that a court might view the facts differently and that it might deem some form of affirmative action appropriate to restore the treaty Indians to a place in the fishery which they would have had absent any such discrimination.

Justice Powell in *Regents of University of California v. Bakke*, ____ U.S. ____, 46 L.W. 4896 (June 28, 1978), with reference to affirmative action relief, said:

> "* * * The scope of the remedies was not permitted to exceed the extent of the violations." (*supra* at 46 L.W. 4904.)

And Justice Brennan observed in the same case:

> "* * * that racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to the achievement of those objectives.'" (*supra* at 4920)

And, Justice Blackmun observed:

> "I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past." (*supra* at 4932)

While the Justices in *Bakke* reflected substantial disagreement in reviewing the admissions policy of the California Board of Regents, the members of the Court do reflect, in various opinions, an agreement that if a

[50] At least two of which are represented by counsel who have been counsel of record for tribes in this litigation.

particular affirmative action program is legally permissible, it is permissible only to the extent necessary to remedy past practices by means of a remedy devised to be transitional and not permanent, on-going and unchangeable.

The point here is that the State has not had a day in court on any allegations about the existence or the extent of any discrimination. Both the United States and the lower courts have treated this litigation as involving exclusively the permanent and immutable meaning of the treaties. Their decisions are the antithesis of the doctrine of equal protection and affirmative action. If the State is to be charged with a form of discriminaiton which violates the requirements of equal protection, it is at least entitled to a trial on those charges and a remedy suited to any violations which it is found to have committed.

The common thread in the affirmative action cases[51] which differs from the present case is that the affirmative action cases reflect an effort by a temporary remedial action, the length of which is unknown, to accomplish a real as well as a theoretical equal application of the law in our society. In contrast, the present decisions provide not that sort of remedy but rather declare a fixed right which is permanent and is the antithesis of equal opportunity.

As indicated in the preceding section, the quantity and quality of Indian fishing gear has substantially improved since the original 1974 decision. This increase has provided Indians with the capacity sustantially to increase their participation in the fishery even if that fishery is conducted on the basis of an equal opportunity for all fishermen. This increase in equipment can continue and undoubtedly will do so. We submit that if a transitory period was needed to effectuate an increased participation by the Indians in the fishery harvest, that transitional period has already taken place. The developments which

[51]E.g., bussing of school children, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); special admission programs, *Regents of University of California v. Bakke*, *supra*, *De Funis v. Odegaard*, 416 U.S. 312 (1974); employment, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1975).

have occurred since the original district court decision; i.e., the increase in the number of Indian fishermen, the influx of federal funds and programs, and the decrease in the non-Indian fishermen by virtue of the moratorium program has reached a stage not requiring any further affirmative action programs, at least without a specific finding that such programs are necessary by reason of specifc state action.

The federal government in its guardian responsibility for the tribes does not need a court decree in order to continue its program of assisting Indian tribes and tribal members.

CONCLUSION

In this brief, we have said little about the International Fishery case (before the Court in No. 78-119), the two state cases (before the Court in No. 77-983) or the case involving the 1978 enforcement order (before the Court in No. 78-139). Instead, we have focused almost exclusively on the issues involved in the Washington Fishery case (before the Court in No. 78-119). This has been deliberate.

As this proliferation of cases shows, the Court is presented with a legal Gordian knot. But that knot can be easily cut. It can be cut by addressing and deciding the basic issue, the proper meaning of the "in common" language of the treaties. All of the complications in the other cases, including all the enforcement problems, stem from the district court's erroneous construction of this language — the construction affirmed in the Washington Fishery case. Once that construction is corrected by this Court, the myriad of other issues in the other cases will, we believe, become manageable, if they do not disappear entirely.[34]

Accordingly, once the basic ruling of the lower federal courts in the Washington fishery case is reversed, the

[34]Not all of the litigation stemming from the district court's basic decision is before this Court. As the Solicitor General correctly observes, each new season in the IPSFC fishery gives rise to a new round of litigation. (U.S. Br. 41-43) An example is found in *Purse Seine Vessel Owners Ass'n v. State*, 584 F. 2d 931 (9th Cir. 1978). The United States defends, in part, by claiming that under the Washington fishery case, the United States is required to provide a special treaty entitlement, through special Indian regulations. Yet in this Court, they argue that "* * * there is no issue properly before this Court regarding that [IPSFC] fishery." (U.S. Br. 76) The Ninth Circuit saw the obvious connection.

> The interpretation and effect of the decree in *United States v. Washington* [Washington Fishery case] are issues which are presently pending before the United States Supreme Court. Under these circumstances, it would be inappropriate for us further to pursue the issues. (*PSVOA v. State*, 584 F. 2d 931 (1978) at 934). (Footnote omitted.)

judgments in all the cases now before the Court should be reversed for further proceedings in accordance with the Court's opinion.

DATED this 22nd day of February, 1978.

Respectfully submitted,

SLADE GORTON,
Attorney General,

EDWARD B. MACKIE,
Deputy Attorney General,

JAMES M. JOHNSON,
Sr. Assistant Attorney General,

TIMOTHY R. MALONE,
Assistant Attorney General,

Counsel for Petitioner State.

FOR ARGUMENT

Nos. 77-983, 78-119 and 78-139

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *et al.*

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*, *Petitioners*,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*

REPLY BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, *Et Al.*

CHARLES E. YATES
DOUGLAS FRYER
Moriarty, Mikkelborg, Broz
Wells & Fryer
3300 Seattle-First National
Bank Building
Seattle, Washington 98154

Attorneys for Puget Sound Gillnetters Association, et al.

JOSEPH T. MIJICH
JOHN P. WORLD
3920 Bank of California
Center
Seattle, Washington 98164

Attorneys for Purse Seine Vessel Owners Association, et al.

Of Counsel:

PHILIP A. LACOVARA
GERALD GOLDMAN
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

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James v. *Almond*, 170 F. Supp. 331 (E.D. Va.), *appeal dismissed*, 359 U.S. 1006 (1959)	75

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Railroad Commission of Texas v. *Pullman Co.* 312 U.S. 496 (1941)	68,69

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United States v. *Washington*, 520 F.2d 676 (9th Cir. 1975), *aff'g* 384 F. Supp. 312 (W.D. Wash. 1974), *cert. denied*, 423 U.S. 1086 (1976)	10,18,53 81,84
United States v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)	4,5,9,10, 12,13,16, 17,18,19, 32,34,43, 46,50,52, 53
United States v. *Wheeler*, 46 U.S.L.W. 4243 (U.S. March 22, 1978) (No. 76-1629)	35
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Western Union Telegraph Co. v. *Pennsylvania*, 368 U.S. 71 (1961)	67
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Treaty of Olympia, 12 Stat. 971 (1855)	passim
Treaty of May 8, 1871, 17 Stat. 863	37,38
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Frankfurter, *Note On Advisory Opinions,* 37 Harv. L. Rev. 1002 (1924)	61
Note, *Defendant Class Actions,* 91 Harv. L. Rev. 630 (1978)	57
J. Adams, *The Fisheries and The Mississippi* (1822)	38
P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System* (Foundation 2d ed. 1973)	68,69
R. Marasco & E. Anderson, *Washington Salmon Fisheries: An Economic Profile* (Washington Department of Fisheries, October 1977), *cited in* U.S. Department of Commerce, NOAA, National Marine Fisheries Service, *Fisheries Statistics of the United States.*	30
J. Moore, *Moore's Federal Practice* (Mathew Bender 2d ed. 1974)	50,61
Restatement (Second), Judgments (Tent. Draft No. 1, 1973)	
R. Thompson, *Summary of the 1978 Sockeye Salmon Commercial Fisheries in U.S. Waters Under the Jurisdiction of the International Pacific Salmon Fisheries Commission* (National Marine Fisheries Service, November 1978).	28,29
U.S. National Marine Fisheries Service, *Preliminary Summary of the 1977 Sockeye and Pink Salmon Commercial Fisheries in U.S. Convention Waters* (1977)	29
C. Wright, *Law of Federal Courts* (West 3d ed. 1976)	62,77
C. Wright & A. Miller, *Federal Practice and Procedure* (West 1972)	50,51, 62,66,83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, *et al.*

No. 78-119

STATE OF WASHINGTON, *et al.*, *Petitioners*,

v.

UNITED STATES OF AMERICA, *et al.*

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*, *Petitioners*,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*

REPLY BRIEF FOR PETITIONERS PUGET SOUND GILLNETTERS ASSOCIATION, PURSE SEINE VESSEL OWNERS ASSOCIATION, ET AL.

INTRODUCTION AND SUMMARY

1. The briefs of the government and the Indian tribes attempt to erect a series of procedural obstacles to reaching the merits of the controversy before the Court. At least for the government, which acquiesced in certiorari precisely to have these issues laid to rest, this is an astounding change of position. In any event, the objections to plenary review are without substance, and only reflect on respondents' part the same lack of confidence in the results reached by the federal courts that Judges Kennedy and Wallace candidly expressed in their concurring opinions below. *See* 573 F.2d at 1136.

Since original claims in the federal action are still pending in the district court, the decree entered by Judge Boldt in 1974 unquestionably was not final and its underlying determinations remain open to plenary review. *See, e.g.*, Fed. R. Civ. P. 54(b); *John Simmons Co.* v. *Grier Brothers Co.*, 258 U.S. 82 (1922). Even if the decree had become final, this Court would not be barred from reaching the treaty interpretation issues, especially on behalf of the non-treaty fishermen who were not parties to the earlier proceedings and cannot be held bound by them.[1]

Furthermore, these federal issues were properly reached in the State proceedings instituted by the fishing associations and the State cases are now properly here on direct review. The State courts were not obliged to defer to the rulings of the lower federal courts, even on the federal issues, and the State supreme court's ruling on the state law issues is conclusive.

[1] Contrary to the assertions of the separate brief of the Yakima Nation, the fishing associations' Petition in No. 78-139 was not out of time. The Petition was filed on Monday, July 24, 1978, not (as claimed by the Yakimas) on July 26, 1978. Although this was 91 days after entry of the Court of Appeals' judgment, Rule 34 of this Court's rules extends the 90-day period for filing a petition for certiorari one day when the last day of the period would otherwise be a Sunday.

2. The Indians attempt to gloss over the fact that, as a result of present economic conditions and the impact of Judge Boldt's apportionment program, this controversy is a commercial dispute of great economic significance for *all* parties. While contending, somewhat inconsistently, that this program has occasioned measurable economic gains for the Indians, respondents attempt to belittle the preference accorded the Indians by apportionment and to ignore its cost to the non-treaty fishermen. As we pointed out in our opening brief (at 10 n.5), there is scant evidence in the record concerning the program's economic impact on the non-treaty fishermen, since they were not parties to the original federal proceedings, and were expressly denied the opportunity to submit such evidence when the district court peremptorily extended its decrees to them. *See* JA 483 (¶ 4), 538-41.

Although the Indians presently take less than 50% of all the fish landed in the State of Washington, many of those fish are of non-Washington origin, and the comparison, therefore, has no relevance to the issues before the Court. This case concerns only the competition for fish harvestable at the Indians' accustomed grounds. Furthermore, the true impact of the federal decisions below must take into account the additional quantity of fish that will be taken by the Indians if the apportionment program is sustained and the Indians develop the power to exploit their 50 percent share in full.[2]

3. When the government and the tribes finally reach the merits, their arguments to support the preference for Indian fishing ordered by Judge Boldt rest on selective assertions of fact—many not accepted by the district judge himself—and on an imaginative rewriting of history and this Court's precedents. While the government is somewhat more candid in admitting

[2] As the Indians concede (Brief of Respondent Indian Tribes at 103 n.294 [hereinafter cited as "Ind. Br."]), they presently take nowhere near 50 percent of the fish in the IPSFC fisheries. United States fishermen land several millions of fish in these fisheries annually.

that an apportionment was never contemplated by any party to the treaties and that the 50-50 allocation decreed below cannot, in any event, be regarded as inevitable, the Indians would have the Court believe that there is a basis in the record or in other historical evidence for compelling this result. Despite the prolixity of the respondents' briefs, however, the simple and irrefutable facts are these:

a. When the tribes ceded any claims that they had to ownership of the land in question, they reserved only a right to fish "in common" with citizens of the Territory at their usual and accustomed fishing sites.

b. Nothing in the text of the treaties or the negotiations leading to them contemplated the imposition of restrictions on fishing by non-Indians, especially at non-Indian sites, in order to assure a particular quota of fish for the Indians.

c. There are *no* findings of fact by the district court that either party to the treaties understood that under the treaties the Indians were extending only so-called "user rights" to the settlers to fish at the Indians' accustomed sites. On the contrary, the findings are that:

> "The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, *but* that the white man also would be allowed to fish." 384 F. Supp. at 355, JA 109 (FF 20) (emphasis added).

And:

> "Apart from one instance when the Makahs prohibited a non-Indian from fishing on their reservation, there is no evidence at the time of the treaties that *either* party intended to restrict the other party's fishing because it was not contemplated that they would interfere with each other." *Id.* at 357, JA 113 (FF 28) (emphasis added).

Thus, the actual findings below are that the Indians did *not* seek or obtain the right to exclude or limit fishing by non-Indians by granting the citizens only "user rights" or by any other means.

d. The concept of "user rights" in the tribes' tradition depended on ownership. Since the Indians were ceding ownership of their usual and accustomed off-reservation fishing sites, it would only have been natural for them to regard the opportunity to fish in common with the settlers as the extension to *them*, the Indians, of revocable "user rights," not the other way around. The treaty guarantee of "common" fishing rights was intended only to counteract this assumption.[3]

e. No nineteenth century fishing treaty, including the 1818 treaty between the United States and Great Britain, has been construed as either permitting or requiring a 50-50 apportionment of fish between the two signatories.

f. To the extent that conditions of scarcity in the last 125 years have undercut the relative productivity of Indian fishing at off-reservation sites, these are problems that the treaties do not cover and that can be addressed only by legislative action, not by judicial reformulation.

4. The prior decisions of this Court interpreting the Stevens treaties dictate the proper result in these cases. As this Court settled long ago, the clause allowing the Indians to take fish in common with the citizens of the Territory is essentially a guarantee of physical access, not the creation of a right to exclude non-Indians from competing with Indian fishermen. The treaties merely "fixe[d] in [this] land such easements as enable the right [to fish] to be exercised." *United States* v. *Winans*, 198 U.S. 371, 384 (1905). This easement permits the

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[3] *See also* 384 F. Supp. at 256, JA 111 (FF 24): "The Indians who negotiated the treaties probably understood the concept of common ownership interest which could have been conveyed in Chinook jargon."

Indians to share off-reservation fisheries with other citizens. But Indians do not have priority rights to the resource when it becomes scarce, and have no right, contrary to what the federal courts below have effectively ordered, either to exclude non-Indians from equal access to these sites or to demand limits on fishing at sites not even covered by the treaties.

In addition, *Winans* and other decisions settle that the Stevens treaties bestow individual rights on non-Indians as well as Indians, "as though named therein," *id.* at 381, and that these rights are of equal dignity. *See also Puyallup Tribe* v. *Department of Game of the State of Washington,* 391 U.S. 392, 398 (1968) ("*Puyallup I*"); *Department of Game of the State of Washington* v. *Puyallup Tribe,* 414 U.S. 44, 49 (1973) ("*Puyallup II*"); *Puyallup Tribe, Inc.* v. *Department of Game of the State of Washington,* 433 U.S. 165, 176 & n.16 (1977) ("*Puyallup III*"). These principles require the rejection of any apportionment that burdens one group for the benefit of another.

The *Puyallup* cases also demonstrate that this Court has already resolved the problem that the apportionment decreed below is intended to solve: the unanticipated relative scarcity of the resource. The *Puyallup* cases hold that, in modern times of relative scarcity, State conservation regulations may lawfully be applied to *all* fishermen, including treaty Indians, so long as the regulations are non-discriminatory. This Court's holdings in the *Puyallup* trilogy have forced even the tribes to concede this point, albeit reluctantly. Ind. Br. at 172 n.399. In *Puyallup I* this Court noted that the Indians' easement continues despite changes in ownership of the lands. 391 U.S. at 397. But several paragraphs later the Court carefully explained that the Indians' rights under the treaties do not permit them to exclude competitors:

> "Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly

> the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State." *Id.* at 398.

See also Tulee v. *Washington,* 315 U.S. 681, 684 (1972).

Thus, rather than require the State to accord preferential treatment to Indians, this Court's earlier cases establish that the Stevens treaties bestow individual rights that must be given equal respect in the regulation of a scarce resource. Nothing in the treaties prohibits the State from imposing similar conservation regulations on Indian fishermen or requires that the regulatory system be structured to give Indians a preferential right to harvest.

5. In order to avoid the force of the incontrovertible facts and this Court's precedents, the respondents indulge in several fictions to frame their arguments.

a. The decision in this case turns on the meaning of the treaty language "in common with." The Indians weave their first fiction when they assert that this language simply creates a *license* granted by the Indians to the non-Indian settlers to use off-reservation lands for fishing, while the Indians reserved special priorities. The United States government wisely does not support this argument, since the text of the treaties and the events surrounding their negotiation contradict it. The Indians were ceding ownership claims over all lands other than those set aside for their reservations. They were understandably concerned about securing access to their traditional, off-reservation fisheries, so that *they* could continue to fish at sites that could otherwise have been closed to them. As *Winans* shows, a right of *equal access* is what they sought and what they received.

b. The Indians construct a second fiction by mischaracterizing our fundamental arguments. Despite their description of our position, we do not suggest that the treaty and non-treaty fishermen are on equal footing *vis-a-vis* all State

regulation. We have recognized from the outset that treaty Indians, as wards of the federal government, effectively enjoy greater freedom to fish than other citizens in *some* respects. Petitioners' Br. at 28 n.18.[4] This is not because Indians have preferential rights to a successful catch under the treaties, but merely because, without congressional authorization, the State's otherwise *plenary* powers to impose affirmative restrictions on fishing extend in *full* force only to non-Indians.

Nonetheless, we are not asking this Court to expand the State's jurisdiction over Indian affairs. Our position is that a just accommodation of non-exclusive rights is achieved if the State's regulations treat all individual fishermen equally, as called for by the *Puyallup* decisions.

c. The respondents' third fiction would have the Court ignore the individual fishermen in this litigation—non-Indians and Indians alike—and confine its inquiry to the activities and interests of "the Tribes" and the State. But the Court is adjudicating the right to fish, and the realities are clear: *Individual* Indians, not tribal entities, fish. *Individual* citizens, not States fish. The treaty negotiations occurred between spokesmen for the tribes and the Territory, but the rights secured were for the benefit of the individual members of these political entities "as though named therein." *United States* v. *Winans, supra,* 198 U.S. at 381.[5] Thus, the effort to justify a 50-

[4] *See United States* v. *Winans, supra* (Indians cannot be excluded from fishing at usual and accustomed sites when the land is acquired by private owners under license of the State); *Tulee* v. *Washington, supra* (treaty Indians are immune from state licensing requirements which are otherwise applicable to the State's fishermen).

[5] Indeed, in *Puyallup III*, this Court noted that the position of the Puyallup Tribe is distinct from that of its members. Although the State, therefore, could not enforce its regulations against the tribal entity, it did have authority to adjudicate the rights of individual members of the tribe. This distinction explains the basis for the State's acknowledged conservation-based regulatory authority over treaty Indians.

50 apportionment between two groups on whose behalf the treaties were negotiated rests on a transparently artificial formality.

d. In a related, creative effort to sustain the 50-50 allocation, the respondents paint the tribes with a royal brush. They ambitiously transform what the district judge described as fragments of tribes into sovereign nations. *See* 384 F. Supp. at 354, JA 107 (FF 17). Indeed, the district judge found that no political structure even existed among the Indians prior to the negotiations with Governor Stevens. *Id.* at 355, JA 108 (FF 18). The numerous bands of Indians in the Washington Territory were organized by Governor Stevens into political entities for the very purpose of negotiating the treaties. Even after adoption of the treaties, the respondents admit that the powers of these "tribes" were no more than those of a quasi-sovereign. *See* U.S. Br. at 66; Ind. Br. at 143 n.379.

Thus, there is little rational basis for attempting to draw an analogy premised on fishing treaties negotiated between the United States and foreign governments. The respondents' elaborate and misleading discussion of the 1818 treaty with Great Britain adds nothing to their position. Neither party to that treaty ever argued, and no international tribunal ever ruled, that the right of equal access enjoyed by the nationals of each country justified any apportionment of the fishery, let alone a 50-50 allocation. The decisions of the federal courts below are truly unprecedented.

ARGUMENT

I. THE 50-50 ALLOCATION ORDERED BY THE COURTS BELOW CANNOT STAND.

The central issue before the Court is the propriety of the 50-50 apportionment and the preferential treatment that it necessarily entails for treaty Indians. In our view, no apportionment can be reconciled with the treaties' guarantee of equal individual access to the Indians' traditional fishing grounds.

A. The Stevens Treaties Accord Individuals Equal Rights To Compete For Fish.

Judge Boldt essentially decreed that the treaties required an allocation of fish as a matter of law in light of a contemporaneous dictionary definition of the term "common." 384 F. Supp. at 343, JA 88-89. The district judge apparently believed that the Indians are entitled to preferential treatment because, in his view, they enjoy fishing "rights," while non-Indian fishermen have mere "privileges." *Id.* at 332, JA 70. The court of appeals, on the other hand, recognized that the Stevens treaties "granted equal rights at the traditional [fishing] areas to Washington citizens . . . ." 520 F.2d at 689, JA 53. The court, nonetheless, analogized the treaty parties' rights to a cotenancy subject to partition on equitable grounds. 520 F.2d at 686 n.3, 687, JA 48-49. The court of appeals affirmed, despite the fact that Judge Boldt had reached his conclusions solely as a matter of law and not as an exercise of any equitable discretion.

We showed in our opening brief (at 27-35) that neither rationale is sound and that the treaties, in fact, grant individuals, whether Indians or non-Indians, equal rights to compete for fish. It follows that any apportionment stands the treaties' guarantee of common access on its head and, indeed, violates principles of equal protection so long as it creates a preference for members of one racial group over those of the other.

The Indians reply that apportionment is proper as a matter of treaty interpretation, as if the treaty parties had anticipated the problem of scarce resources and expressly resolved it. Ind. Br. at 122-35. Even the government, however, acknowledges that "none of the treaty negotiators anticipated the need for restrictive regulations, whether to protect the survival of the run or to assure that both Indians and non-Indians enjoyed a fair share of the fishery." U.S. Br. at 59. Essentially conceding the legislative nature of the apportionment decreed below, the government supports apportionment merely as a solution to the "[p]ractical" problem of "a contingency not envisaged." *Id.* The fact that even today the respondents, like the federal courts

below, are unable to settle on a consistent theory of the case only betrays the absence of any principled foundation for any apportionment at all.

In any event, both respondents assert that the Indians' fishing rights are, in the government's terms (at 64), "special," so that the Indians are entitled to exclude non-treaty fishermen from fishing at the Indians' accustomed sites and even to limit their fishing elsewhere.[6] The government advances this proposition with understandable diffidence, suggesting that the result "would seem to" follow from *Winans* and the *Puyallup* cases. U.S. Br. at 61. The government's analysis, however, would turn the equal protection provided by this Court's precedents for individual fishing rights into an instrument for discrimination itself.

The tribes principally pitch their argument for preferential rights on a proposition of fact—that the Indians understood the treaties to extend only inferior "user" rights to the citizens of the Territory. The government wisely does not support this claim. It is contrary to the historical record and, indeed, to the district court's own findings of fact.

The arguments for superior rights on the part of the treaty Indians falter on a more fundamental difficulty. If the claim for preferential treatment were valid, it might, as the Indians ambitiously argue, entitle them not merely to half of the fish, but to an absolute priority to satisfy all their desires. Yet even the government understandably shrinks from that conclusion. *See* U.S. Br. at 65. It is simply irreconciliable with this Court's precedents.

1. The Historical Record In This Case Confirms That The Treaty Parties Intended No Preference For Indian Fishing.

The Indians purport to review the historical context in which the Stevens treaties were negotiated, but their version of the facts is misleading and incomplete in the extreme. A full picture of the treaty negotiations, its antecedent events, and the

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[6] *See also* Ind. Br. at 247 n.473.

"assumptions of those who drafted" the treaty language[7] unquestionably reveals that respondents have turned history inside out. Far from obtaining the right to exclude others from vigorous competition, the Indians were concerned simply with insuring their continued access to certain sites where incoming settlers would soon also be fishing, and in greater numbers. The Indians' contrary argument is based on unfounded assertions actually rejected by the district court.

a. The Indians' Claims Are Inconsistent With The Historical Record On Which The District Court's Findings Are Based.

Congress carved the Washington Territory out of the Oregon Territory in March of 1853. Act of March 2, 1853, 10 Stat. 172. The Appropriation Act of March 3, 1853, 10 Stat. 226, 238, authorized the President to negotiate with tribes in this Territory to obtain their peaceful acceptance of white settlements and to secure the extinguishment of their claims of title to the land. The Donation Act brought homesteaders into the Territory, and they asserted land claims in the area even though treaties had not yet extinguished the Indians' rights. JA 109. Isaac Stevens, Governor of the Territory, was then appointed to negotiate treaties with the various bands of Indians. 384 F. Supp. at 353-55, JA 106-08 (FF 15-17). In order to accomplish this, he organized these bands into political groups. 384 F. Supp. at 354-55, JA 107-08 (FF 17-18).

It is at this critical juncture that certain documents passing between the treaty negotiators become relevant. The Indians' selective quotes from these documents tell only half the story. *See* Ind. Br. at 127-32. Disclosure of the other half will set the record straight.

In his report to Captain McClellan on March 4, 1854, George Gibbs (who introduced the phrase "in common with" into the treaties[8]) wrote that the Indians of the Northwest were

[7] *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).
[8] 384 F. Supp. at 356, JA 110 (FF 23).

different from prairie Indians who had to reside on vast open spaces to facilitate their custom of hunting grazing buffalo. In contrast, the Northwest Indians sought, in various seasons, berries, fish, and roots. They "require the liberty of motion, . . . but they do not need the exclusive use of any considerable districts." Accordingly, Gibbs proposed securing small tracts of land where the Indians could raise vegetables and bury their dead *without fear of being "driven off."* And, he said, "[*i*]*n like manner,* the use of their customary fisheries . . . should be secured." With respect to these fisheries, both Stevens and Gibbs foresaw that difficulties with the settlers might arise if their ownership of the land gave them a basis for excluding Indians from traditional fishing grounds. JA 326, 327 (emphasis added). *See also* 384 F. Supp. at 356-57, JA 112 (FF 25).

The drafters, therefore, inserted in the treaties language that gave the Indians the right to fish despite their lack of ownership of the sites that they had customarily used. Henceforth, the Indians could fish in common with—together with—settlers. This gave the Indians an easement to fish upon the land that they had ceded. No further or broader rights were sought or given that would permit the Indians to insist upon a restriction of the rights of others to fish.[9]

Several other documents compel this conclusion. James Doty, Secretary to the Commissioner of Indian Affairs, reported on December 26, 1854, that it was appropriate to give the Indians the right to fish, "since this would not in any manner interfere with the rights of citizens." JA at 327. Governor

[9] Significantly, a paper by George Gibbs reveals his belief that, even among themselves, the Indians did not have any "priority" interests in the fisheries:

> "[A]s regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seigniorage for the right of taking." JA 333

See also 384 F. Supp. at 357, JA 112 (FF 25).

Stevens expressed similar sentiments in his letter of December 30, 1854, to George W. Mayberry, Commissioner of Indian Affairs. His concern for meeting the Indians' interests was conditioned upon avoiding any interference with the claims or settlements of the non-Indians:

> "The provisions as to reserves and as to taking fish, pasturing animals, and gathering roots and berries had strict references to their condition as above, to their actual wants, and to the part they play and ought hereafter to play in the labor and prospering of the territory. It may be here observed that their mode of taking fish differs so essentially from that of the whites that *it will not interfere with the latter.*" JA at 329 (emphasis added).

In the course of negotiations, one Indian expressed the fear that he would become poor if he were to lose the right to fish where he wanted. Stevens responded that "he wanted them to fish but that the whites should fish also." JA at 331. And in a May 1855 journal entry Stevens described the treaty right as follows:

> "[The Indians] would have the right of travelling throughout the country for lawful business; fishing at accustomed places in common with the whites. And going to the mountains for berries, always provided that they were to remain upon their reservation when required, and were in *no manner to interfere with the whites when off of it.*" JA at 331-32 (emphasis added).

These documents reveal that the negotiators hardly envisioned the treaties as creating for the settlers only a conditional license to fish, with the Indians retaining preemptive rights.

On the contrary, the treaties included the proviso "in common with" to prevent exclusion of the Indians from fishing at their usual and accustomed grounds. The Indians ceded to the United States all rights and title to the off-reservation land,

except for the right to enter the land to take fish, hunt, and gather berries, as explicitly reserved in the treaties. Had they not reserved these rights, then, as recognized by Stevens and Gibbs, the settlers could have lawfully excluded the Indians from fishing off the reservation. At the same time, as shown by the documentary evidence, the negotiators stressed that the right being given to the Indians would not interfere with the settlers' interests, including their opportunity to fish as intensely as they chose to.

In short, rather than conceding a priority right to the Indians, the treaties simply reserved an equal right to the Indians to fish at their accustomed sites. There is absolutely no contemporary evidence that the government negotiators communicated, or that the Indians understood, anything other than this. Indeed, Stevens told the Indians precisely that "he wanted them to fish but that the whites should fish also." The district court's orders, of course, frustrate that avowed expectation that the non-Indians would not have to give way to the desires of Indian fishermen.

b. The Indians' Claims Are Inconsistent With The District Court's Findings Of Fact.

The Indians rest their historical presentation not on primary evidence, but on the opinion testimony of the government's expert anthropological witness, Dr. Barbara Lane. In particular, the Indians single out Dr. Lane's testimony to the effect that, in her opinion, the Indians must have understood the Stevens treaties to accord the citizens of the Territory mere "user" rights that would be subject to the Indians' prior ownership rights. *See* Ind. Br. at 20-22, 131. The Indians also suggest that "there were no words in the Chinook jargon for 'common' or 'with'" that could have been used to convey a contrary meaning. *See id.* at 133.

Dr. Lane's opinion is on its face self-defeating and the district court did not accept her anlaysis on that issue. According to Dr. Lane, the extension of "user" rights was viewed in

Indian tradition as an incident of ownership. But ownership of the off-reservation land is what the Indians were ceding. Thus, they could not view the settlers as possessing merely revocable, subordinated "user rights" once full ownership of the land passed beyond the Indians' hands. What the treaties assured the Indians, therefore, was the confidence that the settlers would allow them to continue to fish at sites that could otherwise have been closed to them at will. Thus, even when viewed with Indian concepts in mind, the Indians could not have believed that they were obtaining the right to demand the restriction of fishing by non-treaty fishermen at any off-reservation sites.

There are no findings of fact by the district court that any party believed that the Indians under the treaties were only extending "user" rights to the citizens of the Territory.[10] On the contrary, the relevant findings are that:

> "The Indians were assured by Governor Stevens and the treaty commissioners that *they would be allowed to fish, but that the white man also would be allowed to fish.*" 384 F. Supp. at 355, JA 109 (FF 20) (emphasis added).

And:

> Although "[t]here appears to be no phrase in the Chinook jargon that would interpret the term ["in common with"] in any exact legal sense," "[*t*]*he Indians who negotiated the treaties probably understood the concept of common ownership interest which could have been conveyed in Chinook jargon.*" *Id.* at 356, JA 111 (FF 23-24) (emphasis added).

[10] Although the district judge did generally credit the bulk of Dr. Lane's testimony, 384 F. Supp. at 350, JA 99 (FF 2), he notably failed to adopt what otherwise would have been a critical basis for his ruling. In fact, her opinion on the "user rights" question is flatly inconsistent with the specific findings discussed in the text.

The Indians' present assertions are directly at odds with these findings.[11]

The Indians also emphasize Dr. Lane's opinion that "it is likely that the United States treaty commissioners foresaw the need for [conservation] restrictions, although they did not contemplate that the Indian fisheries would be restricted." Ind. Br. at 28. The Indians conveniently omit the fact that Dr. Lane's opinion concerning the contemplated need to regulate Indian fishing was confessedly "in the realm of speculation . . . ." JA 262. The Indians also repeatedly stress that "[t]he State's own anthropologist [Dr. Carroll Riley] testified that the treaty commissioners had no thought that the Indians ever would be restricted in their fishing." *Id.* at 132. *See also id.* at 24, 129. But they ignore the basis for Dr. Riley's testimony:

> "that as of 1855 the number of Indians was so small—in fact, even the number of settlers was so small—that there was no vision on the part of the treaty commissioners about the possible necessity of restricting the fisheries." JA 298.

The witness was explaining why *none* of the parties contemplated the prospect that *any* fishing would have to be restricted, whether by Indians *or* non-Indians.

Significantly, in their brief the Indians neglect to mention the district judge's actual findings:

> "Apart from one instance when the Makahs prohibited a non-Indian from fishing on their reservation, there is no evidence at the time of the treaties that

[11] The Indians repeatedly quote Governor Stevens' statement at the negotiations of the Treaty Point No Point that "[t]his paper secures your fish," JA 331, as if this somehow recognized the superiority of the Indians' rights under the treaty. But it is evident that Governor Stevens meant no more than what the district court found: The Indians "would be allowed to fish, but . . . the white man also would be allowed to fish."

either party intended to restrict the other party's fishing *because it was not contemplated that they would interfere with each other.*" 384 F. Supp. at 357, JA 113 (FF 28) (emphasis added).

Contrary to the Indians' portrayal, therefore, the judge rejected the inference from Dr. Lane's testimony that the government deliberately freed Indian fishing even from conservation regulation — a position, incidentally, unequivocally rejected by this Court's prior decisions. *See, e.g.*, pp. 21-24 & n. 18, *infra.*

The finding that no one claimed or contemplated the right to restrict the fishing rights of others is devastating to the Indians' historical argument. It is inconceivable that a priority right could have been intended for anyone if conditions of scarcity were not even contemplated.[12] Since scarcity was not anticipated, there simply is no basis for assuming that the Indians believed they were receiving a priority right to take fish throughout the Puget Sound area, rather than simply the perpetual right of access to their accustomed fishing sites "in common with citizens of the Territory."

Finally, the Indians similarly misapply Dr. Lane's testimony that the United States intended the Indians to continue to fish both to sustain themselves and to promote the economy of the Territory. *See* Ind. Br. at 19, 152. There was no hint that Indian fishing was to occupy a place of primacy or that it was to displace the economic equality of non-Indian fishermen. The district judge's actual findings are as follows:

> "It was the intention of the United States Government, in negotiating treaties with the Indians, to make at least noncoastal tribes agriculturists, although not to restrict them to that, to diversify

[12] This lack of foresight is repeatedly confirmed in the findings of both the district court and the court of appeals, *see* 384 F. Supp. at 333, 352, 355, JA 72, 102-03, 109 (summary of findings & FF 8, 9, 20); 520 F.2d at 687, 689, JA 50, 52, and, indeed, is conceded by the United States. *See* p. 10, *supra.*

> Indian economy, to teach western skills and trades to the Indians and to accomplish a transition of the Indians into western culture. There was no intent, however, to prevent the Indians from using the fisheries for economic gain." 384 F. Supp. at 355, JA 109 (FF 21).

2. Far From Supporting Preferential Fishing Rights For Anyone, This Court's Precedents Direct That Discrimination Against Individuals Cannot Be Countenanced Under The Stevens Treaties.

The respondents seek to transform cases that prevent certain types of interference with fishing by treaty Indians into support for a right to insist that the State (or the federal government) interfere with the fishing rights of non-treaty fishermen. The attempt to convert a shield into a sword involves little fidelity to the treaties or to the cases interpreting them.

Virtually all the treaties, after all, provide fishing rights at the Indians' accustomed sites for "said Indians, in common with all citizens of the Territory." This language, including the reference to "all" citizens, is most naturally read to create common individual rights of access to what had been the Indians' accustomed fishing sites, sites that were being transferred to the United States on behalf of the migrating settlers. This understanding precludes any apportionment of fishing opportunity at all. This Court said as much in its seminal decision in *United States* v. *Winans, supra.*

In *Winans* the land owners argued that, despite the treaty language, the Indians could be excluded from fishing at their traditional grounds:

> "Respondents contend that the words 'the right of taking fish at all usual and accustomed places in common with the citizens of the territory' confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the

> river, and under the laws of the state, and, such being the rights conferred, the respondents further contend that they have the power *to exclude* the Indians from the river by reason of such ownership." *Id.* at 379 (emphasis altered).

The Court rejected this claim, stating that "[t]he contingency of the future ownership of the lands . . . was foreseen and provided for . . . ." *Id.* at 381. The Court held that treaty Indians enjoyed an easement to their accustomed sites that "was intended to be continuing against the United States and its grantees as well as against the state and its grantees." *Id.* at 381-82.

According to that interpretation, the Indians obtained a substantial right that they would not have had in the absence of the treaty—a right of access to streams and rivers that could not be cancelled by the government or its grantees to whom the fishing grounds might be sold. But this did not translate into a right for the Indians to exclude others from competing with them at those sites or elsewhere. On the contrary, the Court stated that the right to fish "in common" was "not exclusive in the Indians. Citizens might share it . . . ." *Id.* at 381.[13]

The Court also expressly recognized in *Winans* that Indians under these treaties are subject to certain even-handed

[13] Significantly, the equality of treaty rights under *Winans* was an equality among individual citizens and Indians, not one between sovereign or quasi-sovereign entities. The Indians now argue that the references to individual Indians and citizens in the Stevens treaties are shorthand for the tribes and the government, particularly since the Yakima Treaty specifically states that fishing rights are secured to "said confederated tribes and bands of Indians." Yet it was precisely this language that the Court was addressing in *Winans* (*see* 198 U.S. at 378) when it declared that although "the negotiations were with the tribe," "[t]hey reserved rights . . . to *every individual* Indian, as though named therein." *Id.* at 381 (emphasis added). The Indians' argument that the Stevens treaties should be construed by analogy to the aberrant language of the Yakima Treaty thus flies in the face of *Winans* holding exactly to the contrary.

State regulation just as competing non-treaty fishermen are. The treaties' protection of the Indians' right to fish does not "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." *Id.* at 384.[14]

Winans does indicate that State power over fishing by treaty Indians is limited, but this limit on State power does not imply that treaty Indians have the right to demand official restrictions on non-Indian fishing. *Winans* explains that, under the "equal footing" doctrine, the State of Washington entered the Union with the same plenary powers as the original States, subject, however, to previously created rights that Congress intended to endure, such as the Indians' easement to their accustomed sites. *Id.* at 382-84. As a result, when Washington was admitted to the Union, it acquired plenary police power over its non-Indian citizens, including the power to limit their fishing rights, but the Indians remained under special federal protection. The Indians' limited federal immunity from certain types of State regulation, however, is a far cry from a right to demand that the State *impose* regulations on non-Indians fishermen.

The *Puyallup* cases merely apply *Winans* in a modern setting. Thus, *Puyallup I* recognizes the basic equality of rights created by the Stevens treaties. The Court held, first, that when confronted by a depletion of its natural resources, the State may

[14] *Tulee* v. *Washington*, *supra*, clarifies the reach of these state powers. The appellant there, a member of the Yakima tribe, refused to obtain a license to fish for salmon with a net, as state law required. The court ruled that the treaty fishermen were exempt from this license requirement:

> [W]hile the treaty leaves the state with power to impose on Indians, *equally with others*, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging a fee of the kind in question here." 315 U.S. at 684 (emphasis added; footnote omitted).

impose conservation regulations on all its citizens—Indian and non-Indian alike:

> "[T]he right to fish at those [accustomed] places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly *the right* of the latter may be regulated. And we see no reason why *the right* of the Indians may not *also* be regulated by an appropriate exercise of the police power of the State." *Id.* at 398 (emphasis added).

At the same time, the Court explicitly recognized the guarantee of "equal protection implicit in the phrase 'in common with,'" *id.* at 403, by insisting that any such regulation be non-discriminatory. *Id.* at 398.[15]

Again expressly acknowledging that Indians *and* other people have treaty "rights," the Court in *Puyallup II* held that a conservation program is discriminatory if "all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed." 414 U.S. at 48, 49. Although a formal equality of fishing opportunity existed in that the Indians could engage in hook-and-line fishing along with everyone else, while no one could engage in net fishing, the effect of the State's conservation program was to discriminate against the Indians. Only in those circumstances did the Court tolerate an apportionment of fish as a remedy:

> "*If* hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, *then* that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned." *Id.* (emphasis added).

[15] By contrast, the Court found that the treaty at issue in *Antoine* v. *Washington*, 420 U.S. 194, 206 (1975), did not afford non-Indians any rights of equal dignity.

Thus, *Puyallup II* merely sustains apportionment as a form of judicial relief from discrimination by the State in its conservation program. The apportionment in this case cannot be supported on that ground.[16]

Finally, in *Puyallup III*, the Court affirmed a specific allocation of fish to remedy the discrimination identified in the prior decision, but only after reiterating that the Indians' treaty rights are not "exclusive," *id.* at 175, and that "the non-Indian citizens of Washington" also have "rights" under the treaty, *id.* at 176. After repeating the treaty language, the Court explained:

> "As to the treaty fishermen, this sentence effects a reservation of a previously exclusive right. But that language also recognizes that *the right is to be shared*

[16] The United States does not claim otherwise. Judge Boldt did state that "[t]he application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the [reason, *among others*, that] . . . they operate to discriminate against the tribes' treaty right to fish . . . ." 384 F. Supp. at 403, JA 199 (Conclusion 38).

That loose reference to "discrimination", however, is simply another way of stating the judge's conclusion that Indians may not be subjected to regulation, including even-handed regulation, if the effect is to prevent them from taking half of a particular run. These assertions of discrimination *assume* the issue to be decided: whether the State is obliged to impose special restrictions on fishing by non-treaty fishermen in order to assure Indians a particular volume of fish at their usual and accustomed sites. The court of appeals did not rely on any notion of discrimination in upholding the apportionment here.

Moreover, the apportionment ordered by Judge Boldt is not tied to remedying specific instances of discrimination, but rather governs the entire reach of Indian fishing, irrespective of any prior discrimination. *See* pp. 25-30 *infra*. As discussed in our opening brief (at 33-34), by over-extending a limited remedial measure, he has misallocated to the federal judiciary the discretionary authority to upset the equality of rights established by the Stevens treaties and to intrude upon the regulatory authority that the State may exercise to preserve the resource.

in common with the non-Indian 'citizens of the Territory.'" *Id.* at 176 n.16 (emphasis added).[17]

In sum, this Court's precedents confirm the historical evidence that Indians and non-Indians are entitled only to equal access to fish under the Stevens treaties; the right guaranteed by the Stevens treaties "only fixes in the land such easements as enable the right [to fish] be exercised." *United States* v. *Winans, supra,* 198 U.S. at 384. Rights of access are flatly inconsistent with any apportionment whatsoever. In addition, *Winans* and the *Puyallup* cases establish that both the individual citizens of the Territory and the Indians were the intended beneficiaries of these treaties "as though named therein," 198 U.S. at 381, and that their respective rights are of equal dignity. Any disproportionate apportionment is fundamentally at odds with these principles.

Finally, *Tulee* and the *Puyallup* trilogy also demonstrate that this Court has already established the pattern for reconciling the treaty language with modern conditions of scarcity by holding that reasonable conservation regulations can be "imposed on Indians equally with others." *Tulee* v. *Washington, supra,* 315 U.S. at 684. This is an equitable interpretation and resolution of the problem of scarcity for parties who have equal rights of access under the circumstances of this case.

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[17] As the government points out (U.S. Br. at 66-67), the Court did state in *Puyallup III* that the State "has no interest in how the catch is allocated among the Indians . . . ." *Id.* at 178. But this does not diminish the individuality of the fishing rights recognized by the Stevens treaties. Of course, the State has no interest in intra-tribal allocation. As *Winans* teaches, our federal system accords it no regulatory power over that process.

This does not mean that the right to fish belongs any the less to *individuals.* Indeed, the Court underscored the individual nature of this right in *Puyallup III* itself in ruling that the state courts were authorized to adjudicate the treaty rights of individual defendants over whom the courts had personal jurisdiction even if the tribe itself enjoyed sovereign immunity. *See id.* at 171, 173. *Puyallup III* in no way retrenches on the *Winans* principle of individual rights.

3. The Apportionment Improperly Grants Preferential Rights To Indians Without Regard To Any Discrimination Against Them.

Although the Indians try to paint a picture of special hardship, the fact is that the massive dislocation decreed by the district judge does not correct discrimination and, indeed, tips the competitive scales sharply in favor of Indian commercial fishermen.

(a) The district judge found (FF 217; JA 179-80) that under State regulations there were "many instances" in which a large portion of the harvestable number of fish from given runs could be taken by persons with no treaty rights before such runs reached many of the plaintiff tribes' usual and accustomed fishing places. The Indians point to that geographical possibility as a basis for supporting an allocation of the entire fishery. That approach, however, conflicts with the standards of the *Puyallup* trilogy.

The possibility that some successful fishing takes place before a run reaches *some* Indian sites does not support an apportionment of the entire fishery. Moreover, even assuming *arguendo* that the treaties operate to restrict geographically earlier interceptions, many of the interceptions to which the district judge referred are made by the treaty Indians themselves. The district judge's own findings reflecting the locations of each of the tribe's usual and accustomed fishing grounds[18] shows that most of these grounds, including most of the largest ones, are located in salt water areas where non-Indian net fishing also takes place. Thus, treaty Indians have an equal opportunity to "intercept" some of the fish that might otherwise reach *other* Indian sites upstream. One obvious example is the

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[18] FF 39, 45, 46, 48, 50, 51, 58, 65, 67, 76, 86, 99, 108, 120, 121, 131, 137, 141, 146, 148, 154, 159, and 459 F. Supp. 1038, 1049, 1059 and 1060.

Strait of Juan de Fuca, where eight of the nineteen treaty tribes have usual and accustomed sites. *See* Ind. Br. at 232 n.464. Indian fishermen from these eight tribes are among the first fishermen in Washington waters to intercept fish in their migratory flow through Puget Sound.

The findings describing the usual and accustomed fishing grounds also reflect that every body of salt water in the Case Area into which treaty fishing streams flow, such as Puget Sound, the Strait of Juan de Fuca, and the Washington coastal waters, is a usual and accustomed fishing ground for several tribes. Thus, to the extent that there are any interceptions of fish going to the terminal area fishing grounds up-river, tribal Indians fishing at their usual and accustomed fishing grounds in the salt water areas contribute significantly to such interceptions. These competitive conditions, therefore, provide no legitimate pretext for apportioning the entire salmon fishing in Washington as if there were massive discrimination against Indian fishermen within the meaning of the *Puyallup* trilogy.

(b) Moreover, the district judge's allocation, enforced by closing the fishery to non-treaty fishermen, is manifestly discriminatory. For instance, even though the interceptions about which the district judge was concerned involve sport fishermen and commercial fishing beyond the Washington coast (JA 167-68, 174, 346-47), the burden of the judge's orders fall on petitioners, the Puget Sound fishermen. One of the most flagrant inequities of the district judge's decision is the treatment of the non-treaty fishermen in the Fraser River fishery. This fishery takes place in the Strait of Juan de Fuca and the waters surrounding the San Juan Islands in northern Puget Sound, which, as we have noted, are the usual and accustomed fishing grounds of eight of the nineteen tribes having recognized treaty rights in this case. The major sockeye and pink salmon stocks pass through these waters from the Pacific Ocean on their way to the Fraser River in Canada. Each year since

1975, fishermen of these eight tribes have been allowed more fishing time here than non-Indians.[19]

Yet, as we have explained, there is obviously no discrimination against treaty Indians in this fishery to justify a remedy similar to that approved in *Puyallup II*. There are no significant interceptions of these fish by Washington citizens before they enter this fishery. In fact, the first fishermen having access to these fish in Washington waters are the Makah tribal fishermen whose reservation is located on the northwesterly tip of the State of Washington where the Strait of Juan de Fuca begins.[20]

The substantial edge given to Indian fishermen by allotting them extra fishing days free of non-Indian competition is a glaring example of reverse discrimination against non-Indian fishermen. The individual Indian catch rates have been substantial. The Indian purse seine fishery is a case in point.

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[19] *See* U.S. Br. 36. In 1977 and 1978, consistent with the district judge's order, the Bureau of Indian Affairs (BIA) adopted special Indian fishing regulations substantially increasing Indian fishing time over that permitted by IPSFC regulations for non-Indians. "This matter continues to be administered under federal regulations," U.S. Br. at 43, suggesting similar special fishing regulations for Indians in the future unless changed by this Court. 1977 IPSFC Regs., 42 Fed. Reg. 30841; 1977 BIA Regs., 42 Fed. Reg. 31450; 1978 IPSFC Regs., 43 Fed. Reg. 26737; 1978 BIA Regs., 43 Fed. Reg. 27187.

[20] The effect of interceptions by the non-treaty ocean sport fishery, inshore troll (kelpers) fishery, and offshore troll fishery before fish even enter the Strait of Juan de Fuca is not legally or factually relevant. Under the Fisheries Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 *et seq.*, the United States regulates the offshore ocean troll catch and that fishing is beyond the control of the State or the commercial net fishermen. With respect to the ocean sport fishery, the district judge determined that a reduction in non-Indian fishing "would not to any applicable extent" make more fish available for harvest in the Case Area. *See* JA 432. The judge made a similar finding (JA 433) in ruling that inshore trolling (kelping) fishing within the three-mile limit does not affect a "significant number of fish" that would otherwise be available for harvest by the treaty Indians.

During 1978, the Indian purse seine catch of sockeye harvested during treaty-Indian-only fishing days was worth an average of no less than $70,561 for each Indian purse seiner. When his take during all-citizen fishery days is added, the average Indian purse seiner earned at least $99,337.[21] In addition to these profits during the IPSFC sockeye fishery, these same purse seiners predictably harvested substantial amounts of chinook, coho and chum salmon in these waters during non-IPSFC seasons.

By comparison, the average non-Indian purse seiner earned only $31,723, less than a third of what each Indian purse seiner earned.[22] Under these circumstances, the Court can well understand why the non-treaty fishermen are utterly baffled in their effort to see any equity in the bounty awarded to their Indian competitors in the form of highly profitable periods of exclusive fishing.

Moreover, even without this extra fishing time, the Indians still have an advantage. They need not obtain a fishing license and, therefore, there is no limitation on the number of Indians who can fish in these waters, as there is on the non-Indian fishermen who must comply with the Washington gear limitation law (RCW § 75.28.450 *et seq.*).

There is no question but that the Indian gear is quite competitive with the non-Indian gear and will increasingly

[21] R. Thompson, *Summary of the 1978 Sockeye Salmon Commercial Fisheries in U.S. Waters Under the Jurisdiction of the International Pacific Salmon Fisheries Commission* (National Marine Fisheries Service, November 1978) (hereafter "*Thompson NMFS Summary*"), Table 3, p. 11. These calculations are based on an average weight of 6 lbs. per sockeye at the 1978 average price of $2.15 per pound.

Using these same calculations, the Indian purse seiners and gillnetters were able to harvest $1,587,268 worth of salmon on days when non-Indian fishermen were required to remain ashore by the district judge's order. *Id.*, Table 2, p. 9.

[22] *Id.*, Table 2, p. 9, and Table 3, p. 11.

enable the Indians to reap the full benefit of their court-awarded entitlement to at least 50% of the harvest. A government report on the 1977 sockeye and pink salmon fishery noted that, when comparing Indian landings on Indian-only days with landings on all-citizen days, "over 50% of Indian landings for both gillnets and purse seines occurred on all-citizens days when Indian fishermen were in competition with the all-citizen fishery."[23] As these facts demonstrate, to favor the Indians by exempting them from IPSFC regulations and awarding them half the harvestable catch—in the absence of any showing of discrimination—clearly conflicts with the teaching of the *Puyallup* trilogy and unfairly skews what ought to be a competitive commercial industry.[24]

Other available data also vividly illustrates the effects of the district judge's disproportionate allocation. The Indians

[23] U.S. National Marine Fisheries Service, *Preliminary Summary of the 1977 Sockeye and Pink Salmon Commercial Fisheries in U.S. Convention Waters*, p. 5 (1977). Compare the sworn statements of Randy Kinley, a Lummi Indian, that "I have a purse seine vessel and related equipment worth over $300,000," and that of Frank Marinkovich, a non-Indian purse seiner, that "an average [purse seine] fishermen . . . has approximately a $110,000 investment . . . ." Compare also the sworn statements of Hubert Markishtum, a Makah Indian gillnet and troll fisherman, that "I operate a fishing boat and related equipment worth $40,000," and that of Philip Sutherland, a non-Indian, that "an average gillnet fisherman has a vessel valued at approximately $22,500 . . . ." *See* Affidavits Marinkovich, Randy Kinley, Frank Marinkovich, Hubert Markishtum and Philip Sutherland filed in *Purse Seine Vessel Owners Association, et al.* v. *U.S. Department of State*, U.S. Dist. Ct., W.D. Wash., Cause No. C77-471.

[24] Both the government and the Indians in their briefs seek to create the illusion that this case involves a dispute between law-abiding Indian fishermen and lawless non-Indian fishermen. To the extent this issue is relevant, a clearer picture of compliance with the law is provided by the *Thompson NMFS Summary*, which reports that, during the 1978 sockeye season in United States waters under the jurisdiction of the IPSFC, Indians accounted for 15% of the fishermen but 33% of violations cited by federal enforcement agents. *See id.* at 15.

assert that the number of treaty fishermen has now risen to about 1200 (up from 794 at the time of trial, *see* JA 169). Ind. Br. at 59 n.209. At the same time, there were 3,612 non-treaty commercial fishermen who fished in Puget Sound. Even accepting the Indians' statistics, tribal fishermen constitute at most 25% of the commercial fishermen on Puget Sound.[25] Yet the treaty Indians were permitted to harvest 56% of the Puget Sound origin salmon commercially harvested in 1977. *See* JA 593-94. Thus, as one would suspect, the treaty Indian commercial fishermen are increasingly able to exploit the premium advantage they have received from the district judge throughout the case area.

B. If An Allocation Were Permissible, It Could Not Be Based On A 50-50 Split.

Properly understood and legitimately enforced, the Stevens treaties allow the courts only one practical solution to the current problem of scarcity. As the treaties are worded, each individual fisherman—treaty Indian and non-treaty fisherman—is subject to equal hazard and benefit, as against the forces of nature. The State's conservation regulations were promulgated to reduce the risks and increase the gains. In fact, the success of these regulations will determine whether the right to fish in common will remain a meaningful one for *all* the parties.

A modern accommodation of rights cannot be done at the expense of the explicit language of the treaties. The treaties

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[25] R. Marasco & E. Anderson, *Washington Salmon Fisheries: An Economic Profile*, Table 7 (Washington Department of Fisheries, October 1977) (source: U.S. Department of Commerce, NOAA, National Marine Fisheries Service, *Fisheries Statistics of the United States*).

We are assuming for purposes of this discussion that the 1200 Indian fishermen are all fishing in the waters of Puget Sound in competition with petitioners, but in fact the Indians' own source material shows that this figure includes approximately 162 Indian fishermen from the Hoh, Quileute, and Qumault tribes who are not engaged in fishing in these waters. Thus, the disproportionate bounty awarded to Indians competing with petitioners is even more dramatic.

give all fishermen the right to compete for the resource—whatever it may be—equally. The district court's orders for the adoption of enforcement measures that allocate at least 50 percent of the fish to the Indians, in order to satisfy the Indians' desires, contradict the bare language of the treaties.

Any apportionment could be justified only on a finding that at a particular site the Indian fishermen had been discriminatorily denied equality of opportunity. *See Puyallup II, supra*, 414 U.S. at 48. In that event, the only fair allocation would be one based on the size of the groups of Indian and non-Indian fishermen competing for the fish at those sites, with the allocation proportioned to allow each fisherman an opportunity to harvest the same *per capita* share of the catch.

1. A 50-50 Split Is Inconsistent With The Creation Under The Treaties Of Individual Rights Of Equal Dignity, With Common Sense, And With The Understanding Of The Treaty Parties.

The Indians actually suggest that the Indians may have understood the treaties to give them half of the fish harvest. Ind. Br. at 133-35. The government understandably does not support this claim; it is as baseless as the Indians' other factual assertions. The government does, however, join them in contending that a 50-50 allocation will, minimally, fulfill the treaty Indians' needs.

As we have shown, the Stevens treaties recognize individual rights entitled to equal consideration in any regulation of a scarce resource. The 50-50 allocation adopted by the federal courts below is flatly inconsistent with this conclusion, since it obviously grants individual Indian fishermen considerably greater benefits than individual non-treaty fishermen. The context of the treaty negotiations also undermines the legitimacy of the 50-50 division.

Under the conditions prevailing at the time the treaties were negotiated, an allocation of 50 percent of the fish to the

treaty Indians and 50 percent to other fishermen would have been decidedly disadvantageous to the Indians. In 1854 there were approximately 7,600 Indians and 2,000 non-Indians in Western Washington. 384 F. Supp. at 352, JA 103 (FF 9). If the theory reflected in the district judge's orders had been applied when the treaties were negotiated and signed, the Indians, with a population four times greater than that of the non-Indians, would have received only half the harvest—or only one-fourth the volume allocated to the settlers when measured on a *per capita* basis. The Indians would hardly have been eager to agree to a mechanical 50-50 allocation under those circumstances, and there is no reason to believe the government's negotiators would have sought to impose such an allocation. Now that the population ratios have shifted, however, there is no defensible basis for attributing such an intent to the parties, simply because today it would confer a bounty on the Indians.

Indeed, the 50-50 allocation has always been logically unsound. As we pointed out in our opening brief (at 31-32), if only one treaty Indian remained interested in commercial fishing, it would entitle him to harvest as many fish as all of the State's other fishermen combined. It would also entitle members of a geographically favorably positioned tribe like the Makahs to join non-Indian fishermen in taking entire harvestable runs, to the complete exclusion of members of other tribes. Identical language in Article III of the Yakima treaty relating to use of public highways "in common," if construed identically, would allow the Yakimas to monopolize half the highways in the State. Neither the United States nor the Indians have even attempted a response to these logical absurdities of the position they espouse.

The Indians suggest to this Court that the tribal negotiators believed that "in common with" meant "one-half." The evidence to which they point, however, does not support that contention, since they construe quotes grossly out of context in an effort to manufacture helpful history. Apparently, several of

the negotiators did discuss splitting the Washington treaty lands in half, with the Indians to receive full rights to one half and none to the half to be ceded to the Territory. That approach, however, was *not* the one ultimately agreed on. Mr. Simmons, a Territory agent dealing directly with the Indians, explained to the Indians why that approach would be unsound:

> "[I]f they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. That [in comparison] where a small tract alone was left, the privilege was given of going wherever else they pleased to fish and work for the whites. If you can cultivate more land than this, you can have it." JA at 330.

Obviously, the Indians chose to keep a small tract of land as their "reservation" and to retain the freedom to enter "off-reservation" sites to fish. Thus, a provision sharing access to the resources was preferred over splitting the land resources in half. The Indians' present distortion of that incident simply illustrates the desparate flimsiness of their position. Moreover, the discussion of halving the land—a discussion that did not lead to agreement on that possibility—is *not* even paralleled by a discussion of dividing the fishery resource in half.

The Indians note that a word for "half" appears in Chinook jargon. But if that is so and if the parties did intend to split the catch in half, there is no plausible reason why these terms were not used in the treaties in place of "in common with." Understandably, the district court made no findings adopting the Indians' factual contentions here, and the United States now completely eschews them.

2. The Treaties Cannot Be Interpreted By Analogy To Agreements Between Two Foreign Governments.

The respondents ask the Court to uphold the 50-50 split by viewing the treaties between the Indians and the federal government like treaties between two separate and foreign nations, analogous to certain fishing treaties between the

United States and Great Britain. They also assert that the constructions that were given to treaties between those two countries should apply to the treaties between the Indian tribes and the United States. The argument is not only inapt, but disingenuous, for despite the implications carefully nurtured by the respondents, no international fishing treaty, including the ones they discuss, has been construed as even permitting a 50-50 allocation of the resource, much less as requiring such a division.

The analogy that respondents pose is inapposite for several reasons. First, the treaties were negotiated between the federal government and "numerous bands and fragments of tribes" that were organized by the federal authorities into political entities solely for the purpose of negotiating the treaties. 384 F. Supp. at 354-55, JA at 107-08 (FF 17-18). Governor Stevens actually decided how many tribes to construct and even selected chiefs and subchiefs with whom to bargain. *See* JA 42, 108. Thus, the actual history of the negotiations belies comparison with international compacts forged by two independent countries.

Second, the fiction recognized in international law that each nation is an equal sovereign does not generally carry over to Indian treaties and certainly would be fatuous if applied to the treaties before the Court. After all, Congress had already asserted American domestic jurisdiction over the Washington Territory, and the issues being negotiated involved the accommodation of the interests of people unquestionably subject to federal authority, American settlers and groups of Indians. It is naive formalism to suggest that each treaty between the United States and a specially organized tribe was intended to imply a 50-50 split of the fishery resource, regardless of the relative numbers of non-Indians and treaty Indians who, from time to time, might want to engage in commercial fishing. Indeed, Judge Boldt's own 1977 allocation to the Indians of from 37 to 48 percent of certain runs and this Court's affirmance in *Puyallup III* of a 45-percent apportionment for them preempt

the argument that a 50-50 split is a corollary of the supposed equality of the bargaining parties.

Two cases recently decided by this Court put into sharper focus the limited utility of talking about Indian tribes as "quasi-sovereign" nations. In *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), this Court decided that the Suquamish tribe—one of the parties to the present case—could not exert its criminal laws over non-Indian offenders residing on the reservation, despite the tribe's claim of quasi-sovereign status. This Court held that under the Treaty of Point Elliott, 12 Stat. 927 (1855)—also at issue here—the tribe acknowledged its dependence on the government of the United States, so that its powers are limited by the Constitution, congressional enactments, and other treaties. The Court concluded that the "exercise of jurisdiction over non-Indian citizens of the United States would belie the tribe's forfeiture of full sovereignty in return for the protection of the United States." 435 U.S. at 211.

In *United States* v. *Wheeler,* 46 U.S.L.W. 4243 (U.S. March 22, 1978) (No. 76-1629), the Court made clear that Indian tribal sovereignty is unique: "It exists only at the sufferance of Congress and is subject to *complete* defeasance." *Id.* at 4246 (emphasis added). The Court's discussion of the sharply limited scope of tribal sovereignty shows why the analogy to a foreign sovereign nation is a false one and why "quasi-sovereignty" does not support the implication of a right to control the off-reservation activities of non-Indian fishermen:

> *"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.* Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. . . . [T]hey cannot enter into direct commercial or governmental relations with foreign nations." *Id.* at 4246 (emphasis added; citations omitted).

Since the dispute now before the Court involves a clash between the rights of tribal members and non-Indian citizens, the Court cannot bow to assertions of tribal sovereignty. The concept of tribal sovereignty drops out of the picture once the interests of non-tribal members become involved.

Furthermore, any quasi-sovereign status enjoyed by the tribes does not extend to the members of the tribes. *See Puyallup III, supra.* The Indians before the Court are now United States citizens who enjoy the same rights and privileges as non-treaty fishermen. A federal equity court called upon to interpret and implement these treaties in the 1970's cannot blind itself to the fact that, at bottom, it is resolving a dispute between two groups of American citizens, not between two independent nations.

Finally, to the extent that the Stevens treaties were negotiated by the tribes and by the federal government as two separate sovereigns, the parties were negotiating as representatives *on behalf* of their respective citizens. As *Winans* holds (*see* pp. 20 n.13, 24 n.17, *supra*), rights accrue to those citizens, not simply to the entity. As we pointed out in our opening brief (at 36), the tribes do not even share in the proceeds from fish sales by their fishermen. Respondents choose to overlook this distinction between the mechanics of corporate negotiation and the individual enjoyment of the treaty rights, but that omission fatally infects their argument that a 50-50 apportionment is either required or justified by the quasi-sovereign status of the tribes.

3. Nineteenth Century International Fishing Treaties Were Not Implemented By A 50-50 Allocation.

The briefs of the government and the Indians would lead the Court to believe that the fishing treaties between the United States and Great Britain governing Newfoundland fisheries was understood by the American government as justifying a 50-50 apportionment of the fish and that an international tribunal had

so held. The briefs would also lead the Court to believe that the "in common with" language of these treaties was understood, too, to prevent excessive fishing by one party to the detriment of the other, rather than merely to guarantee equal access for all to the relevant fisheries. *See* Ind. Br. at 142-50; U.S. Br. at 67-69. Despite the respondents' artful discussions of these treaties, none of those inferences is true.

The respondents spend considerable time discussing the various interpretations of the phrase "in common with" in the treaties with Great Britain.[26] Yet the respondents' characterization that the United States interpreted these treaty rights as apportionable equal shares is disengenuous. The American position was concerned with assuring equal *access* by American fishermen and with preventing *discriminatory* regulation of them. There was never any contention that the common fisheries recognized by these treaties should be physically apportioned or that American fishermen could exclude their British counterparts in order to achieve a particular level of success in their ventures.

The Indians urge that, in negotiating the Treaty of 1818, both parties agreed "that the provision 'in common with' would prevent any practical crowding out of British fishermen by an excess of Americans, and would guarantee 'the equal measure and quality of right in the fisheries for which they were contending.' " Ind. Br. at 148. Thus, they argue, the Stevens treaties must effectively protect the relatively small number of treaty Indian fishermen from competition by a larger number of non-Indians. The historical premise is wrong, however, for the 1818 treaty was not viewed as a guarantee against vigorous competition, no matter how effective.

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[26] Treaty of October 20, 1818, 8 Stat. 248; Treaty of June 5, 1854, 10 Stat. 1089; Treaty of May 8, 1871, 17 Stat. 863.

The "crowding out" of which Lord Bathurst complained had nothing to do with competition by the Americans, but concerned their actual exclusion of British subjects from the fisheries. Lord Bathurst expressly stated:

> "It was *not of fair competition* that His Majesty's Government had reason to complain, *but* of the preoccupation of British harbors and creeks, in North America, by the fishing vessels of the U.S., and the *forcible exclusion* of British vessels from places where the fishery might be most advantageously conducted." S. Doc. No. 870, 61st Cong., 2d Sess., Vol. 2, at 278 (1910) (emphasis added) (hereafter "S. Doc. No. 870").

Similarly, John Adams recognized, as the Indians note (Ind. Br. at 144), that American citizens were entitled to "full enjoyment of an equal share in this fishery." The Indians carefully end the quote there and imply that the words "equal share" were used to mean a 50-50 apportionment of the fishery between the two nations. That truncated quote, however, falsifies Adams' position. He immediately proceeded to point out that, because of the migratory nature of the fish, "it was necessary to have a nearly *general access* to every part of it." J. Adams, *The Fisheries and The Mississippi* 184 (1822) (emphasis added). *Equal access* was what Adams was concerned about.

Secretary Evarts' position was exactly the same. The Indians misleadingly quote Evarts to suggest that in his view the Treaty of 1871 precluded interference with "the enjoyment of either's share of the common fishery . . . ." Ind. Br. at 145. But he, too, recognized that American and British fishermen were to have unrestricted and undivided access to the fishery. His reference to interference with the enjoyment of fishing rights dealt only with dilution of the fishery by admitting

nationals of a *third* country.[27] Indeed, in a passage not quoted by the Indians, Evarts endorsed the view that under the treaty the Americans enjoyed "the freedom of the fishery [to use] the methods and occasions of our fishing enterprise and skill," even if that might "depreciate [the] benefit [of the fisheries] to the coast population, even beyond the treaty period . . . ." H. Ex. Do. No. 84 at 9. Evarts obviously contemplated full competition among the fishermen of both countries, with the only limitation being the exclusion of foreign fishermen from the common fishery.

The United States' position in the arbitration with Great Britain in 1909 also emphasized that the essence of the treaty right was equal individual access to the fishery. The Americans urged that the "liberty [to fish] was held *equally by the fishermen* of the two countries." S. Doc. No. 870, Vol. 8, at 36 (emphasis added). The Americans explained that this meant that the individual inhabitants of each country were free to fish, but not to exclude others from fishing:

> "[The treaty] implies a negation of exclusiveness, and hence, the words as heretofore stated, have no other meaning than that the liberty of fishing granted was one *to be held and enjoyed equally by the fish-*

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[27] The full quotation, including the material deleted by the Indians, reads:

> "The test of the fishery articles of the Treaty of Washington shows that there was *no limitation whatever* upon the grant, *except* that the estate, right, and privilege granted were to endure but for a term of years, and were to be enjoyed by the United States *not exclusively, but in common* with Great Britain. There was, to be sure, a restriction imposed upon both countries which excluded both equally from extending the enjoyment of either's share of the common fishery beyond the 'inhabitants or the United States' on the one side and 'Her Britannic Majesty's subjects' on the other, thus disabling either government from impairing the share of the other by introducing foreign fishermen into the common fishery. . . ." H. Ex. Doc. No. 84, 46 Cong., 2d Sess. 8 (1881) ("H. Ex. Doc. No. 84") (emphasis added).

ermen of the two countries, and therefore, necessarily, by neither to the exclusion of the other." S. Doc. No. 870, Vol. 8, at 38 (emphasis added).

The government's venture to guess that "an international tribunal would award half the fishery to each nation" in a dispute over common fishing rights is, indeed, a bold and misleading journey. U.S. Br. at 67-68. It is without a basis in fact. The treaties with Britain granted the liberty to fish "in common," but neither they nor any tribunal interpreting them contemplated any apportionment of the fish. An arbitral tribunal was convened in 1909 instead to resolve the reach of British regulatory power over United States citizens fishing in the common fisheries.

The Indians suggest (Ind. Br. at 149-50) that the United States then opposed all such power on Britain's behalf, since that assertedly would have rendered the Americans' rights "empty and valueless." The fact is that the United States agreed that Americans were subject to reasonable regulations by Britain, provided that the regulations were "appropriate and necessary for the protection and preservation of the common rights in such fisheries" as well as "fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class . . . ." S. Doc. No. 870, Vol. I, at 73-74. The United States asked only that its concurrence in the reasonableness of these regulations be required.[28] Far from objecting to British

[28] Despite the quotations seized on by the Indians from the American brief to the arbitral tribunal, the American position expressly disclaimed any contention "that American fishermen would have a greater liberty than that enjoyed by British fishermen . . . [or] that the subject-matter of the grant might be destroyed for want of regulations for its preservation if any should prove to be necessary." S. Doc. No. 870, Vol. 8, at 36.

Contrary to the implication of the Indians' selective quotations, the United States was arguing not that American fishermen were on any footing different from their British counterparts, but that the United States was entitled to participate with Britain in the formulation of whatever regulations might be necessary.

regulatory authority or demanding special privileges in the common fishery, the United States simply anticipated this Court's teachings in the *Puyallup* trilogy: the right to fish "in common" with others is no bar to the implementation of conservation regulations that preserve equal access to the fishery for all. That right of access does not imply a right to exclude others.

The decision of the arbitral tribunal reinforces this conclusion. The arbitration court specifically found that the words "in common with" confirm that United States inhabitants "were admitted to a regulated fishery." S. Doc. No. 870, Vol. I, at 78. These words "admit them only as members of a social community, subject to the ordinary duties binding upon citizens of that community, as to regulations made for the common benefit . . . ." *Id.* at 79. We argue for no more when we say that the Stevens treaties give treaty and non-treaty fishermen equal access to the Puget Sound fisheries, but give neither group a preference over the other.

In light of this record of interpretation, it is particularly ironic that the respondents point to the treaties with Great Britain, for, if relevant at all, they support our interpretation of the Stevens treaties, not theirs.

4. One-Sided Emphasis On The Indians' Alleged Needs Does Not Justify The 50-50 Apportionment.

Both the government and the Indians try to develop a third rationale for the apportionment decreed below, different from the grounds relied on by the district court and by the court of appeals. The district court viewed the language "in common with" as commanding a roughly equal apportionment as a matter of law. The court of appeals affirmed on the rationale that it was within the district judge's equitable discretion to apportion the fishery in the way a tenancy in common might be divided. The respondents now insist that the Indians' "needs" are a relevant benchmark and that, as a matter of fact, their needs now require at least 50 percent of the fishery. *See* U.S.

Br. at 69-72; Ind. Br. at 150ff. It is certain that the district judge did not follow that analysis, since he did not make any findings on what the Indians' "needs" are now, or on how to translate any alleged assurance of a particular standard of living as of 1855 into modern conditions.

The Indians and the government seek to rely on *Winters* v. *United States*, 207 U.S. 564 (1908), to support their contention that the Indians are entitled to as many fish as will serve their "needs." *See* Ind. Br. 76, 109, 122, 151ff; U.S. Br. 9, 56. The *Winters* case, however, involved water needed for the *personal use* of the tribe *on the reservation*. The water was not going to be used by the tribe for commercial purposes; that is, it was not going to be sold as fish are sold. Thus, it was practicable to decide what volume of water was needed for *personal* consumption on a *per capita* basis. Here, however, the Court is concerned with the proposed apportionment of fish to be taken off the reservation for commercial purposes. There is nothing in the text or history of the treaties to suggest that any subjective notion of commercial "needs" was to be superimposed on the Indians' right of equal access to their traditional fishing sites.

The respondents' standard of "needs" is not only boundless, but inherently discriminatory. Even assuming that "needs" could somehow be measured, nothing would prevent the respondents from returning to court in the future to complain that 50 percent no longer meets their needs.[29] But there is no reason to believe that each Indian fisherman's "needs" are greater on the average than those of the non-Indian fisherman. Just as the district judge concluded that the treaty right was to provide a volume of fish sufficient to the fair

[29] In *Arizona* v. *California*, 373 U.S. 546, 601 (1963), the Court "concluded . . . that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage," rather than population figures. But, unlike the number of irrigable acres on a reservation, the respondents' claim to satisfy their subsistence, ceremonial, *and* commercial "needs" has no limitation. Population figures here supply the "only feasible and fair" measure of *commercial* entitlement to fish, if an apportionment must be made.

needs of the Indians, the judge also concluded: "The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes." 384 F. Supp. 401, JA 195 (Conclusion 20). Thus, to the extent that "needs" are relevant today, they do not support the allocation of a disproportionately high share of the catch to the Indians.[30]

C. Modern Conditions Do Not Permit The Judiciary To Create A Preference For Indian Fishing.

The government argues that the 50-50 percentage allocation of rights is an "appropriate" solution to a problem not addressed by the treaties, in light of modern conditions. *See* U.S. Br. at 60. The recognition that the 50-50 split involves a basic policy or "legislative" decision, however, should be fatal to what the federal courts below have done. Moreover, modern conditions more convincingly negate the percentage allocation than favor it.

Respondents' over-zealous efforts to achieve a one-sided preference for Indian rights in order to adjust for unforeseen changes over the past century and a quarter have no legitimate foundation in the principles of fair interpretation of Indian treaties. This Court has held that when interpreting a treaty that grants bilateral interests, it will not "vary its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress." *Northwestern Bands of Shoshone Indians* v.

[30] The respondents' "needs" analysis is based on cases that have no resemblance to the circumstances here. Of course, it may be appropriate to infer water rights on behalf of Indian reservations that could not otherwise sustain themselves. But that has nothing to do with the proper construction of treaties that expressly confer only rights to fish "in common" on the constituents of the treaty parties. The respondents' claim for a priority to satisfy their "needs" must be rejected, since it simply reads the "in common with" language out of the treaties.

United States, 324 U.S. 335, 353 (1945). *Cf. Oliphant* v. *Suquamish Indian Tribe, supra,* 435 U.S. at 197 n.8. Most recently, this Court has reminded us that the canons of construction for the interpretation of Indian treaties must be applied sensibly. *State of Washington* v. *Confederated Bands and Tribe of the Yakima Nation,* 47 U.S.L.W. 4111, 4115 n.22 (U.S. Jan. 16, 1979), No. 77-388.

Unlike the situation in *Winans* (*see* p. 20, *supra*), where the Court held that the parties had anticipated private ownership of the Indians' former fishing sites and had dealt with that condition, neither treaty party anticipated the events that have precipitated the decline in the productivity of Indian fishing here. No one foresaw that a resource as abundant as the salmon was at treaty times would ever become as relatively scarce as it is today.[31] Nor did anyone appreciate the degree to which economics would dictate the development of new marine fisheries in which fishermen can intercept some portion of fish that would otherwise pass the Indians' accustomed grounds. The treaty Indians were, of course, free to compete in those new fisheries on equal terms.[32]

The Stevens treaties guaranteed only an equality of access to these fishing sites; they did not promise that the Indians could maintain any particular level of productivity by the limitation of fishing by others, if necessary. The respondents' assertion that the treaty Indians have a priority right to fish

[31] This scarcity is not simply the product of increased fishing by non-Indians over the past 125 years, as the Indians imply. There has been a dramatic absolute decline in the fish harvested. For example, the average annual catch in the period 1911-1914 was 24,901,000 fish, but by 1971-1974 the catch had declined to 6,508,000. *See Amici* Br. of American Friends Service Committee, *et al.*, at 14-15.

[32] Contrary to the Indians' suggestion that these fisheries have only been exploited for the purpose of diminishing the Indians' catch, the fact is that species such as chum and pink salmon deteriorate rapidly on the way to their spawning grounds. As a result, it is more profitable to take these salmon before they migrate back up stream.

when the resource is scarce simply imputes to the treaties an intent that never existed. If the parties had had infinite prescience, perhaps they *might* have struck a different bargain. Yet, in light of concern by Governor Stevens and his colleagues that the Indians' treaty rights not interfere with the settlers' interests (*see* pp. 14-15, *supra*), it is highly doubtful that they would have conceded any priority for the Indians. In any event, it is not for the courts to rewrite history in order to confer greater treaty rights on one group of beneficiaries than any of the parties had any reason to consider and negotiate. Only the legislature—federal or state—has the power to alter and update the respective rights of the treaty parties to accommodate unforeseen circumstances.

As the district court's findings, supported by the evidence, indicate, the government negotiators believed that they were sufficiently accommodating the interests of all involved by stating simply that each person was to have the right to fish "in common" with every other person. That belief was communicated to the Indians. The only interpretation of the Stevens treaties that does not impermissibly alter their language is the one that takes the terms at face value and gives them a natural rather than a contrived meaning: the right to take fish "in common" gives each holder the right to fish together with his neighbor at the sites subject to this protection. This right cannot rationally be elevated into a right to exclude non-Indian fishermen from the opportunity to fish. The respondents' claims for "special" rights have no basis in law or fact that would permit their recognition by the courts.

This Court's decision in *Puyallup II* establishes that a federal court may consider some allocation only as a remedy for proven discrimination against Indian fishing at particular sites. Neither the district court nor the court of appeals purported to justify the "broad brush" 50-50 apportionment of the entire fishery on the basis of that principle, and there was surely no effort to tailor the decree to any peculiar problems at particular

sites.[33] In no event could a disportionate allocation to Indians be justified.

A federal court of equity attempting an implementation of these treaties today must be guided by several factors. First, little is accomplished by tying the allocation to the tribal character of the Indians, or to their dependence on fishing 125 years ago. The district court found that the Indians of Western Washington have, since treaty times, become increasingly assimilated into modern society:

> "Today most Indians wear traditional western clothing, speak English, utilize the western economic system and western technology, share western religious traditions and participate in the western sociopolitical organization. Traditional religious rights and ceremonies are no longer widely observed by most tribes. Modern Indians share similar goals with modern non-Indians to acquire most items of American material culture." 384 F. Supp. at 358, JA 114-15 (FF 33).

The district court also found that the treaties themselves were intended to "accomplish a transition of the Indians into western culture." *Id.* at 355, JA 109 (FF 21). The treaty Indian fishermen today no longer battle the elements to any greater extent that the non-treaty fishermen.

An equally important contemporary consideration is that the Indians are now citizens of the United States.[34] Thus, the recognition and enforcement of preferential commercial entitle-

[33] If the district court had found instances of discrimination, the only fair remedy would have been one that would ensure that treaty Indians had a practical opportunity to harvest a proportion of the available run that would be based on the number of Indian commercial fishermen when compared with the number of non-Indians. That would, on an average, respect the *per capita* equality of opportunity for all competing fishermen.

[34] 8 U.S.C. § 1401(a)(2) (1966), *amending* Citizenship Act of 1924.

ments for Indian citizens directly and substantially disadvantages the livelihoods of other American citizens whose involvement with the salmon fishing life is no less intense and compelling.

Additionally, subsequent to the negotiation of the Stevens treaties, the Fourteenth Amendment guaranteeing equal protection to all persons was added to our Constitution. A governmental decree requiring a 50-50 split between two groups of disproportionate size is unavoidably an unequal apportionment of the resource among the members of those groups. Yet it is our fundamental national policy to deal with individuals as such, and this Court has been loathe to allow group membership to submerge the individual's interest in personal justice. The Court should be equally skeptical here of the results reached by the courts below.

Thus, it is especially unwarranted for a court of equity today to superimpose on the Stevens treaties a judicial guarantee that treaty Indians may harvest more than their fair *per capita* share of the resource.

II. THIS COURT SHOULD NOT BE DIVERTED FROM SETTLING THE INTERPRETATION OF THE TREATIES.

In attempting to convince the Court to ignore the substantial and important questions raised by the non-treaty fishermen, the government (in a virtual repudiation of the position taken by the Solicitor General in his brief acquiescing in certiorari) and the Indians have presented a pastiche of confused and inconsistent jurisdictional and procedural arguments.[35] When

[35] In its brief acquiescing in certiorari, the United States urged the Court to reach and decide all the issues presented by the federal cases, expressly including the treaty interpretation questions. U.S. Br. on Pet. at 21-22. The government correctly observed that the Court's prior denial of certiorari did not operate as *res judicata* or "law of the case" with respect to any of the issues presented in that first petition. *Id.* at 22 n.17.

(footnote continued)

those arguments are examined, however, it becomes apparent that *res judicata* does not bar this Court from authoritatively construing the treaties, that the Court has jurisdiction over the cases coming here from the Washington Supreme Court, and that the Washington State courts properly entertained the claims of the non-treaty fishermen.

A. The Original Decision Of The District Court In This Case Cannot Be Accorded *Res Judicata* Effect.

In an effort to avoid the consequences of respondents' own default—their failure to join the non-treaty fishermen as parties under Rules 19(a) or 20(a) of the Federal Rules of Civil Procedure or to make the federal case a defendant class action under Rule 23(b)(1)—they now boldly seek to muzzle our

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(footnote continued)

In its main brief, however, the government has reversed itself, and, while conceding that the doctrine of *res judicata* does not apply, now states that this Court should apply some other undefined doctrine of "finality" to leave in force the outstanding federal court interpretations of the treaties. No reason is given for this abrupt and highly inappropriate change in position, which clearly interferes with the proper exercise of this Court's discretionary jurisdiction, and which also serves to impede the formulation of clear and precise issues for decision by this Court.

The government's waffling on the State court cases is similarly puzzling. Its main brief now suggests, without even a pretense of legal argument, that the Court should summarily vacate the State supreme court's judgments because of the alleged impropriety of that court's acceptance of jurisdiction. Yet, in acquiescing in certiorari, the Solicitor General had advised this Court: "in all the circumstances, it is unprofitable to pursue the question whether the state courts should have declined the invitation to create a conflict of decisions." U.S. Br. on Pet. at 24.

In order to side-step the conflict between the State and federal decisions, the respondents would have this Court employ the expedient of summarily vacating the State court judgments without confronting the merits. Even if the Court could use such a device to eliminate the current conflict, however, the federal court decisions meet the other standards for review on the merits under Rule 19 of this Court's Rules.

arguments on the treaty questions. We trust, however, that the Court will hold that the non-treaty fishermen have a right to speak for themselves on the decision that imperils their livelihoods.

The government properly concedes that "the doctrine of *res judicata* is not strictly applicable" here (U.S. Br. at 48), but makes a "finality" argument that we deal with later (pp. 61-62). The Indians, however, spent considerable energy attempting to invoke that doctrine (Ind. Br. at 79-93), and to their points we now turn.

1. The District Court's Decision Was Non-Final And, Therefore, Not Entitled To *Res Judicata* Effect.

(a) The Indians concede, as they must, that *res judicata* "applies only to final judgments." Ind. Br. at 83. There are several reasons why the district court's decision was not final for *res judicata* purposes, chief among them being the court's failure to make the necessary certification required by Rule 54(b) of the Federal Rules of Civil Procedure for entry of a final judgment resolving less than all the claims in litigation. That Rule provides in pertinent part:

> "In the absence of such determination and direction, *any order or other form of decision, however designated,* which adjudiciates fewer than all the claims or the rights and liabilities of fewer than all the parties *shall not terminate the action as to any of the claims or parties, and* the order or other form of decision *is subject to revision at any time* before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.)

The initial district court decision is clearly one to which Rule 54(b) was applicable because it adjudicated "fewer than all the claims" between the parties. Included among the complaints against the State in the original district court proceedings were claims for relief based on the State's alleged environmental degradation of the fishing resource. By special

order the district court segregated this and other issues for separate trial in what is now referred to as Phase II of this litigation. *See* 384 F. Supp. at 328, 411, JA 64, 214. Pretrial discovery on these claims has been proceeding and motions for summary judgment will be argued in April 1979. In still a later phase of this continuing litigation, the district court is to decide the treaty Indians' claims concerning entitlements to artificially propogated fish produced in State hatcheries. Those proceedings are presently scheduled to begin in June 1979. Indeed, the district judge himself repeatedly referred to his 1974 decree merely as "Final Decision *No. 1.*" (*E.g.*, JA 209 *et seq.*, 217 *et seq.*)

It is well settled that, absent a Rule 54(b) certificate, any decision or judgment falling within the ambit of Rule 54(b) remains interlocutory and does not finally terminate the action as to any of the claims or parties.[36] Rule 54(b) expressly so provides. The failure to certify the entry of a partial decision in accordance with Rule 54(b) means that, until all of the claims in the federal litigation are resolved, the 1974 decision remains interlocutory and provisional, and therefore cannot be accorded *res judicata* effect.[37]

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[36] *See, e.g., Holton* v. *Crozer-Chester Medical Center,* 560 F.2d 575 (3d Cir. 1977); *Alley* v. *Dodge Hotel,* 551 F.2d 442, 444 n.6 (D.C. Cir.), *cert. denied,* 431 U.S. 958 (1977); *New York* v. *Nuclear Regulatory Commission,* 550 F.2d 745 (2d Cir. 1977); *Stevens* v. *Security Pacific National Bank,* 538 F.2d 1387 (9th Cir. 1976); 6 J. Moore, *Moore's Federal Practice* ¶ 54.42 (and cases cited therein); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2660 (West 1973).

[37] *See Republic of China* v. *American Express Co., Inc.,* 190 F.2d 334, 338 (2d Cir. 1951); 6 J. Moore, *Moore's Federal Practice, supra,* ¶ 54.42 at 812-13; 10 C. Wright and A. Miller, *supra,* § 2661 at 90. *See also Acha* v. *Beame,* 570 F.2d 57, 63 (2d Cir. 1978); *City of Parma* v. *Levi,* 536 F.2d 133 (6th Cir. 1976); *Virgin Islands* v. *2.6912 Acres of Land,* 396 F.2d 3 (3d Cir. 1968).

This is not to say that the district court's initial decision was not properly appealable to the court of appeals. That court had jurisdiction of the appeal pursuant to § 28 U.S.C. § 1292(a)(1), which

(footnote continued)

In *Republic of China* v. *American Express Co., Inc.,* 190 F.2d 334 (2d Cir. 1951), for example, the Second Circuit held that the dismissal of a counterclaim was non-final absent a Rule 54(b) certification. Under these circumstances, the court said, the decision was not entitled to *res judicata* effect, even in a parallel proceeding. *Id.* at 338. The court explained that by failing to make the express determination prescribed by Rule 54(b), a district court judge is deemed to have reserved "the power to alter" his decision, as though "by his explicit reservation, he left the order revocable, he kept it in suspense, and therefore truly interlocutory . . . ." *Id.* at 388.[38] Thus, the

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(footnote continued)

provides for review of "[i]nterlocutory orders of the district courts . . . granting . . . injunctions . . . ."

Although the district judge stated that the initial 1974 decision was final and reviewable (JA 96), that assertion did not constitute an adequate "certification" for purposes of Rule 54(b). The district judge did not refer to the rule and did not make what Rule 54(b) explicitly and unambiguously requires: "an express determination that there is no just reason for delay." In making a determination that there is no just reason for delay, there must be some indication in the court's certification that all relevant factors were considered and that the rule's implicit presumption against finality was properly overcome.

Rule 54(b) certification must be reserved for the "infrequent harsh case." *Panichella* v. *Pennsylvania Railroad,* 252 F.2d 452, 455 (3d Cir. 1958); *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270 (2d Cir. 1968). *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 2659 at 76-77 (West 1973). The district court must clearly "articulate the factors it relied upon in reaching the decision to grant certification." *Allis- Chalmers Corp.* v. *Philadelphia Electric Co.,* 521 F.2d 360, 366 (3d Cir. 1975). *Accord, Gumer* v. *Shearson, Hammill & Co., Inc.,* 516 F.2d 283, 286 (2d Cir. 1974); *Schwartz* v. *Compagnie General Transatlantique, supra,* 405 F.2d at 275.

Judged against these standards, the district court's assertion of finality with respect to its 1974 decision is patently inadequate to certify that decision under Rule 54(b). Thus, the decision remained non-final for *res judicata* purposes.

[38] *Accord, Doctor* v. *Seaboard Coast Line R.R.* 540 F.2d 699 (4th Cir. 1976); *Bache & Co., Inc.* v. *Taylor,* 458 F.2d 395 (5th Cir. 1972); *United States* v. *North Carolina,* 425 F. Supp. 789 (E.D.N.C. 1977); *Oliver* v. *Monsanto Co.,* 56 F.R.D. 370 (S.D. Tex. 1972), *aff'd per curiam sub nom. Oliver* v. *Home Indemnity Co.,* 487 F.2d 514 (5th Cir. 1973).

district judge's initial decision in this case was not final for *res judicata* purposes either to bar litigation of the issues in the State court actions or to preclude reexamination of the initial rulings by the court of appeals—which did not invoke *res judicata*—or by this Court.

(b) Even apart from Rule 54(b), the district judge's 1974 initial decision is not entitled to *res judicata* effect under general principles of finality. That decision marked only a stage in these lengthy and complex proceedings.

The relevant case law compels the conclusion that the district judge's 1974 decree was in substance an interlocutory order. In *Catlin* v. *United States*, 324 U.S. 229 (1945), this Court stated: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 233. Similarly, in *John Simmons Co.* v. *Grier Brothers Co.*, 258 U.S. 82 (1922), the Court held that a decree entering a permanent injunction and ordering an accounting was non-final because the accounting—"an inquiry not formal or ministerial, but judicial, in order to ascertain the amount of the damage to be awarded"—"was necessary to bring the suit to a conclusion upon the merits." *Id.* at 89.[39]

In the federal case now before the Court, the district judge has retained continuing jurisdiction over the cause to resolve a host of issues, including issues with a direct bearing on the issues addressed in the initial decision. *See* 384 F.Supp. at 388-89, 419, JA 171-72, 228-29. The ongoing nature of this litigation was also recognized by the court of appeals, which in

[39] *See also Marconi Wireless Telegraph Co.* v. *United* States, 320 U.S. 1, 47-48 (1943) (following *Simmons*); *George* v. *Victor Talking Machines Co.*, 293 U.S. 377 (1934) (per curiam) (decree "granting an injunction and appointing a special master to take . . . an account of profits . . . was interlocutory");*Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976); *Acha* v. *Beame*, 570 F.2d 57 (2d Cir. 1978); *Aetna Casualty & Surety Co.* v. *Giesow*, 412 F.2d 468 (2d Cir. 1969); *City of Louisa* v. *Levi*, 140 F.2d 512 (6th Cir. 1944); *Restatement (Second), Judgments* § 41 Comment b at 3 (Tent. Draft No. 1, 1973).

the first appeal in 1975 affirmed the district court's initial decision but also remanded the case "so that [the district court] may maintain continuing jurisdiction." 520 F.2d at 693, JA 59.

Moreover, since the 1974 decision, the district judge has issued literally dozens of orders—some of which are at issue in this appeal—that have significantly modified and altered the first decision and injunctive decree. For instance, although the district court's initial decree sought only to assure an *opportunity* for the treaty Indians to take at least 50% of the harvestable fish (JA 88-89, 223), the court's 1977 decree and subsequent orders following this Court's denial of certiorari sought to *guarantee* to treaty Indians a disproportionately successful catch by banning fishing by non-treaty fishermen (*e.g.*, Pet. No. 78-119 at A. 89-90; Pet. No. 78-139 App. C).

In similar fashion the district judge has repeatedly revised the specific allocation of the harvestable fish. The original decree, as affirmed by the court of appeals, gave the treaty Indians a 50% allocation. *See* JA 50-51, 88-89. The 1977 decree and later orders provided for a different apportionment, varying from 37% to 48% on many runs, for an overall allocation of 45% of the harvestable fish. *See* Pet. No. 78-119, at A44 *et seq.* In still later orders on June 6, 1978, however, the court reverted—without explanation—to the original 50% allocation formula. *See* JA 482 (¶ 1).

Even more significant in this respect is the series of orders issued subsequent to the district court's 1974 decision and the initial appeal from that decision. In the intervening orders, the district judge has undertaken the direct management and control of the State's fisheries. In his initial decree, the judge had directed the State to issue revised regulations in accordance with his allocation formula, and also required prior court approval of new State regulations that would limit the harvest of fish by treaty Indians. *See* 384 F. Supp. at 415-17, JA 222-25. The regulatory scheme contemplated by the initial decree was clearly one of *State* management and enforcement, subject only to supervision by the district court.

In various orders beginning in August 1977, however, the State was ousted from virtually all responsibility for management of the fisheries, and the district judge, in turn, assumed control over all allocations. As described at length in petitioners' main brief, this assumption of control included, *inter alia*, the adoption by the district court of a plan for the management of the Puget Sound salmon resource, as well as various injunctive orders directed at petitioners, the non-treaty fishermen, prohibiting them from fishing in violation of the court's allocation scheme.

In view of such extensive revision and administration of its 1974 decree, the district judge's original decision can scarcely be termed final in any meaningful sense. As a non-final judgment, the 1974 decree was not entitled to *res judicata* effect either in this Court or in the State court proceedings.

2. The Parties To The Original District Court Decision Were Not The Same As The Parties In The Later Proceedings, And There Was No "Privity."

The district judge's 1974 decision is not *res judicata* for still another, independent reason: the parties in the federal litigation at the time of that decree were not the same as the parties presently before this Court in either the federal or the State cases. As the Court recently commented, *res judicata* only operates as a bar to relitigation of identical claims between *identical parties*. *Parklane Hosiery Co., Inc.* v. *Shore*, 47 U.S.L.W. 4079, 4080 n.5 (U.S. Jan. 9, 1979) (No. 77-1309). *See also Commissioner* v. *Sunnen*, 333 U.S. 591 (1948).

This salutory rule is constitutionally based. Due process forbids the binding of a person to a judgment in a prior litigation in which he was not a party, or in which he was not vicariously represented by an agent who assiduously and diligently represented interests that were precisely co-extensive with those of the non-party.[40]

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[40] *See Parklane Hosiery Co., Inc.* v. *Shore, supra*, 47 U.S.L.W. at 4081 n.7; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940); *Chase National Bank* v. *Norwalk*, 291 U.S. 431 (1934).

For the reasons set forth at greater length in petitioners' main brief (at 57-64), the State of Washington was not an "adequate" representative of petitioners' interests for due process purposes. The mere fact that *some* of the positions asserted by the State were similar to those now advanced by the non-treaty fishermen hardly operates to bind them in interest with the State or otherwise to preclude their claims. The State was bound under State law to represent and accommodate the interests of *all citizens* of the State, including both the treaty and non-treaty fishermen, and, indeed, different groups of non-treaty fishermen. The petitioner Gillnetters and Purse Seiners are constitutionally entitled to represent their independent interest without the dilution that such multiple representation inevitably causes. Respondents' contrary claims in this regard are particularly ironic in light of their repeated attempts to tax us with the State's concessions or elections in the original federal proceedings that are obviously inconsistent with the interests of the non-treaty fishermen.[41]

The *parens patriae* decisions relied on by respondents and the court of appeals[42] are simply inapposite. The states in those cases were constitutionally adequate representatives because all their respective citizens had precisely the same interest as the State — the allocation to that State and its citizens, rather than to another State and its citizens, of a maximum share of a scarce resource. In the present case, however, the central issue is the allocation of a scarce resource among competing groups *within* a single State. The distinct status of the Gillnetters and the Purse Seiners is underscored by the district judge's decision to focus on these groups, rather than on other citizen fishermen like sports fishermen, when he extended his injunctive orders.

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[41] *See* Ind. Br. at 94 (State position concerning apportionment), 248-49 (State handling of hatchery-fish issue); U.S. Br. at 65 n.32 (State position concerning *per capita* allocation), 75 (State position concerning on-reservation fishing and fishing for subsistence and ceremonial purposes).

[42] *E.g.*, *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam); *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935); *Wyoming* v. *Colorado*, 286 U.S. 494 (1932).

Under these circumstances the State of Washington could no more be the legally adequate representative of *all* its citizens than a class representative could adequately represent two distinct classes whose interests are in direct conflict with each other. *See Hansberry* v. *Lee*, 311 U.S. 32 (1940). This is especially true where, as here, the application of *res judicata* against the non-treaty fishermen would operate retroactively to reconstitute the federal litigation as a defendant class action— a procedural device that requires very careful application and administration even under ideal circumstances.[43]

For these reasons, the respondents' reliance on *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), proves unavailing. While it is true that the Court held there that the rights of various citizens had been settled in earlier litigation to which only the State had been a party, a special assistant attorney general had been specifically appointed in that case to represent the independent interests of the State's citizens. *See* 357 U.S. at 326. That procedure was not followed here, and thus the district judge's decree against the State cannot be treated as stripping the non-treaty fishermen of the right to be heard in an appropriate forum.

Nor is the requirement of legally adequate representation avoided by assertions that the non-treaty fishermen were in some formalistic sense "privies" of the State. As we explained

[43] In *Consumers Union of the United States, Inc.* v. *Consumer Product Safety Commission*, Slip Op., No. 75-2059 (D.C. Cir., December 22, 1978), *petition for cert. filed*, No. 78-1248 (U.S. February 12, 1979), the court expressly rejected an attempt to analogize a prior suit against a government agency to a defendant class action:

> "Nor can the agency's role . . . be likened to that of the named representative of a class in a defendant class action, and thus raise the spectre that a judgment against the agency would extend to bind all putative members of the hypothetical class it supposedly represents. . . . [W]hen — as in the present circumstances—no class has been convened, no preclusive effect can possibly follow . . ." Slip Op. at 16.

in our opening brief (at 64-67), privity for purposes of binding non-parties is not a substitute for adequate representation.[44] On the contrary, privity *presupposes* constitutionally adequate representation. The essential inquiry in each case is *not* whether the party and non-party have *some kind* of legal relationship—like the relationship of a citizen to a State—but whether in the particular case the party and non-party are legally identified in interest.

As we have shown, there is a sufficient divergence in interests between the State and the Gillnetters and Purse Seiners—and other groups of Indian and non-Indian fishermen—to render the privity concept inapplicable. Therefore, the extension of *res judicata* effect to the district judge's 1974 decree in this case would deprive petitioners of their constitutionally protected right to a day in court, a right they were not given when the government and the Indians failed to join them as parties to the federal case.[45]

[44] Indeed, a relationship of privity connotes a nexus between the interests of the party and the non-party that is even closer than the constitutionally required minimum of adequate representation. Were the rule otherwise, the class action device would be rendered superfluous. Any vigorously defended ordinary civil suit would have the same preclusive effect as an action properly certified pursuant to Federal Rule 23.

[45] As illustrated by *Consumers Union*, there is no merit to the argument that petitioners must be bound by the initial district court decree in order to avoid the imposition of conflicting obligations on State agencies and officials. Federal Rules 19, 20, and 23 adequately provide for such contingencies. *See Provident Tradesmen Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 120 (1968) (joinder intended to resolve the problem of conflicting exercise of equity jurisdiction); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

Respondents could have attempted to use those devices so as to structure the federal litigation to bring about a final and binding resolution of all issues in this case, uniformly determining the rights and responsibilities of all interested classes. They failed to use the devices open to them when they filed the federal case, and even after the district judge invited them to join all legally interested persons (JA 64). Respondents cannot now be heard to argue that their default should be remedied by the sacrifice of petitioners' right to a meaningful day in court.

Finally, as the District of Columbia Circuit recently held in *Consumers Unions of the United States, Inc.* v. *Consumer Product Safety Commission*, Slip Op., No. 75-2059 (D.C. Cir., decided December 22, 1978), *petition for cert. filed*, No. 78-1248 (U.S. February 12, 1979), the real party-in-interest who was not joined in a third party's suit against a government agency is not bound by the outcome of that suit and is free to pursue an independent action against the agency and to seek relief inconsistent with the earlier decision.[46] In this case, since the government and the Indians failed to join the non-treaty fishermen as parties in the original proceedings, as they could have done under Rules 19(a) and 20(a) of the Federal Rules of Civil Procedure, the 1974 federal decree against the State may not lawfully bar us from asserting our independent legal rights in state courts of competent jurisdiction.

3. This Court's Prior Denial Of Certiorari Did Not Render The District Court's 1974 Decision *Res Judicata*.

The fact that this Court once before denied certiorari in a prior phase of the federal litigation in this case has no significance with respect to the availability or scope of review

[46] In *Consumers Union* the court of appeals rejected the argument that a judgment in a reverse Freedom of Information Act suit against a federal agency, prohibiting it from disclosing certain material, should be treated as binding on a different plaintiff seeking disclosure of the material in a later FOIA action against the same agency. The position asserted unsuccessfully by the agency in the first action was the same as the position asserted by the plaintiff in the second action. The court explained that:

> "to accept a government agency as an adequate representative of requesting parties whenever the agency nominally favors disclosure is to ignore the stark fact that their interests are not congruent." *Id.*, Slip Op. at 15 n.42.

The court also commented:

> "An agency's interest in FOIA suits . . . diverge markedly from private interests and raise serious doubt whether the agency could ever be decreed to represent members of the public." *Id.*, Slip Op. at 15.

now. This Court has on numerous occasions granted certiorari and decided issues that had been the subject of an earlier decision in the same litigation that the Court had declined to review.[47] In none of these cases did the prior refusal of review operate as *res judicata*.

In declining to review a decision in an on-going litigation involving important questions of federal law, this Court does not forever cut off its appellate jurisdiction to decide federal questions presented at a later stage of the proceedings. Where, as in this case, the operative judgment of the lower court is an injunction over which the trial court retains continuing supervision, this Court must have the power to undertake plenary review of the federal issues whenever it concludes that the standards of Rule 19 are met.

The denial of a petition to review even a final judgment operates as *res judicata* in one respect only: it bars relitigation of the same claims between the *same parties* in *separate lawsuits*. This is a straight-forward and routine application of traditional *res judicata* doctrine, and the cases cited by the Indians stand for no more than this basic proposition. *See, e.g., Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). Since, as contemplated all along, proceedings have taken place in the federal case after the initial denial of certiorari, *res judicata* does not bar this Court from reviewing the underlying issues in that case now.

B. The State Supreme Court Properly Reached The Merits Of Petitioners' Claims And Its Decision Is Properly Before This Court For Review.

Throughout their briefs, the government and the Indians repeatedly accuse the Washington Supreme Court of bad faith, of encouraging illegal conduct, and of engaging in subterfuge.

[47] *See, e.g., Piper* v. *Chris Craft Industries, Inc.*, 430 U.S. 1 (1977); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers Co.*, 240 U.S. 251, 257-58 (1915); *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941); *Mercer* v. *Theriot*, 377 U.S. 152, 153-54 (1964).

See, e.g., U.S. Br. at 52-53; Ind. Br. at 200-02, 205. These charges should be repudiated as unwarranted and unseemly. That court was called upon to adjudicate the claims of the non-treaty fishermen against the State, including issues of State law. There was clearly jurisdiction over the controversy. The fact that the government and the Indians disagree with the opinion of the majority of that court, and are unhappy that the court declined to defer to a federal court's decision to which it was under no duty of deference, does not provide any support for an *ad hominem* attack. The Justices of the Washington Supreme Court acted professionally, in accordance with their understanding of the law and in the legitimate exercise of their judicial function.

1. The State Cases Present Justiciable Controversies.

(a) In their briefs on the merits, the government and the Indians have suggested for the first time that the State cases do not present a "case or controversy" within the meaning of Article III, and that such a determination "would justify vacating the resulting judgments without reaching the merits." U.S. Br. at 51; *see* Ind. Br. at 254.

It is especially dismaying to see the Solicitor General subscribe to a contention that so clearly misperceives not only Article III, but also the jurisdictional consequences of his own argument. If the State cases did not constitute "cases or controversies" within the meaning of Article III, the result urged by the Solicitor General—overturning the State judgments—would not follow. Rather, this Court would lack jurisdiction to review them. This Court would then lack any power whatsoever to disturb the State Supreme Court's judgments, or to issue any order other than a dismissal of the writ of certiorari for lack of jurisdiction. The State supreme court judgments would stand as they have been entered, and would remain in full force and effect. *See Tileston* v. *Ullman*, 318 U.S. 44 (1943).

No doctrine of federal law prohibits a State court from deciding a dispute that might not satisfy the requirements of Article III, even if the parties are tendering federal questions for

resolution.[48] Any holdings of a State court in a federally non-justiciable matter—including rulings on matters of federal law—must be left undisturbed by this Court. *See* 6A J. Moore, *Moore's Federal Practice* ¶ 57.12, at 57-110 n.7 (2d ed. 1974); Frankfurter, *Note On Advisory Opinions*, 37 Harv.L.Rev. 1002 (1924). Since the respondents have not even bothered to suggest any legal basis for their contrary assertion, the Court should reject it summarily.

(b) In fact, this Court does have constitutional authority to review the State cases, since the parties to those cases were sufficiently adverse to pose a "case or controversy" for Article III purposes.

Neither the State nor the non-treaty fishermen are "actually and formally in control of the other party," as in *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892). Neither party is in control of and financing both sides of the litigation, as in *United States* v. *Johnson*, 319 U.S. 302 (1943). Nor does this case involve a situation where parties are purposefully cooperating in order to injure the rights of rival claimants by litigating without the knowledge of the third parties, as in *Lord* v. *Veazie*, 49 U.S. (8 How.) 251 (1850).

Nonetheless, the Indians claim that adversity is lacking because the non-treaty fishermen and the State are "identified in legal interest" and "desire the same result."[49] In asserting

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[48] *See DeFunis* v. *Odegaard*, 84 Wash. 2d 617, 529 P.2d 438, *on remand from* 416 U.S. 312 (1974) (Washington courts not bound by requirements of Article III).

[49] The Indians erroneously equate the views of State officials with the official posture of the State. Even though various State officials agreed with the non-treaty fishermen that the federal court had erred in its interpretation of the treaties, the State was under order to enforce the federal decree. Accordingly, the State interposed the federal decree in defending against the actions filed by the non-treaty fishermen. In addition, the State also disputed our claim that State law marked the outer limit of the enforcement powers of State officials. *See Nozewski Polish Style Meat Products* v. *Meskill*, 376 F.Supp. 610 (D. Conn. 1974).

that we are identified in legal interest with the State, the respondents are again trotting out their formalistic arguments about "privity." As we have demonstrated at length in our main brief (*see* pp. 55-73), however, and as we reiterate in this brief (*see* pp. 54-58), non-treaty fishermen are not in privity—or "identified in legal interest"—with the State. In fact, the fishermen's interests diverge substantially from the State's.

In addition, in arguing that we are not adverse to the State because we "desire the same result," the respondents have fallen victim to the imprecision that so often confounds litigants who interpose arguments of non-justiciability. As Professor Wright has noted, "[t]he rule against collusive litigation does not mean—though it is sometimes stated as if it is meant— that the parties must actually disagree." C. Wright, *The Law of Federal Courts* § 12, at 40 (West 2d ed. 1970). If parties actually have different interests and one is seeking judicial relief against the other, there is sufficient adversity to support federal jurisdiction. *See* 13 C. Wright & A. Miller, *Federal Practice and Procedure* § 3530, at 167 (West 1975).

Thus, a federal court has the power to enter judgment on the consent of the parties, *see Swift & Co.* v. *United States*, 276 U.S. 311 (1928), or to render a decree despite a defendant's failure to challenge a plaintiff's claim, *see Sharon* v. *Tucker*, 144 U.S. 533 (1892). As long as there are two independent parties to a litigation, there is sufficient adversity if one party seeks a decree that would bind the other to a course of conduct different from the conduct being challenged, but the defendant is unwilling or unable to act in the absence of a decree.[50]

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[50] *See Kentucky* v. *Indiana*, 281 U.S. 163 (1930); *Consumers Union of the United States* v. *Consumer Product Safety Commission*, 561 F.2d 349 (D.C. Cir. 1977), *vacated and remanded for further consideration*, 434 U.S. 1030 (1978), *on remand*, Slip Op., No. 75-2059 (D.C. Cir., December 22, 1978), *petition for cert. filed*, No. 78-1248 (U.S. February 12, 1979). *See also Granville-Smith* v. *Granville-Smith*, 349 U.S. 1 (1955); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 210 n.9 (1968).

For example, in a case that is materially indistinguishable from this one, *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), Indiana declined to perform on a contract with Kentucky. Even though Indiana agreed that the contract was valid, it refused to perform because the contract was being challenged by Indiana citizens in the Indiana courts. This Court held that there was a "case or controversy" between those states even though the parties "desired the same result" and were in exact agreement on the law and the facts. There was sufficient adversity because, in the absence of an order from this Court, the "State of Indiana, while desiring to perform its contract, is not going on with performance because of a suit brought by citizens in its own court." *Id.* at 173.

The *Consumers Union* case recently decided by the District of Columbia Circuit is similar to *Kentucky* v. *Indiana*, and is also virtually on all fours with this case in establishing federal jurisdiction over the suits between the State of Washington and the non-treaty fishermen. The plaintiffs in *Consumers Union* had filed a Freedom of Information Act request with the Consumer Product Safety Commission. When the Commission ultimately decided that it would disclose the requested information, various manufacturers sought and obtained a preliminary injunction against disclosure, over the Commission's opposition, in a "reverse FOIA suit." While that case was pending the group seeking the information filed an FOIA suit against the Commission in a different court. The district court dismissed for lack of justiciability, since the Commission also agreed that the information should be disclosed. Therefore, the district court observed, the plaintiffs "[stood] in the same position on the crucial issue in the case" as the defendant Commission. 400 F.Supp. 848, 851 (D.D.C. 1975). The court of appeals, however, reversed, holding that the case was, indeed, justiciable. The court explained that "although the Commission would like to provide appellants with the requested documents, the preliminary injunction entered by the Delaware District Court unequivocally precludes it from doing so." 561 F.2d at 354. *See also* Slip Op., *supra*, at 12.

Under the principles recognized by these cases, this Court has before it a justiciable controversy within the meaning of Article III. At the time the State cases were being litigated in the State courts, and even now, the State of Washington was subject to federal court decrees compelling it to act against the non-treaty fishermen in a manner that the fishermen claim is illegal. These fishermen sought in the State courts, and seek now, to bind the State to a different course of conduct. Indeed, the government itself emphasizes that the State Department of Fisheries was enforcing the district judge's orders against the non-treaty fishermen *until* the State supreme court ruled that conduct illegal. U.S. Br. at 24. Even if certain Washington officials personally desire the same ultimate result in this case as the non-treaty fishermen, those officials were and are unable to achieve that result because of orders issued by a federal court. Sufficient adversity thus exists in the State court cases between the non-treaty fishermen, who seek a particular result, and the State, which is otherwise unable to achieve that result.[51]

(c) Finally, we find it ironic indeed that the government and the Indians are complaining about the vigor with which the

[51] The two-paragraph per curiam opinion in *Moore* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 47 (1971), on which respondents rely, does not undercut these principles. In *Moore* both the plaintiffs and the defendant affirmatively argued the same position — that North Carolina's anti-busing statute was constitutional. That is quite a different situation from this case, where the State actually presented arguments contrary to those of the non-treaty fishermen, and where unarguably adverse parties — the United States and the fishermen — reenforced those contrary arguments as *amici curiae*.

Moreover, the plaintiffs in *Moore* did not seek to enjoin the defendant or bind it to any position or course of conduct different from the position it was then taking. The plaintiffs merely sought a declaratory judgment that a state statute was constitutional; so did the defendant charged with enforcing it and willing to enforce it. A clearer case of a request for an advisory opinion is hard to imagine. Thus, when the Court considers the facts of *Moore* — as opposed to a single phrase taken out of context by respondents — it becomes clear that *Moore* bears little resemblence to the State cases now before the Court.

State argued its case in the State courts. The respondents argue that *amicus* status is sufficient for petitioner non-treaty fishermen to be bound by the federal decree but carefully ignore their own active participation as *amici* in *Gillnetters* and their deliberate refusal to accept the invitation to participate in *Passenger Vessel*. They had full opportunity to present their arguments as vigorously as possible, and did so. Even "[c]ases conceived in cooperation [which this case surely was not] . . . may be saved by the intervention of a genuine adversary . . . ." *Associated General Contractors of America, Inc.* v. *Laborers' International Union*, 476 F.2d 1388, 1403 (Temp. Emer. Ct. App. 1973).

The actual participation in the State courts by the government and the Indians—parties undeniably adverse to the non-treaty fishermen—renders academic any arguments about the adversity of the State and the non-treaty fishermen. Both the State and the *amici* placed before the State courts the federal judge's evidentiary findings and legal conclusions. In this setting, it is preposterous to suggest that the State courts were being lulled into deciding federal issues blindly, without a vigorous adversary presentation.

2. The Absence Of The United States And The Indians From The State Cases Did Not Bar The State Courts From Adjudicating The Commercial Fishermen's Claims.

In an astonishing display of irony, the respondents—who lightly dismiss the non-treaty fishermen's arguments that they were prejudiced by their exclusion from the federal case—cry in outrage that they were not present in the State court cases and insist that the State courts were unable to proceed without them. The argument is worthless.

In the State supreme court, the respondents, as *amici curiae*, asserted that they could not be joined due to their

sovereign immunity. Ind. Br. at 217.[52] They were invited to intervene under Washington Rule of Civil Procedure 24, but declined to do so. Consequently, it does not now lie in their mouths to claim that the State court should not have proceeded without them.

In any case, the alleged indispensability of parties in State court, and the power of a State court to proceed without a party, are matters of State law and are not cognizable by this Court. Even if the government or the Indians had been "indispensable" in State court under State law, that fact would be irrelevant now. The relief requested—a holding that the State courts should have dismissed these actions, *see* Ind. Br. at 219—is simply beyond this Court's power to award.[53]

Moreover, even analogizing to the standards of Rule 19 of the Federal Rules of Civil Procedure, the State courts would not have been required to dismiss the non-treaty fishermen's complaint. Rule 19 expressly recognizes that it may be impossible to join an otherwise "indispensable" party because of some jurisdictional impediment, and the Rule quite sensibly declines to command dismissal of the action. Instead, under Rule 19(b) the court must undertake a flexible and pragmatic analysis of whether the action should proceed without the presence of the person who cannot be joined. *See Provident Tradesmen Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 119 (1968); 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1607 (West 1972).

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[52] In light of this fact, the United States' assertion that there was no "attempted joinder," *see* U.S. Br. at 51, is purely tendentious. Indeed, the statement is inconsistent with the prior sentence that "each of the Tribes, as well as the United States, enjoyed sovereign immunity."

[53] The Indians cite no authority supporting the relevance of this State law argument in this Court. The cases cited by the United States, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940), and *Minnesota* v. *United States*, 305 U.S. 382, 386-89 (1939), deal only with the existence of sovereign immunity.

In this case, even if we assume that the government and the Indians should have been joined if feasible—as the State attempted to do—the State courts had the power to decide that the actions could fairly proceed in their absence. The "indispensable party" objection, therefore, like all of the respondents' other procedural straw men, furnishes no ground for upsetting the State court judgments.[54]

In sum, the Washington State courts acted legitimately in deciding the merits of our claims, and the State cases are properly here for review on the merits.

C. The State Courts Were Not Obligated To Defer To The Lower Federal Courts As A Matter Of Comity Or Under The Supremacy Clause.

While conceding that the "doctrine of *res judicata* is not strictly applicable" to this case (U.S. Br. at 48), the government

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[54] The Indians also assert that the adjudication of the State cases without their presence as parties violated their federal due process rights. The Indians, however, invoked sovereign immunity to prevent their joinder, but nevertheless participated as *amici curiae*. They had ample opportunity to be heard, an opportunity that was offered to them with as much insistence as the law allowed.

The posture of the Indians in the State court cases is dramatically different from the status of the non-treaty fishermen in the federal case. The Indians stood behind sovereign immunity to frustrate repeated efforts to join them in the State cases. By contrast, they had made no effort to join the non-treaty fishermen in the federal case, and when some fishermen sought permission to intervene in that case, they were rebuffed by the district judge.

In addition, the Indians' contrivance about a due process issue is of scant relevance at this stage. The proper time for them to complain about the State judgments would come if at some point in the future someone claims that the judgments operate as *res judicata* against them. Indeed, that is the irrelevant thrust of the cases they cite in support of their due process argument. *See Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).

Shields v. *Barrow*, 58 U.S. (17 How.) 130 (1855), also cited by the Indians, is an early expression of the federal law of indispensable parties, and has no direct bearing on the issues in this case.

propounds a different basis for its challenge to the decision of the State courts to hear the claims of the non-treaty fishermen: "judicial comity." The Indians frame a similar argument in Supremacy Clause terms. Both theories dissolve upon analysis.

1. No Principle Of Comity Applied.

(a) The "comity" argument is fundamentally flawed in that it misunderstands basic principles of federalism. While the federal courts are courts of limited jurisdiction and, as a constitutional matter, must defer to State courts in deciding questions of State law, *see Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), the converse is not true. State courts are courts of general jurisdiction, and their power to decide federal questions is coordinate with that of the federal courts.[55] Thus, a State court is under no duty to defer to the decisions of federal district courts or courts of appeals in deciding questions of federal law. *Cf. Consumers Union of the United States* v. *Consumer Product Safety Commission, supra*, Slip Op. at 13 n.36.

There is simply no doctrine of federal law that *obligates* a State court to refrain from deciding a case involving federal questions that are also being adjudicated by a federal court, even if the claims or issues in both courts are similar or identical. The coordinate autonomy of the State courts is especially appropriate where, as here, the federal decision is not yet final (*see* pp. 49-54, *supra*) and important questions of State law are inextricably intertwined in the case. Not surprisingly, therefore, the government is unable to cite anything in support of its peculiar notion of "comity."

The "abstention" doctrine—by which federal courts may defer to State courts in cases that involve unsettled questions of state law, *see Railroad Commission of Texas* v. *Pullman Co.*,

[55] *See Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 502 (1962); *Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts And The Federal System* 359-60, 418-30 (2d ed. 1973) (hereafter "*Hart & Wechsler*").

312 U.S. 496 (1941), or might create a conflict with a State's administration of its own affairs, *see Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943)—provides an instructive comparison. This form of "comity" is animated by our federalism: the federal judiciary ought not encroach upon areas of State law that are the *exclusive* province of the State courts to define.

The reverse, however, is not so: the State courts have concurrent jurisdiction to participate in the definition of federal law. Under the constitutional plan of the Framers, the very decision whether to create inferior federal courts was left open for resolution by Congress. *See Hart & Wechsler* at 11-12. When Congress decided to establish lower federal courts, it entrusted them with quite limited jurisdiction, principally diversity jurisdiction. As explained by *Hart & Wechsler* (at 844):

> "[T]he principle established by the first Judiciary Act was that private litigants must look to the State tribunals in the first instance for vindication of federal claims subject to limited review by the United States Supreme Court."

Indeed, the State courts had virtually the entire responsibility for developing federal law (subject to this Court's review) prior to the creation of general (but not all-embracing) "federal question" jurisdiction in 1875. *See* Judiciary Act of 1875, § 1, 18 Stat. 470. Properly understood, therefore, nothing in our federal system implies that a State court has a duty to defer to a lower federal court on federal questions.[56]

[56] Moreover, even under the "abstention" doctrine, a federal court has discretion whether to stay or dismiss an action. *See Railroad Commission of Texas* v. *Pullman Co., supra*. Thus, even if the "reverse-abstention" asserted by the respondents were the law, the State court would not be *required* to stay or dismiss the proceedings before it, but would merely be *permitted* to do so. In this case, the State courts, although expressly aware of the federal proceedings and the "comity" arguments against adjudication of the fishermen's claims (*see* the dissents in the Washington Supreme Court cases), decided that it was appropriate to proceed.

(b) Moreover, respondents misperceive the nature of judicial "comity." As the Court of Appeals for the District of Columbia Circuit has recently noted, the doctrine of "comity" "surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent." *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip Op. at 17 (footnote omitted). The decisions invoking "comity" involve circumstances in which the plaintiff in the later suit was a *party* to the earlier action involving the same issues and subject matter. *See id.,* at 17 & n.46. *See also, e.g., Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.,* 342 U.S. 180 (1952).

The plaintiffs in the State cases—the non-treaty fishermen—were *not* parties to the federal court proceedings, and the district judge expressly so recognized, JA 431. Accordingly, the principle of comity cannot be applied, for to do so would be to deprive them of their day in court. "Even if comity might be thought at all relevant, it would not outweigh the non-parties' right, guaranteed by . . . the Constitution, to have their claims adjudicated." *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip Op. at 18-19 (footnote omitted). This Court has stated again and again that "no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."[57] This basic tenet of due process can hardly be circumvented by the government's "ritualistic invocation of 'comity.'" *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip. Op. at 23.

Indeed, by claiming that the State courts should have dismissed the non-treaty fishermen's claims on grounds of "comity," the respondents are seeking to penalize the fishermen for the respondents' own tactical errors. As we have shown above (at 48-49, 57 n.45), Rules 19, 20, and 23 of the Federal

[57] *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra,* 390 U.S. at 122, *quoting Mallow* v. *Hinde,* 25 U.S. (12 Wheat.) 193, 198 (1827).

Rules of Civil Procedure provided a panoply of devices whereby the government and the Indians might have brought the commercial fishermen into the federal suit. Indeed, when some of the fishermen sought to intervene, their petition was successfully opposed. Having eschewed all these mechanisms, the respondents cannot now bemoan the threat of inconsistent adjudications, "since they never attempted to foreclose that possibility by seeking the joinder of" the non-treaty fishermen in the federal case. *Consumers Union of the United States* v. *Consumer Product Safety Commission, supra,* Slip Op. at 24. *See also Boles* v. *Greeneville Housing Authority,* 468 F.2d 476, 479 (6th Cir. 1972).

2. The State Court Judgments Are Not "Void Under The Supremacy Clause".

The Indians argue that the judgments of the State court are "void under the Supremacy Clause," since State officers are "obligated to honor and protect federal rights" and since there had been "a federal court decision which had already held that the state action would lead to a denial of a federal right." Ind. Br. at 207-08. Both of these assertions beg the question, in that they assume that federal law is what respondents want it to be.

It is certainly true that, under the Supremacy Clause, State officials, including State courts, must abide by federal law. But it is equally true that the decision of a lower federal court does not definitively declare the supreme law of the land. Under the constitutional plan, state courts have autonomy to decide what federal law is unless and until this Court speaks.

While there is no doubt that State judges are bound by treaties entered into by the United States, a State court may come to its own independent conclusion about the meaning, validity and effect of the treaty in a given case, if this Court has not settled the matter. The State court may be incorrect, and if so, it is subject to reversal for that reason by this Court. But the contention that a State court judgment is "void under the

Supremacy Clause" because it disagrees with an opinion of an inferior federal court has no foundation in the Constitution.[58]

D. The Holding Of The State Supreme Court As To The Power Of State Officials Must Be Accepted By This Court.

1. The Holding Is A Matter Of State Law.

The Washington Supreme Court has held, in a definitive interpretation of several State statutes, that the officials of the Washington Department of Fisheries are only authorized to regulate the State's fisheries for conservation purposes, and are *not* empowered to allocate fish among fishermen for any other purpose.[59] This definition of the scope of official powers of State

[58] Similarly, the Indians' argument that the State supreme court's holding "operates" to "obstruct the implementation" of the federal district court's remedies, Ind. Br. at 212, has nothing to do with the Supremacy Clause. The argument is nothing more than a restatement of the *res judicata* arguments that are repeated throughout their brief.

The Indians emphasize the statement in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), that "once a district court's order becomes *final*," the State officials who are parties to the federal proceedings are bound by it. Ind. Br. at 212-13. This statement clearly refers, of course, to the *res judicata* effect of the district court judgment on parties, not to any broader effect on non-parties flowing independently from the Supremacy Clause.

The other cases cited by the Indians in the "Supremacy Clause section" of their brief, Ind. Br. at 207-13, are not germane either. Both *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964), and *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971), simply involved review of federal district court proceedings in which State statutes were declared unconstitutional.

Testa v. *Katt*, 330 U.S. 386 (1947), also cited by the Indians, is equally inapposite here. *Testa* holds simply that a State, having made a particular type of remedy available in its courts for violations of State law, could not refuse to grant that remedy for violations of federal law.

[59] *See Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P.2d 1151, 1153-54, 1159 (1977); *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, 89 Wash. 2d 276, 279, 571 P.2d 1373 (1977).

officials is the law of the State of Washington, and this Court must accept it as such. That aspect of the State court's decision, therefore, is not subject to reversal by this Court, unless the State statutes themselves, as thus interpreted, are in violation of federal law. The respondents have not even attempted to make that argument.

The Indians, however, engage in a confusing exercise in which they attempt to argue that these holdings are really matters of *federal* law. Ind. Br. at 203-06. The State court, however, relied on State statutes in holding that the Department of Fisheries has no statutory authority to issue regulations designed to allocate fish to users on any basis other than one related to *conservation*. The Department of Fisheries may allocate the salmon harvest between sport fishermen and commercial fishermen, for example, or among various types of fishing gear, because such allocations are directly related to *conservation*.[60] The Department is not, however, empowered to allocate the fish within a "user class," and may not, for example, make any distinctions among hook and line sport fishermen fishing a particular run, or among gillnet commercial fishermen fishing a particular run. Under these principles the State court ruled that its officials may not treat Indian and non-Indian fishermen differently, except to the extent that they fall into different "user classes."

When the holdings of the State supreme court are examined, it becomes absolutely clear that *State* law issues were being decided. The fact that those decisions may have affected the manner in which a federal district court is able to frame a decree does not change the basic State law nature of those holdings as determinations of State law or subject them to reversal by this Court.

[60] An allocation of the salmon harvest among various types of fishing gear is clearly related to conservation. Thus, Wash. Rev. Code § 75.12.010, cited by Indians at n.435 of their brief, is perfectly consistent with the statutory scheme as explicated by the Washington Supreme Court.

2. A Federal District Court May Not Mandate That State Officials Act Affirmatively In Excess Of Their Authority Under State Law.

(a) As we demonstrated in our main brief, the district judge acted improperly in ordering State officials to act affirmatively in excess of the authority granted them by State law. In our view, the treaties do not constitute an independent basis for charging State officials with the responsibility for enforcing apportionments that a federal district court believes are appropriate under treaties between the United States and the Indians. If there is a federal right to apportionment, it is up to Congress to furnish the resources to administer it. The treaties do not permit the district judge to dragoon otherwise unauthorized State officials into a federal posse, as he has attempted to do.[61]

We agree with the United States, of course, that State officials may be prohibited from *interfering* with the operation of a federal treaty. *See* U.S. Br. at 78-79. It is quite a leap, however, from that obvious proposition to the proposition that State officials are *required* to become the administrative arm for *enforcing* a federal treaty, regardless of the limits on their authority under State law. That is a leap this Court should not make, for to do so would be to ignore the serious federalism questions raised in our main brief.

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[61] The government has implied that the non-treaty fishermen disagree with the State's acknowledgement that the State courts will accede to this Court's interpretation of the treaties on the enforcement responsibilities of State officials. U.S. Br. at 78. This is a blatant misquotation.

In our main brief at 54 n.44, we stated our disagreement with the State attorney general's position that this is properly an issue of federal rather than State law. We argued only that the position of the state Executive on the question of the Department of Fisheries' authority could not control over State legislative judgments and judicial interpretations. We certainly do not take issue with the proposition that, if this Court concludes that the federal treaties validly impose additional powers and duties, all parties, including the State, will be bound by that decision.

An analogy may sharpen the issue. Congress has enacted hundreds of federal criminal statutes. It has also provided for enforcement of those laws by various federal agencies. State police officers could be enjoined from interfering with the enforcement of these federal laws by federal agents. But a federal court could not assign the enforcement responsibilities themselves directly to State police officers who had not been empowered by the State legislature to perform those functions. Is that clear excess of federal authority in any way distinguishable from what the district judge has done here?

The respondents have cited several school desegregation cases in arguing against this fundamental principle. The commercial fishermen resent the obvious effort of the respondents, through forced and constant references to desegregation cases, to turn this into a civil rights case. It is no such thing. It is an effort by one group of commercial fishermen to exclude a larger number of competitors from access to a limited valuable resource. As such, the case must be viewed as a clash of economic interests in which several Indian treaties happen to be the focus.

In addition, in relying on the desegregation cases, respondents fail to note that the State statutes in question in those cases—statutes which purported to prohibit State officials from complying with desegregation orders—were themselves held to be unconstitutional. *See, e.g., Griffin* v. *County School Board of Prince Edward County, supra.* [62] This is a crucial distinction, for in this case there has been no holding that the State statutes regulating the Department of Fisheries' authority are in violation of federal law. Since those statutes were valid and in force, State officials are bound to obey them, and to act only within

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[62] *See also Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962); *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va.), *appeal dismissed*, 359 U.S. 1006 (1959). In those two cases as well as *Griffin*, the courts found that the intent and purpose of the legislation in question was to prevent compliance with the Constitution.

their limits, any district court orders to the contrary notwithstanding.[63]

(b) Nor is this issue moot, as the Indians argue. Ind. Br. at 184, 221. First, the State and the Department of Fisheries remain subject to certain affirmative duties in connection with the district court's management of the fisheries. *See, e.g.*, Preliminary Injunction Order (Oct. 17, 1977), Pet. No. 78-119, at A97-A99; Preliminary Injunction Order re Enforcement (June 6, 1978), Pet. No. 78-139, at C3-C4. Indeed, in the June 6, 1978 Order, the district court decreed that "[n]othing in this order shall relieve the defendant State of Washington or its agencies, officers and employees of any obligation under prior orders of this Court . . . ." *Cf. Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Division 1287, Amalgamated Association of Street, Electric Railway and Motor Coach Employees* v. *Missouri*, 374 U.S. 74 (1963).

Moreover, the district judge assumed fisheries management responsibilities because the State could not enforce his allocation plan. *See* Memorandum Order and Preliminary Injunction (Aug. 31, 1977), Pet. No. 78-119 at A55. The judge clearly preferred State implementation of his plan. Thus, there is a real prospect that allocation duties will be reimposed on the Department of Fisheries in the future, since the district judge cannot assume permanent management of the fishery. Clearly, then, the issue of the Department of Fisheries' allocation power is sufficiently "alive" to be considered by this Court. *Cf. Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 415 (1972).

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[63] The Indians characterize *Bell* v. *School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Thaxton* v. *Vaughan*, 321 F.2d 474 (4th Cir. 1963); *Wright* v. *County School Board*, 309 F. Supp. 671 (E.D. Va. 1970), *rev'd on other grounds*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); and *Bradley* v. *School Board*, 51 F.R.D. 139 (E.D. Va. 1970), as going merely to the respect a district court should give to a State's internal allocation of power among officials. The cases actually stand for the proposition that State or local officials cannot be required to exceed their authority under State law.

III. THE DISTRICT COURT'S INJUNCTIONS AGAINST THE NON-TREATY FISHERMEN WERE ISSUED WITHOUT PERSONAL JURISDICTION.

1. The Orders Against Petitioners Were Not Merely Ancillary To The Original Decree.

As non-parties to the original federal proceedings in this case, the petitioner associations and their members were not properly bound by the district judge's orders against them in 1977 and 1978. The government and the Indians mistakenly rely on exceptional cases that permit the federal courts to enjoin non-parties from actively interfering with judicial decrees. To apply those cases here, however, would be to allow the exception to swallow the rule. In this case the non-treaty fishermen were not enjoined from preventing the sole defendant—the State—from complying with the decree against it. Instead, the district judge retroactively treated the non-treaty fishermen as indispensable parties and summarily extended to them the principal form of relief sought by the plaintiffs, because relief against the State alone was deemed insufficient.

These extraordinary orders—many of which were issued *ex parte*—shifted directly to the non-treaty fishermen the full burden of the district judge's allocation scheme. The orders were not ancillary to the injunction issued against the State. Rather, they were a wholly new form of relief *in lieu* of the relief that had been directed against the State. The "ancillary order" doctrine is thus irrelevant as a pretext for what now has become the main equitable relief in favor of the plaintiff Indians.

As discussed in petitioners' main brief (at 55-73), both due process and Rule 65(d) prohibit the enforcement of injunctions against persons who have never had their day in court—either directly, as named parties, or indirectly, through an agent or other representative whose interests in the controversy are identical to those of the non-party. Under either of these tests, it is abundantly clear that the non-treaty fishermen cannot be

bound by injunctions whose legal and factual foundation and whose equitable propriety they have never had an opportunity to contest.

The conclusion that the district judge overstepped his constitutional and equitable power here is not weakened by a line of lower court decisions, relied on by the respondents, in which injunctive orders were directed against non-parties. In many of these cases the question of the enforceability of the injunctions arose in the context of contempt proceedings, rather than on direct appeal from the orders.[64] This Court has on many occasions indicated that the validity of an injunctive decree is not always fully open to challenge in subsequent proceedings for contempt. *See United States* v. *United Mine Workers*, 330 U.S. 258 (1947); *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967).

As developed in *Walker* and later cases, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530 (1971); *Maness* v. *Meyers*, 419 U.S. 449 (1975), the rule appears to be that a defendant in a criminal contempt proceeding will be restricted in his challenges to the underlying order if he failed to pursue an opportunity for effective review of that order before violating it.[65] *See* C. Wright, *Law of Federal Courts* § 16 at 59-62 (West 3d ed. 1976). Thus, in the cases relied on by respondents it is by no

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[64] *E.g.*, *United States* v. *Hall*, 472 F.2d 261 (5th Cir. 1972); *Bullock* v. *United States*, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); *Russell* v. *United States*, 86 F.2d 389 (8th Cir. 1936); *Minerich* v. *United States*, 29 F.2d 565 (6th Cir.), *cert. denied*, 279 U.S. 843 (1929); *In re Curtis Petition*, 240 F. Supp. 475 (E.D. Mo. 1965), *aff'd*, 362 F.2d 999 (8th Cir. 1966), *cert. denied*, 386 U.S. 914 (1967).

[65] However, as Mr. Justice Rehnquist noted in passing on a stay application submitted on behalf of two non-treaty fishermen convicted of criminal contempt for violating the orders in this case, *Dolman* v. *United States*, No. A-534 (78-987) (decided December 21, 1978), an exception to this rule has been recognized for cases in which the defect in the underlying order is a lack of *in personam* jurisdiction.

means clear that the injunctions against non-parties would have been enforceable if challenged directly, as in the instant appeals.

More generally, however, the decisions relied upon by the respondents do not really bolster their position because in each case the orders directed against non-parties were merely *ancillary* to the main equitable relief running against the named party-defendants. The orders directed the non-parties simply to "step aside" in order to facilitate the operation of the court's principal remedial scheme. In the present case, by contrast, the State of Washington and its various agencies—the original named party-defendants in the federal litigation—have been virtually irrelevant to the district judge's remedial scheme since the issuance in 1977 and 1978 of injunctions running directly against the non-treaty fishermen.

These injunctions are not ancillary to the main relief in the case; they *are* the main relief in the case. In this respect *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), cited by respondents, is inapposite. In *Swann* and other cases this Court has recognized that broad federal injunctive decrees may sometimes inpinge on the activities of persons who are technically strangers to the underlying litigation. However, it hardly follows that these strangers may be enjoined by the court as the principal means of implementing the court's decree. There is simply no warrant for excusing the failure of the government, the Indians, and the district judge to recognize that the non-treaty fishermen should have been brought into the federal case at the pre-trial stage if the relief to be awarded might include orders directly commanding them not to fish.

2. The Non-Treaty Fishermen Were Not Vicarious Parties To The Original Federal Proceedings and Suffered Actual Prejudice From the Denial of a Hearing.

(a) Like the court of appeals, the government and the Indians also rely heavily on various *parens patriae* decisions by

this Court that have permitted individual States to sue in their sovereign capacity and as representatives of their citizens.[66] For reasons explained in our main brief (at 66-67) and in our showing above (at 54-58, *supra*) that the doctrine of *res judicata* is not applicable as a bar to hearing the grievances of the non-treaty fishermen, those cases are wide of the mark here.

These cases clearly recognize that the preclusive effect of litigation—even litigation between sovereign States—depends on the adequacy of the representation of non-parties who are later sought to be bound. Where there has been no effort by the trial court or by the State to appoint special counsel to advance the interests of diverse groups *within* a State, *compare City of Tacoma* v. *Taxpayers of Tacoma, supra*, and where the State was obliged to tailor its presentation to promote "the economic well-being of the citizens as a whole," *Puget Sound Gillnetters Association* v. *Moos*, 88 Wash. 2d 677, 565 P.2d 1151, 1153 (1977), the State cannot be deemed the legally adequate representative of any group of non-parties with independent interests.

The legal inadequacy of the State's representation of the interests of the non-treaty fishermen in this case is not merely a matter of theory or speculation. It was not until the second appeal to the court of appeals that the State of Washington was placed on notice that as named defendant in the litigation its role was in effect that of class representative on behalf of a defendant class consisting of all the non-Indian commercial fishermen.

Thus, it is not surprising that in the original proceedings in the district court, and in clear conflict with the interests of the non-treaty fishermen—as indeed the government and the

[66] *See, e.g., City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958); *New Jersey* v. *New York*, 345 U.S. 369 (1953) (per curiam); *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935); *Wyoming* v. *Colorado*, 286 U.S. 494 (1932); *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *Missouri* v. *Illinois*, 180 U.S. 208 (1901)

Indians emphasize in this Court—one of the State agencies felt itself free to support an apportionment of the fishery resource. The agency urged the court to "quantify the treaty right by reference to an objective definite standard" to be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to the waters of the State of Washington in the case area." *See* U.S. Br. at 8-9. That position is flatly at odds with our contention that the treaties provide no justification for guaranteeing any fishermen a particular level of commercial success.

Subsequently, in the first appeal to the court of appeals, the State also acquiesced in some aspects of the district judge's apportionment formula, *see* 520 F.2d at 690, and in the second appeal the State accepted without serious challenge the overall 45-55 allocation, *see* 573 F.2d at 1130. Indeed, the court of appeals in the second appeal all but conceded the inadequacy of the state's representation of petitioners' interests, observing bluntly that "[a]ny complaints the fishers may have . . . are matters between them and the State." 573 F.2d at 1133.

One need not look far to find still other evidence of specific prejudice resulting from peremptory imposition of the district court's 1977 and 1978 injunctive orders directed against petitioners. As sustained by the court of appeals, the entire apportionment program at issue in this case rests on the district court's exercise of equitable discretion. Yet one searches the record in vain for meaningful evidence concerning the economic impact of the 50-50 allocation on the non-treaty commercial fishermen—the very persons who are most directly affected by the remedial scheme and whose livelihoods are most directly threatened.

By the time the district judge extended his orders to these fishermen, he insisted that "[t]he rights of the treaty and non-treaty fishermen [had] already been adjudicated," so that, in the view of the district court, the "economic disruption associated with implementing the 1974 decree [was] not legally

cognizable." JA 483 (¶ 4). *See also* JA 538-41. The commercial fishing industry would have been the best source of information about the value of the fisheries and about the economic impact of various schemes of allocation. Obviously, the record before this Court would look very different if the government had brought the non-treaty fishermen into the federal litigation at the outset. Since this was never done, the district court's equitable discretion was exercised in a vacuum, to the manifest prejudice of the interests of the non-treaty fishermen.[67]

Furthermore, to combat the Indians' claims to special or even exclusive fishing rights, the commercial fishing industry could have shown through its records that long prior to the signing of the treaties there were non-Indian fishermen participating in the harvest of salmon alongside Indian fishermen, with no evidence of a claim of superiority or exclusivity by the Indians. In addition, the non-treaty fishermen could have submitted detailed evidence on a tribe-by-tribe basis and a location-by-location basis demonstrating a lack of discrimination against Indian fishermen. This presentation would have nullified any pretext for the district judge's apportionment of the entire fishery.

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[67] Because the proceedings in connection with the 1977 and 1978 orders only addressed the enforcement and not the merits of the court's initial decision in 1974, the non-treaty fishermen had no meaningful opportunity to participate in the federal litigation. In addition, the district court expressly acknowledged that "[t]he fact that [the non-treaty fishermen] are not parties to this lawsuit has placed restrictions on the scope of their participation" and that "[u]nder the reference to the Magistrate, there was no power for him to grant the status of 'party' to a non-party." JA 480 (¶¶ 11-12).

Thus, even if the court had acquired personal jurisdiction over the non-treaty fishermen in connection with the 1977 and 1978 orders, those proceedings were clearly inadequate to satisfy petitioners' due process rights to address the merits of the district court's 1974 decision.

(b) Still another argument advanced by respondents is that the district court's injunctions against petitioners are enforceable as *in rem* decrees. This notion, which first appeared seven years after the federal complaint was filed, deserves high marks for creativity but a failing grade on the merits. From its inception, the federal litigation has been predicated on *in personam* jurisdiction over the State and its agencies, not on *in rem* jurisdiction based on any alleged power over fish swimming freely in the waters of Puget Sound.

Nor could *in rem* jurisdiction have been perfected in this case. The principal case on which the district judge relied in first accepting that theory in 1977, *United States* v. *Dean Rubber Manufacturing. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946),[68] is the case Professor Wright singles out for critical discussion in concluding that the "application of in rem jurisdiction principles to injunction decrees seem dubious." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2956 at 573 (West 1973).

Apart from the general impropriety of using *in rem* jurisdiction as a justification for an injunction "purporting to bind the world," *id.* at 553, the concept is singularly inapplicable here. The essential predicate for the assertion of *in rem* or *quasi in rem* jurisdiction is the "attachment or seizure of property present in the jurisdiction . . . ." *Shaffer* v. *Heitner*, 433 U.S. 186, 196 (1977); *see* 4 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1070, 1072 (West 1969). In this case, of course, there has been no seizure or attachment of the free-swimming fish, and, thus, there is no "property" under the control of the district court. Indeed, the respondents' recent contrivance, predictably accepted by the district judge, runs

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[68] In extending the September 27, 1977, injunction to the non-treaty fishermen, the district judge held that he had power to "enjoin interference with property which is under the control of this Court." Pet. No. 78-119 at A-87. An identical conclusion underlies the extant injunction of June 6, 1978. Pet. No. 78-139 at C-13.

squarely afoul of the earlier explicit acknowledgement by the court of appeals on the first appeal:

> "The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession." 520 F.2d at 687.

As thus recognized by the court of appeals, this Court has repeatedly rejected any fictional notion that fish or game are anyone's property, including a State's, "until they are reduced to possession by skillful capture." *Douglas* v. *Sea Coast Products,* 431 U.S. 265, 284 (1977); *see Toomer* v. *Witsell,* 334 U.S. 385 (1948); *Missouri* v. *Holland,* 252 U.S. 416 (1920). Hence, it is pure nonsense to contend that there is *in rem* jurisdiction over free swimming fish that empowers a court to restrict the right of non-parties to try to catch those fish.[69]

(c) Finally, the injunctions against the non-treaty fishermen exceeded the district court's powers because there was not even a colorable attempt to comply with the strict requirements of Federal Rule 65(d). The non-treaty fishermen are obviously not "officers, agents, servants, employees [or] attorneys" of the State of Washington. Nor were petitioners in "active concert or participation" with the State as those terms are used in the Rule.

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[69] Even if the injunctions against the non-treaty fishermen could be properly characterized as *in rem*, that approach does not provide an alternative basis for binding non-parties. This Court held in *Shaffer* v. *Heitner, supra,* that *in rem* or *quasi in rem* jurisdiction is subject to the same due process limitations as assertions of *in personam* jurisdiction. Thus, the enforceability of the district court's 1977 and 1978 orders depends, ultimately, on whether the court properly obtained personal jurisdiction over petitioners at the outset of the federal litigation. This, of course, was never done. Nor did the district court have constructive personal jurisdiction over petitioners since, as we have shown, they were neither privies of the State nor adequately represented by the State.

That aspect of the Rule is meant to bar a named party from doing indirectly—through "aiders and abettors," *Regal Knitwear Co.* v. *NLRB,* 324 U.S. 9, 14 (1945)—what he has been lawfully enjoined from doing directly. The "active concert or participation" language of Rule 65(d) was derived from the seminal decision in *Alemite Manufacturing Corp.* v. *Staff,* 42 F.2d 832, 832-33 (2d Cir. 1930) (L. Hand, J.), and is manifestly *not* intended to authorize injunctions against non-parties who, like the non-treaty fishermen, "act independently and whose rights have not been adjudged according to law." *Chase National Bank* v. *Norwalk,* 291 U.S. 431, 437 (1934). An injunction directed at non-parties who are neither agents nor confederates of a named party-defendant "violates established principles of equity jurisdiction and procedure." *Id.*

The equitable powers of a federal judge are considerable, but they are not without limit. A judge's decrees are not like criminal statutes, binding on all persons who engage in the proscribed conduct. Yet it is not an overstatement to say that the district judge in this case purported to act in precisely that way.

CONCLUSION

The judgments of the United States Court of Appeals and the enforcement order of the United States District Court should be reversed. The judgments of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

CHARLES E. YATES
DOUGLAS FRYER
Moriarty, Mikkelborg, Broz,
Wells & Fryer
Attorneys for Puget Sound
Gillnetters Association, et al.

JOSEPH T. MIJICH
JOHN P. WORLD
Attorneys for Purse Seine
Vessel Owners Association, et al.

Of counsel:

PHILLIP A. LACOVARA
GERALD GOLDMAN
Hughes Hubbard & Reed

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In the Supreme Court

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United States

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *Petitioner,*

vs.

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No. 78-119

STATE OF WASHINGTON, *Petitioner,*

vs.

UNITED STATES, *Respondent.*

No. 78-139

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vs.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER STATE OF WASHINGTON, PETITIONER PUGET SOUND GILLNETTERS ASSOCIATION, AND RESPONDENT WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae Pacific Legal Foundation.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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This motion of the Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Rule 42, consent to the filing of a brief having been granted by counsel for petitioner State of Washing-

ton, petitioner Puget Sound Gillnetters Association, and respondent Washington State Commercial Passenger Fishing Vessel Association, but withheld by counsel for all other parties involved in this action.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief.

Pacific Legal Foundation is deeply concerned by the lower court actions in these consolidated cases in granting special privileges and immunities to a small fraction of persons to the detriment of all others based upon the rationale that Indian treaty rights may be superior to the Fifth Amendment of the United States Constitution. Further, there are grave concerns about the direction being taken by the courts below in contravention of the national policy of harmonizing the diverse elements of our society. Decisions which made it more profitable and grant more rights to those who remain apart from the mainstream of society can only fractionalize and splinter the United States and fly in the face of over two hundred years of judicial, legislative, and executive attempts to ensure that all persons living within the United States have equal rights, responsibilities, and opportunities.

Pacific Legal Foundation believes that these issues are of grave, national importance and that the parties to this action cannot adequately represent the interests of the public while at the same time representing their own, somewhat diverging interests.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae
Pacific Legal Foundation.

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INTEREST OF AMICUS

The interest of amicus is set out in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinions herein consolidated for appeal are reported below as follows: *Washington State Commercial*

Passenger Fishing Vessel Association v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977); *United States v. Washington,* 573 F.2d 1118 and 573 F.2d 1123 (9th Cir. 1978); and *Puget Sound Gillnetters Association v. United States District Court for the Western District of Washington,* 573 F.2d 1123 (9th Cir. 1978).

INTRODUCTION

The facts of this case, as set forth in petitioner State of Washington's opening brief and herein adopted, raise several significant issues. Of these, the issue of whether the granting of fifty percent of the total of a commercial salmon fishery to a small minority of the people living in the State of Washington is proper in light of the Fifth and Fourteenth Amendments to the United States Constitution, and the issue of the nature of the relative sovereignty of Indian tribes, the States, and the United States are of vital importance with respect to the public interest.

These issues arise following protracted litigation brought by the United States on its own behalf and on behalf of several western Washington Indian tribes seeking a declaration of rights with respect to the legal authority of the State of Washington to regulate off-reservation, commercial fishing by Indian fishermen. The United States District Court for the Western District of Washington found that the State of Washington had no right to regulate off-reservation fishing by treaty right fishermen except to that extent necessary for conservation of fisheries resources, and further that the Indians had a right to the opportunity to catch fifty percent of all salmon considered

to be harvestable[1] in the entire northwestern Washington area. *United States v. Washington,* 384 F. Supp. 312, 342-43 (W.D. Wash. 1974). This latter conclusion, which in effect deprives many non-Indian and non-treaty Indian commercial salmon fishermen of their right to seek a livelihood at their chosen profession, was based upon Article III of the Treaty of Medicine Creek, and similar treaties, which stated:

> "'The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory ....'" *United States v. Washington,* 384 F.Supp. at 331.

Relying on the fact that this treaty as well as other treaties negotiated for the United States by Governor Isaac Stephens of the Washington Territory was made at arm's length with a "sovereign" Indian tribe, the district court construed the "in common" language to mean that the Indians had an absolute right to fifty percent of all salmon which would normally pass through the Indians' usual and accustomed grounds and stations. *United States v. Washington,* 384 F. Supp. at 343. In order to ensure that this number of fish did indeed pass through these areas, the court found it necessary to subtract from that portion remaining for the non-treaty fishermen the number of fish which had already been harvested at some prior point in their migration to their spawning redds. *United States v. Washington,* 384 F. Supp. at 344. The court of appeals

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[1]Harvestable salmon means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations after deducting the number of fish required for spawning escapement and tribal needs. *United States v. Washington,* 384 F. Supp. 312, 343 (W.D. Wash. 1974).

upheld this decision in all respects save for not allowing a deduction for that number of fish taken by citizens of other states and nations beyond the territorial waters of Washington. *United States v. Washington,* 520 F.2d 676, 689 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

From this decision flow all three of the cases consolidated for appeal. The courts left it to the State to promulgate regulations to carry out the court's edicts and by doing so have placed the State in an impossible position. As a sovereign, the State of Washington is charged with a responsibility to all of its citizens to manage effectively its resources for their benefit, granting no special privileges and immunities, and protecting them from encroachment into their rights by other political subdivisions. In its capacity as a State, Washington is expected to fulfill the responsibilities given to it by the United States Constitution. The courts, by the simple expedient of characterizing the Indian tribes as co-equal, quasi sovereigns, have taken away the power of the State to manage its resources, provide and protect for its citizens and have forced it into a position contrary to the United States Constitution. It is of no small importance that the court of appeals feels that the State of Washington has approached the task of carrying out its directives with some reluctance. *Puget Sound Gillnetters,* 573 F.2d at 1128. It is in fact impossible and these decisions themselves violate the Fifth, Tenth, and Fourteenth Amendments.

The court of appeals decisions grant a status to Indian tribes which did not exist at the time of treaty negotiation. Further, they require the state to grant special privileges and immunities in violation of the Fourteenth Amendment.

Had the court of appeals properly characterized the nature of tribal sovereignty and given due regard to the responsibilities of the State to its citizens, there is little doubt that it would have found that the State of Washington is the proper party to manage its salmon fishery with due regard and responsibility to all its citizens be they treaty Indians, non-treaty Indians, or all others living within its borders.

ARGUMENT

I

THE NATURE OF TRIBAL SOVEREIGNTY WILL NOT SUPPORT TRIBAL REGULATION OF OFF-RESERVATION TREATY FISHING.

In a concurring opinion in *Puyallup Tribe, Inc. v. Washington Game Department,* 433 U.S. 165 (1977) (*Puyallup III*), Justice Blackman stated:

> "I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as was enunciated in United States v United States Fidelity & Guaranty Co. 309 US 506, 84 L Ed 894, 60 S Ct 653 (1940). I am of the view that that doctrine may well merit re-examination in an appropriate case." *Puyallup III,* 433 U.S. at 178-79.

The present consolidated cases both directly and inferentially raise this doctrine of tribal immunity and even more directly the concept of tribal sovereignty, which underlies both tribal immunity and the continuing viability of treaties between the various Indian tribes and the United States Government. This is most certainly "an appropriate case" for a re-examination of the vitality and even the present day propriety of laws and concepts fashioned in times past

and intended for use under totally different circumstances. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563 (1916).

A. Tribal Sovereignty Is Not Absolute.

The concept of sovereignty spans an extremely broad range. It can be the absolute sovereignty of a nation depicted by the Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), or it can be the conditional sovereignty attributed to the states of the United States in *John E. Madden v. Kentucky*, 309 U.S. 83 (1939). Beyond these two parameters exist other examples of sovereignty. A municipal or county government can be said to enjoy a certain "sovereignty" because of its ability to enact ordinances and regulations. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909). The captain of a ship at sea is a sovereign in consideration of his ability to rule absolutely the day-to-day functioning of his vessel and her crew. *See Southern Steamship Company v. National Labor Relations Board*, 316 U.S. 31, 42-46 (1942). A property owner can even be said to have certain sovereign attributes over his property. From all of these examples save that of an independent nation it can be readily seen that a political group or individual can be both a sovereign and a subject at the same time. The determinate factor will be the type of activity which is being considered.

The sovereignty often granted to Indian tribes or bands is not an absolute sovereignty. In some aspects, a tribe may enjoy sovereignty over some activities of the tribal members while on the reservation. *See McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1972); *United States*

v. Mazurie, 419 U.S. 544 (1975). In other aspects, the tribal entities must defer to the legitimate interests of the state (*Puyallup III*), or of the federal government (*United States v. Wheeler*, ... U.S. ....., 46 U.S.L.W. 4243 (1978)). Therefore, tribal sovereignty is, in fact, a limited authority, the scope of which depends upon the location and activity to be regulated.

B. Indian Tribes Were Never Considered Absolute, Independent Sovereigns.

Further support for the premise that Indian tribes are not to be considered sovereigns, able to regulate activity not occurring on Indian reservations, is readily apparent from a historical view of the initial characterization of the Indian tribes. Throughout the nineteenth century, the people of the United States were spreading throughout the territories in the spirit of Manifest Destiny. Possibly due to a sense of propriety, but more probably due to the lessons learned during the Indian wars, the United States Government entered into treaties with the Indian tribes to ease the way for settlement wherever possible. In the Pacific Northwest, Governor Isaac Stephens of the Washington Territory negotiated eleven different treaties for this purpose with the Indian bands of the area. *United States v. Washington*, 384 F. Supp. at 330. Although there was no reason to do so, Governor Stephens treated these Indian bands *as if they were* sovereigns. *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975). The court of appeals in *Puget Sound Gillnetters* recognized that this was not the sovereignty generally granted to an independent, foreign nation, but rather was, "the limited sovereignty of a domestic dependent nation." *Puget Sound*

Gillnetters, 573 F.2d at 1127. Even this characterization is somewhat less than accurate. Considering the facts surrounding the negotiation of these treaties, the sovereignty accorded to the various tribes of the Washington Territory might more properly be characterized as that which exists in a property owner facing eminent domain proceedings.

In *Late Corporation of Latter-Day Saints v. United States*, 136 U.S. 1, 42-3 (1890), the Court stated:

> "The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States."

The power to make all rules and regulations for any territory of the United States is specified by the Constitution, Article 4, Section 3. There was no need for the Congress to treat Indian tribes as sovereigns unless it was for the purpose of accommodation and ease in ensuring territorial expansion. It follows, therefore, that this initial sovereignty of the tribes of Washington was something less than that of an independent nation, and further that this status could not change without some subsequent congressional action. There has been action in this area, but far from granting a broader aspect to Indian sovereignty, Congress has evidenced a strong intent to abandon the concept altogether. In 1871, Congress enacted legislation doing away with the power of the United States to make treaties with Indians. In pertinent part it states:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ." 25 U.S.C. § 71.

Within the narrow confines of the question of whether or not Indian tribal sovereignty still exists, this statute provides a negative answer. Further, Congress has also enacted legislation making all Indians citizens of the United States. 8 U.S.C. § 1401(a)(2). These statutes clearly exhibit a congressional intent to make the Indian part of the mainstream of our society, rather than an intent to create a group of dependent, quasi sovereign nations living within, but not under jurisdiction of, the States of the United States. It must also be noted that the extension of citizenship to all Indians closely parallels the emancipation and citizenship granted to the black members of United States society through the Thirteenth, Fourteenth, and Fifteenth Amendments.

Throughout the long and arduous litigation leading to this appeal, the district court, and the court of appeals in turn, relied on the concept of tribal sovereignty to substantiate the holding that the State of Washington had no right to regulate off-reservation fishing by treaty right fishermen. The court of appeals in *Puget Sound Gillnetters* states:

> "Treaty fishers fish under the regulation of one quasi-sovereign, nontreaty fishers under the regulation of another." *Puget Sound Gillnetters*, 573 F.2d at 1128.

There can be only one rationale for this holding: the Indian tribes have been elevated to a status which they have never previously held. The tribes, through this holding, have been granted a sovereignty equal to that of each of the fifty States. The Tenth Amendment to the United States Constitution absolutely forbids either a character-

ization of the states as a quasi sovereign or the characterization of an Indian tribe as an equal of the States. The Tenth Amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This amendment makes it evident that the States are absolute sovereigns over all but that which is either granted to the federal government or that which is specifically denied to them by the Constitution. Indian tribes have never enjoyed this particular level of sovereignty nor is there any constitutional provision which may authorize it. On the contrary, the Constitution is specific in placing the Indian tribes under the regulatory control of the Congress. United States Constitution, Article I, Section 8, Clause 3.

This Court described the true status of sovereignty as regards Indian tribes in *Oliphant v. The Suquamish Indian Tribe,* ..... U.S. ....., 46 U.S.L.W. 4210, 4215 (1978).

> "'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these two.' [Citation omitted.]"

C. The Treaties Granted No Sovereign Rights to the Indian Tribes.

The source of the present dispute is the "in common with" language of Article III of the Treaty of Medicine Creek:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . ." *United States v. Washington,* 520 F.2d at 683.

By reading this language in context with the characterization of the Indian tribes as sovereigns the court of appeals created a fiction of a cotenancy in the off-reservation salmon fishery of Puget Sound. *United States v. Washington,* 520 F.2d at 685. When viewed in light of a dominant sovereignty existing in the territory, however, the meaning of the above clause changes. It does not reserve co-equal rights in the Washington Territory and in the Indian tribes to regulate a fishery, rather, it grants and reserves the right to all citizens of the territory, be they Indian or other, to an equal opportunity to catch fish. To use the words of the court of appeals, these "principles," applied in good faith, should answer most of the arguments in this dispute. *Puget Sound Gillnetters,* 573 F.2d at 1128. The court of appeals continues to state that the problem is then one of enforcement. Indeed, when it is necessary for two supposedly co-equal sovereigns to regulate a single fishery under the scrutiny of a judicial fish master, there is a problem of enforcement. A problem which might even lead the court to state that the State of Washington only, "enforced the district court's orders grudgingly at best." *Puget Sound Gillnetters,* 573 F.2d at 1128.

New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916), also dealt with the reservation of fishing rights in Indian treaties. It was argued in that case, as the court of appeals found here, that the reservation of fishing rights maintained and element of tribal sovereignty which thereby subjected the land itself "'to a joint property ownership

and the dual sovereignty of the two peoples, white and red.'" *Id.* at 563. This Court rejected that view finding that if neither whites nor the Indian tribe could exercise authority with respect to the other:

> "either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both." *Id.*

This is the very danger noted by this Court in *Puyallup II* in holding that:

> "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." *Washington Game Department v. The Puyallup Tribe,* 414 U.S. 44, 49 (1973) *(Puyallup II).*

II

ARTICLE THREE OF THE TREATY OF MEDICINE CREEK, AS INTERPRETED, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Chief Justice Marshall in *M'Culloch v. Maryland* (US) 4 Wheat. 314 (1819), stated:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." *M'Culloch,* (US) 4 Wheat. at 423.

In the instant case, there exists a situation in which the Court is faced with a painful duty. It is not, however, the painful duty to find that the initial act of Congress, that of ratifying the treaties negotiated by Isaac Stephens, was not the law of the land, but rather, it is the duty to state that these treaties could not be the law of the land if the court of appeals interpretation is correct.

A. No Treaty May Violate or Amend the United States Constitution.

It is well established that Congress does not have the power to do by treaty that which it cannot do by statute. *Holden v. Joy,* (US) 17 Wall. 211 (1872). Further, there is no support for this proposition in the supremacy clause itself. The state court, in addressing this limitation on the clause, quoted an earlier opinion of this Court:

> "'There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.'" *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wash.2d

276, 571 P.2d 1373, 1377, *quoting from Reid v. Covert,* 354 U.S. 1, 16 (1957).

The foregoing makes it clear that treaties must be measured against the Constitution and if it is found that a particular provision or an entire treaty violates one or another of the articles of the Constitution, it will be the duty of the courts to find that such treaty is not the law of the land. In the instant case, however, there is no more than the bare words of the treaties of 1855-56 to serve as a guide in the constitutional measure. There is in existence the interpretation of these treaties made by the United States District Court. The Supreme Court of the State of Washington addresses this point by stating:

> "If a treaty itself may not contravene constitutional provisions, it must follow that an interpretation of a treaty which leaves it open to constitutional objections, is likewise forbidden . . . ." *Id.*

B. The Granting of at Least Half of a Commercial Salmon Fishery Violates the Fifth Amendment Rights of All Other Citizens of Washington.

The District Court for the Western Division of Washington in *United States v. Washington,* 384 F. Supp. 312 (1974), in discussing the nature of the fishing rights of the treaty fishermen specifically found that:

> "The fishing right was reserved by the Indians and cannot be qualified by the state. The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource . . . . Additionally, state regulation must not discriminate against the Indians, and must meet appropriate due process standards." *United States v. Washington,* 384 F. Supp. 333.

The basis for this finding was the "in common with" language contained in most of the treaties in question here. However, from this seemingly innocuous statement, the district court found that it was necessary to apportion the fishery so that the reserved right of treaty fishermen to fish at all usual grounds and stations was meaningful. The manner in which this right was made meaningful was to require that at least fifty percent of the harvestable salmon available at a particular ground or station be reserved for tribal fishermen. *United States v. Washington,* 384 F. Supp. at 343. This is accomplished by limiting the amount of fish which might be caught by non-treaty fishermen prior to the time these fish reach the areas in question. This remedial judicial legislation amounts to a denial of due process to those who have lost the opportunity to fish "in common with" treaty rights fishermen. The Supreme Court of Washington points out the manifest injustice of the results of the court's edicts by showing that there are only 794 treaty rights fishermen commercially fishing for salmon while there are 6,600 non-treaty rights fishermen attempting to pursue the same profession as well as 283,650 sports fishermen. *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wash. 2d 276, 571 P.2d 1373, 1376. This type of apportionment is unprecedented.

Perhaps some understanding for the rationale behind the district court's decision may be found in Associate Justice Utter's dissenting opinion in *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson.* This opinion and the opinion of the district court in *United States v. Washington* rely heavily on the

Court's decision in *United States v. Winans,* 198 U.S. 371 (1905). In construing *Winans* Justice Utter states:

> "*Winans* stands unequivocally for the proposition that 'in common with' does not limit Indian fishing rights to those which others may also exercise. . . . the *Winans* decision is itself a clear recognition of the separate character *and separate source* of Indian treaty rights; while the ordinary United States citizen has rights as defined by the constitution and subject to limitation by the proper exercise of the police power of the states, treaty Indians *retain rights as established under treaty* prior to the grant of United States citizenship to the Indians." *Washington State Commercial Passenger Fishing Vessel Association v. Tollefson,* 89 Wash. 2d 276, 571 P.2d 1373, 1381 (emphasis in original).

The fact that a "right" has been granted by treaty does not make it superior to those rights established by the Constitution. As was noted in *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73 (1977), this Court has not been deterred, "particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Id.* at 84.

Considering the nature of tribal sovereignty as previously discussed, and considering the fact that the supreme law of the United States is the Constitution, under which all laws and treaties must be tested, Justice Utter's rationale has no basis in law or in logic. Nonetheless, the non-treaty fishermen must have a right to pursue salmon commercially in order for there to be a denial of the Fifth Amendment. Without this right, then, as both the district

court and the court of appeals suggest, the other citizens of the State of Washington have a mere privilege against which a reserved right has priority and against which no denial of equal protection can be claimed. *United States v. Washington,* 384 F. Supp. at 332.

C. Non-Treaty Fishermen Have the Absolute Right Secured by the Fifth Amendment to Pursue any Lawful Profession Including Commercial Salmon Fishing.

The Fifth Amendment's due process clause includes several enumerated rights which cannot be abridged. Included in these rights is that of liberty. On several occasions the Court has determined that the concept of liberty in the Fifth Amendment includes the liberty to pursue a lawful profession free from unreasonable governmental control or restriction. *See Greene v. McElroy,* 360 U.S. 474 (1959); *Dent v. West Virginia,* 129 U.S. 114 (1889); *Cf. United States v. Briggs,* 514 F.2d 794 (5th Cir. 1975). The concept of liberty and the right to make a living at a chosen trade or profession, taken together, is basic to the democratic nature of our society. In addressing the question of whether a licensing statute requiring that doctors had to be certificated by the State of West Virginia prior to practicing medicine, Justice Field stated:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years

> of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." *Dent v. West Virginia,* 129 U.S. at 121.

Justice Field's comments are particularly applicable to the present situation. The present controversy is not whether the Indians have a right to subsistence fishing on their own reservations or at off-reservation grounds and stations, nor is it a controversy of whether the State may exact licensing fees from Indian fishermen. The controversy surrounds a *commercial* salmon fishery in which the treaty and the non-treaty fishermen have equal rights, as guaranteed by the Fifth Amendment and by the treaties themselves. That such rights exist in the non-treaty fishing community is made so clear in the *Puyallup* decision that it is difficult to understand how it can be questioned. This Court held in *Puyallup II:*

> "Moreover, the *right* to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the *right* of the latter may be regulated. And we see no reason why the right of the Indians' may not also be regulated by an appropriate exercise of the police power of the State." 391 U.S. at 398 (emphasis added).

Similarly, in *Puyallup III,* this Court noted that if treaty fishermen were allowed unrestrained on-reservation fishing rights, "the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the *rights* of the non-Indian citizens recognized in the Treaty

of Medicine Creek." 433 U.S. at 176 (footnote omitted, emphasis added).

These decisions hold not only that the non-treaty citizens have fishing rights, but that these rights are recognized in the very treaty which is claimed to grant rights only to treaty Indians.

D. Promoting Tribal Separatism Contravenes National Policy.

There can be little doubt that an Indian would much rather be considered a member of a recognized tribe than a fully integrated citizen of the United States when consideration is given to the increased benefits thereby granted. The simplest of economics dictates this result. This is not, however, consistent with the policies of assimilation which have been practiced by the United States from its beginnings. In *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), this Court traced the history of the attitudes of the United States government towards Indian separatism, as follows:

> "The general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia (US) 6 Pet 515, 561 . . . Kansas Indians (Blue Jacket v. Johnson County) (US) 5 Wall 737 . . . and New York Indians (Fellows v. Denniston) (US) 5 Wall 761 . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it

> was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law . . . ." *Organized Village of Kake*, 369 U.S. at 72.

In 1934 a new tack was taken in relations with Indians by permitting Indian tribes to establish themselves as federal corporations. *Id.* at 73. "The result of this policy was that the influence of state law increased rather than diminished" (*Id.*), as exemplified by the Court's listing of inroads into the sole jurisdiction of the Indian tribes both on and off the reservation. *Id.*

The thrust of that decision was that there is a definite congressional intent to assimilate the Indians of the United States into the common society, an intent consistent with the inclusion of all others who have entered this country as either willing or unwilling emigrants. This Court has made clear that Indians are not destined to retain a status of perpetual federal wardship. *Williams v. Lee,* 358 U.S. 217, 220-21 (1959). It makes little sense to state that the source of Indian rights is separate from the constitutional source of the rights of ordinary citizens (*Washington State Commercial Passenger Fishing Vessel Association*, 89 Wash. 2d 276, 571 P.2d 1373, 1381, Justice Utter, dissenting) when it is this same Constitution which grants its concomitant civil, political, social, and cultural rights, protections, and benefits to United States citizens. The final irony is that the Indian who earlier abandoned his tribal origins and became a citizen of the United States and the State of Washington is the loser. This Indian, although sharing a common heritage and possible lineage with

treaty-rights Indians, may now be denied his Fifth Amendment rights to seek a commercial fishing profession for salmon merely because he took the path of assimilation paved by Congress.

CONCLUSION

The three cases consolidated for review present questions which transcend their facts. They raise questions of national policy with regard to whether or not the United States is to be composed of one, assimilated society or whether this society is to become increasingly fractionalized and segregated as special interest groups promote their own causes. The cases raise questions about the supremacy of the United States Constitution over treaties, acts of Congress, judicial decisions, and judicial orders. They raise questions about the ability of the separate States effectively to govern their respective territories as guaranteed by the Tenth Amendment, and they raise serious questions about the present vitality of the equal protection of all citizens of the United States.

These questions, after more than 200 years of national growth and prosperity, should no longer have to be asked. If allowed to stand, the decision of the court of appeals will provide no answers. These decisions can only promote the shredding of the fabric of our society. In light of these deep social, cultural, and political considerations, and for the reasons set forth above, amicus curiae Pacific Legal Foundation urges this Court to find that all citizens of the United States, be they Indians living under treaty status, Indians living as integrated members of society, or any

other citizen of the United States, are subject to the full range of the burdens and benefits of the United States Constitution and that the separate States of the United States have the right to govern their territories subject only to those powers granted to the federal government or specifically denied them by the Constitution.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
Pacific Legal Foundation
455 Capitol Mall, Suite 465
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae
Pacific Legal Foundation.

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IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

BRIEF OF *AMICUS CURIAE* AMERICAN INSTITUTE OF FISHERY RESEARCH BIOLOGISTS

MUNDT, MACGREGOR, HAPPEL,
FALCONER & ZULAUF
J. Carl Mundt
Henry H. Happel III
Counsel for Amicus Curiae

Office and Post Office Address:
1230 Bank of California Center
Seattle, Wa. 98164
Telephone (206) 624-5950

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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41 Fed. Reg. 108	31
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43 Fed. Reg. 121	32
43 Fed. Reg. 122	32

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37 George Washington L. Rev. 1251 (1969) 20

Goals and Objectives of Fishery Management, Food and Agriculture Organization of the United Nations Fisheries Technical Paper No. 166 (1977) 14

Management of the Ocean's Living Resources: An Essay Review, Ocean Development and International L J., Vol. 3, No. 2 (1975) 15

Objectives and Problems of Managing Aquatic Living Resources, Journal Fisheries Research Board of Canada, Vol. 30, No. 12 (1973) 14, 17

Ocean Distribution of Stocks of Pacific Salmon, Oncorhynchus spp., and Steelhead Trout, Salmo gairdnerii as shown by Tagging Experiments, National Marine Fisheries Service Technical Report, SSRF-689 (1975) 6

Optimum Sustained Yield as a Management Concept In Recreational Fisheries, American Fisheries Society, Special Publication No. 9 (1975) 16

Pacific Salmon and the High Seas Salmon Fisheries of Japan, National Marine Fisheries Service Processed Report (1977) 6

Salmon of the North Pacific Ocean—Part IV. Spawning Populations of North Pacific Salmon. Pacific Salmon in the United States. International North Pacific Fisheries Commission Bulletin No. 23 (1967) 7

Settlement Plan for Washington State Salmon and Steelhead Fisheries (1978) 10, 11, 12

Stock and Recruitment, Journal Fisheries Research Board of Canada, Vol. II, No. 5 (1954) 9

The Pacific Salmon, a Unique Problem in Resource Management, Northwest Fisheries Center, National Marine Fisheries Service (1974) 10

The Politics of the Ocean, University of Washington Press (1972) 34

World Fisheries — World Concern, World Fisheries Policy-Multidisciplinary Views, University of Washington Press (1972) 14

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

BRIEF OF *AMICUS CURIAE* AMERICAN INSTITUTE OF FISHERY RESEARCH BIOLOGISTS

I. Motion for Leave to File Brief of *Amicus Curiae*

The *amicus curiae* is the American Institute of Fishery Research Biologists. The Institute is an international association of professional fisheries scientists and managers founded in 1956. Many of the Institute's 1,100 members have been or are involved in managing and investigating salmon and steelhead resources. The Institute moves the

Court for an order giving the Institute leave to file this brief. The Institute has received the written permission of the United States, the Puget Sound Gillnetters Association, and the Purse Seine Vessel Owners Association. The Institute has not received the permission of the Indian tribes, the State of Washington, the Washington State Commercial Passenger Fishing Vessel Association, or the Washington Kelpers Association.

A. *Statement of the Case*

The cases under review in this proceeding comprise the most recent chapter in a dispute which has festered in the Pacific Northwest since before the beginning of the 20th century. The controversy stems from six treaties signed in the 1850's by Isaac Stevens acting for the federal government and by tribal representatives acting for a number of western Washington Indian tribes.[1] Since that time, repeated litigation has required the attention of the state and federal courts of the region. The Supreme Court has regularly been called upon to settle the issues arising from the often hostile encounters between the litigants. The subject matter of the dispute is fish, namely, the salmon and steelhead resources of western Washington.

This latest series of cases, now before this Court, started with the decision of the United States District Court for the Western District of Washington in *United States v. State of Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), cited hereinafter as "*U.S. v. Washington*". The trial judge made two broad rulings. The court ruled first, that the

1. The six treaties are those of Medicine Creek, 10 Stat. 1132 (1855), Point Elliott, 12 Stat. 927 (1859), Point No Point, 12 Stat. 933 (1859), and those with the Makah, 12 Stat. 939 (1859), the Quinaeilt, *et al.*, 12 Stat. 971 (1859), and the Yakimas, 12 Stat. 951 (1859).

treaty tribes and Washington state agencies had defined roles to play in managing the salmon and steelhead fisheries of western Washington, 384 F. Supp. at pp. 339-341, and second, that the members of modern Indian tribes who had descended from the original signatories had the right to an opportunity to harvest a specified share of the salmon and steelhead resources within the tribes' usual and accustomed fishing grounds in a "case area" in western Washington, 384 F. Supp. at p. 343.

The court defined as the case area that portion of the state of Washington west of the Cascade Mountains and north of the Columbia River drainage area, including the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas, 384 F. Supp. at p. 328. A subsequent order of the court extended the case area to include the Grays Harbor watershed, (R. ....). Within the case area the court described usual and accustomed grounds as the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs, 384 F. Supp. at p. 402.

The judgment of the trial court was affirmed by the Ninth Circuit Court of Appeals in *United States v. State of Washington,* 520 F.2d 676 (9th Cir. 1975). The Supreme Court denied *certiorari,* 423 U.S. 1086 (1976). The trial judge retained continuing jurisdiction over the case for implementation purposes, 384 F. Supp. at p. 408, and issued a number of subsequent rulings which, together with the original decision, led to the cases now before this Court.

B. *Interests Represented*

The Institute submits an *amicus* brief in this proceeding because two critical interests are before the Court without representation. The interests are first, that of the continued productivity of the resource itself and second, that of the science of fishery management. The Institute claims to speak on behalf of both interests. The Institute has no direct economic, recreational, or institutional involvement in the controversy and has never litigated treaty fishing questions in the past.

C. *Reasons for Granting the Motion*

The argument of the *amicus* is fundamentally different from that of all parties before the Court. The Institute presents no argument relating to the right to catch fish which may be enjoyed by any party or by any fisherman. *In fact, the Institute specifically disclaims any purpose to affect the rules which this Court may develop or confirm for sharing the resource.* The Institute's argument is directed solely at the portion of the overall controversy which relates to the fisheries management jurisdiction of the institutions—state, federal, tribal, and international—which are involved in managing fisheries for case area salmon and steelhead stocks.

The Institute believes that no party before the Court will adequately analyze and give appropriate emphasis to the interrelationship among the institutions which currently attempt to manage the case area's salmon and steelhead fisheries. These institutions have had, and will continue to have, a profound impact on the resources.

The *amicus* does not argue in favor of or against the jurisdiction of any existing institution. Rather, the *amicus*

argues that diffuse authority, proliferated among tribes, tribunals, states, federal government, regional fishery councils, and international commissions, has so complicated the conservation of the resources as to threaten their very existence. The relief which the *amicus* suggests is also different from that sought by the parties. The Institute does not seek to "win" or "lose" before the Court on the issue of who should manage the fisheries, but rather asks the Court to make a contribution toward the establishment of a unified fisheries management system capable of preserving the resource and attaining other management objectives as may be required by law.

II. Biological and Technical Premises

The Institute's argument depends on an understanding first, of the biological characteristics of salmon and steelhead resources and second, of the technical characteristics of the fisheries operating on those resources. This section discusses each of the two characteristics. The Institute has relied on the joint biological statement of the parties in *U.S. v. Washington*, hereinafter cited as "JX-2", and on well-recognized scientific materials which are cited as appropriate.

A. *The Salmon and Steelhead Resources*

Five species of Pacific salmon and one of steelhead trout are indigenous to the waters of the case area. The five species of salmon are *Oncorhynchus tshawytscha* (chinook), *Oncorhynchus kisutch* (coho), *Oncorhynchus gorbuscha* (pink), *Oncorhynchus keta* (chum), and *Oncorhynchus nerka* (sockeye). The one species of steelhead trout is *Salmo gairdnerii*, JX-2, p. 1.

Salmon and steelhead trout are anadromous fish, that is, they spend most of their lives in salt water but return to freshwater rivers and streams and to some lakes to spawn. When ready to spawn, the female excavates a nest or "redd" in appropriate graveled areas and lays her eggs which are then fertilized by an accompanying male. All Pacific salmon die after spawning, but steelhead trout may spawn several times, JX-2, pp. 1-8.

The eggs incubate in the gravel over the winter and hatch in late winter or spring, depending upon water temperature and other environmental factors. After hatching, the young fry commence a feeding and migration period that varies according to species. Chum and pink salmon fry descend directly to saltwater and commence their marine phase. Sockeye salmon, which are nearly always associated with lake systems, remain in fresh water for one or two years before migrating to sea. The young of coho and chinook salmon usually spend one year in freshwater streams, but certain forms of chinook salmon may go to sea earlier. Steelhead spend one or two years in fresh water before migrating to sea, JX-2, pp. 1-8, Tables 1-17.

Once at sea, case area salmon and steelhead distribute themselves widely, Appendix I, pp. A1-A6, *infra*.[2] The duration of the marine interval varies by species, ranging from two summers and one winter for pink salmon to as

2. Appendix I is based on French, Robert R., Bakkala, Richard G., and Sutherland, Doyle F., 1975. *Ocean Distribution of Stocks of Pacific Salmon, Oncorhynchus spp., and Steelhead Trout, Salmo gairdnerii, as shown by Tagging Experiments*, National Marine Fisheries Service Technical Report, SSRF-689. See also Fredin, Reynold A., Major, Richard L., Bakkala, Richard G., and Tanonaka, George K., 1977. *Pacific Salmon and the High Seas Salmon Fisheries of Japan*, National Marine Fisheries Service Processed Report, pp. 4-19.

much as five years for some stocks of chinook salmon, JX-2, pp. 1-8. At the end of the marine phase, salmon and steelhead begin a unique activity—their return to place of origin to spawn.

Salmon and steelhead trout bound for western Washington waters spawn in a great number of streams and lakes. The salmon spawning areas are shown in Appendix II, pp. A7-A11, *infra*.[3] Each species in each stream system comprises a spawning unit, and the fish born in that stream and returning to it are genetically distinct from all other fish, including those of the same species bound for other streams. Biologists describe each spawning unit as a stock. Each stock among each of the species has its own particular schedule of migration, passing from ocean to stream on a rigid schedule which varies but little over the years.[4] Once destroyed, any given stock is as extinct and irreplaceable as the passenger pigeon.

In addition to being characterized by genetically unique stocks, salmon and steelhead are also marked by the phenomenon of the cycle. The fish in any particular run are with minor exceptions of the same age. Younger fish of the same species scheduled to return to the same spawning area in a later year generally will not be mixed with older fish, but will remain in the ocean until they are ready to commence their spawning migration. Thus, the spawning fish of any year are, for the most part, distinct from the

3. Atkinson, C.E., Rose, J.H., and Duncan, T.O., 1967. *Salmon of the North Pacific Ocean—Part IV. Spawning Populations of North Pacific Salmon. Pacific Salmon in the United States.* International North Pacific Fisheries Commission Bulletin No. 23, Figures 10-14, pp. 85-89.

4. Royce, William F., 1965. *Almanac of Bristol Bay Sockeye Salmon.* Fisheries Research Institute, College of Fisheries, University of Washington. Circular No. 235, p. 1, Figures 1-5, pp. 41-45.

spawning fish of the next year. Each year's spawners begin a cycle which is repeated periodically. The length of the period is equal to the length of the history, *i.e.*, from two to five years depending on species.

The management implication of the cycle is that the abundance of fish returning during peak years does not help to increase the runs in scarce years. Unlike many fisheries, overharvesting in one year cannot be remedied by protective measures in the next. When a cycle is reduced in size to non-productive levels, it may take many years for the stocks to recover to productive levels.[5]

One dramatic example of this phenomenon is the cycle of sockeye salmon runs on the Fraser River in Canada. Every fourth year the size of the run is large, sometimes exceeding the combined runs of the three previous years. The three low years cannot be improved by restrictions in the higher fourth year. A second example of the cycle is that Puget Sound pink salmon return in quantity only during odd numbered years; no viable runs occur in the even numbered years.

The migratory paths of salmon and steelhead follow similar routes year after year, and the fish know no national, state, or local boundaries. Thus, the great Fraser River runs of British Columbia pass through Canadian waters, thence to U.S. waters, and finally back to Canadian waters as they head for the mouth of the Fraser River, pressed forward by the spawning urge. Similarly, salmon destined for spawning grounds in Washington may pass from the open ocean through Alaskan, Californian, Oregonian, and

5. Thompson, William F., 1945. *Effect of the Obstruction at Hell's Gate on the Sockeye Salmon of the Fraser River.* International Pacific Salmon Fisheries Commission, Bulletin 1, pp. 11-12.

then Canadian waters before entering Washington streams, JX-2, pp. 28-37, Figures 13-17.

Each year's spawning migrations are marked by intermixing of stocks. Stocks migrate to shore from widely divergent areas of the Pacific Ocean. Within the near-shore and inshore marine areas, stocks bound for different spawning grounds congregate and intermingle before finally separating and migrating to their respective destinations. As a particular stock progresses through inshore waters toward its river of origin, it becomes identifiable only after separation from other groups of fish.

A run of fish moves through any particular geographical location rapidly, and the bulk of the run may pass along a portion of its route in a matter of a few days, JX-2, pp. 37-39, Figures 20-24.

A final, critical characteristic of the salmon and steelhead resources is that reproductive success depends on the number of adults which reach the spawning grounds, JX-2, pp. 72-73. There is a great deal of evidence indicating a more direct relationship between the numbers of spawners and the resultant progeny in salmon and steelhead than in almost any other species of fish. For each stream there is an optimum number of spawning adults. If more or less than the optimum number spawn, the number of resultant progeny will decline.[6] The fisheries manager seeks to ensure that the optimum number of each stock of fish escape capture by fishermen and are able to spawn each and every year. There is little margin for error.

6. Ricker, W.E., 1954. "Stock and Recruitment" in *Journal Fisheries Research Board of Canada*, Volume II, No. 5, pp. 559-621.

B. *The Fishermen*

There are seven types of fishermen operating on the salmon and steelhead stocks passing through the waters of the case area using seven distinct types of fishing techniques and gear. These are: 1. ocean trollers, 2. gillnetters, 3. purse seiners, 4. reef netters, 5. set netters, 6. dip net and gaff fishermen, and 7. recreational fishermen. The seven fisheries are geographically dispersed. They operate at various times, sometimes simultaneously, sometimes in sequence.[7]

The ocean trolling fleet is highly mobile, extending from mid-California to the Gulf of Alaska, quickly moving to areas where the fishing is best. Trolling involves dragging a number of baits or lures at selected depths behind a moving boat usually manned by one or two persons. Chinook, coho, and lesser numbers of the other species of salmon are susceptible to capture by troll gear. Thirty-three hundred vessels are licensed for trolling in Washington waters. This figure includes approximately 50 tribal fishermen.[8]

Gillnet, purse seine, and reef net fisheries operate in inside waters in the case area, in the Strait of Juan de Fuca, Puget Sound, and Grays Harbor. Gillnets are made of nylon mesh, varying from 4 to 9 inches stretched measure, and are suspended from floats at the surface. Each net forms a vertical wall of netting. The size of the gillnet mesh determines the size range and species of salmon that will be caught. The migrating fish collide with the net

7. *The Pacific Salmon, a Unique Problem in Resource Management,* 1974. Northwest Fisheries Center, National Marine Fisheries Service, pp. 15-19.

8. Merkel, John C., Alverson, Dayton L., Hough, John D., 1978. *Settlement Plan for Washington State Salmon and Steelhead Fisheries,* pp. 274 and 284.

and are tangled in the fine meshes. All five species of salmon are taken by gillnet gear. Approximately two thousand gillnetters are licensed to operate in U.S. waters in Puget Sound and in the Strait of Juan de Fuca, including approximately 500 tribal fishermen. Approximately 300 gillnetters are licensed to fish in Grays Harbor.[9]

Purse seiners set their nets in a circle and "purse" by closing the bottom of the net and bringing it close to the side of the boat. The enclosure is reduced until the fish can be dipped out. All five species of salmon are taken. Approximately 400 purse seine vessels are licensed to fish in Puget Sound. This figure includes approximately 10 tribal vessels. No purse seining occurs in Grays Harbor. Purse seine vessels have a crew of four or five persons.[10]

Reef net fishermen operate in specific locations in northern Puget Sound. An artificial ramp or "reef" is created which leads a school of salmon into the surface layers of the water above a net which is stretched horizontally between two floats. When salmon, particularly sockeye and pink, are observed from a floating tower, the net is raised trapping the fish from below. Approximately 80 fishermen are licensed to operate reef net gear in Puget Sound. Reef netting requires one to four persons.[11]

Gillnets can be anchored or attached at one end to shore, and are then called "set nets." Set nets are operated primarily in fresh water locations in rivers and estuaries. There are approximately 550 treaty fishermen in the case area employing set nets. All five species of salmon as well as steel-

9. *Id.*, pp. 275-276, and 284.
10. *Id.*, pp. 277 and 284.
11. *Id.*, p. 278.

head are taken by set nets. Non-Indians do not operate set gillnets.[12]

Dip net and gaff fishing occurs exclusively in the rivers, usually upstream of all commercial and recreational fishing activities. Non-Indians do not use dip net and gaff gear. The numbers are not known to the Institute with specificity, but a majority of dip netters and gaff fishermen are fishing for salmon and steelhead for personal consumption or ceremonial use only, JX-2, pp. 112-114.

Angling for coho and chinook salmon and for steelhead is the seventh fishery and is one of the major recreational attractions in the western portion of Washington for a large number of the residents and also for thousands of tourists visiting the state during the summer. Angling for salmon in the ocean is conducted from a fleet of over 400 charter boats on which each angler buys a ticket and from thousands of small, privately-owned boats, usually trailered to the launching site and powered by outboard motor. The recreational fishery has increased significantly in participation (angler-days) and value since the 1950's, especially the recreational salmon fishery on the coast and in the Strait of Juan de Fuca. In 1976, there were over 625,000 resident and non-resident anglers who spent 2 million angler-days fishing for salmon in Washington waters. Sixty percent of the total recreational salmon catches in Washington were made in the coastal fishery, while the remaining 40% were caught in the Puget Sound area.

Steelhead add another dimension to the recreational fishery. The number of recreational fishing days by sportsmen angling for steelhead in the streams and rivers of the state

12. *Id.*, p. 284.

has averaged between 100,000 and 150,000 for the past 10 years. During the 1977-78 season this rose to 310,000. The steelhead recreational fishery is not as large, in terms of numbers of anglers, angler-days, or size of the catches, as the salmon recreational fishery, but the esteem in which it is held by steelhead anglers makes this sport fishery important beyond its numbers.

The total fishing capability of all the fishermen in the case area is sufficient, absent regulation, to decimate the resource, RCW 75.28.500. The stocks have survived to the extent they have due to the management activities of the various governing bodies which are discussed in the next section.[13]

III. Fisheries Management

The Institute has set forth the most important characteristics of the resource and the fishermen who harvest it. In this section the Institute provides the Court first, with a definition and a description of salmon and steelhead fisheries management and second, with a picture of the manner in which jurisdiction to manage the case area's salmon and steelhead fisheries is presently divided among the managing institutions.

A. *Salmon and Steelhead Fisheries Management*

The activity of managing salmon and steelhead fisheries is the sum of the regulatory measures taken by management agencies to achieve the goals which the fisheries man-

13. Although case area fish are taken throughout their migratory range, the majority of the fish are taken after they have returned to the case area. See Mundt, J. Carl, 1977. *Catch, Licensing, Gear Reduction, and Allowable Fishing Time History for Washington Salmon Fisheries 1965-1977*, Report to the Regional Task Force of the Presidential Task Force on Northwest Fisheries Problems, pp. 1-5, Exhibits 1-12.

agers are directed to fulfill. These goals are as follows: first and foremost, the conservation of the stocks; second, maximization of the yield from the resource consistent with conservation taking into account economic, social, and ecological objectives; and third, allocation of the yield among competing fisheries.[14]

These goals are achieved, in general, by regulation and control of the fishermen rather than the fish. The regulatory measures employed are restrictions on the size of fish taken, when and where fishing may occur, for how long, and with what number and types of fishing gear. These measures have an indirect effect on the fish themselves by decreasing the possible catch.[15]

The Institute believes that it is essential to understand the mechanics by which the fisheries managers seek to accomplish the goals of conservation, maximization of yield, and allocation. For salmon and steelhead fisheries, those mechanics begin with the collection of biological and statistical information. By obtaining and analyzing historical information on the past performances of the various runs,

14. Gulland, John A., 1977. *Goals and Objectives of Fishery Management*. Food and Agriculture Organization of the United Nations Fisheries Technical Paper No. 166, pp. 6-7. See also Alverson, Dayton L. and Paulik, G.J., 1973. "Objectives and Problems of Managing Aquatic Living Resources." *Journal Fisheries Research Board of Canada*, Vol. 30, No. 12, p. 1937 and McKernan, Donald L., 1972. "World Fisheries–World Concern" in *World Fisheries Policy–Multidisciplinary Views*. Brian J. Rothschild, editor. University of Washington Press, p. 49.

15. To some extent fisheries management agencies manage fish directly through hatchery programs designed to enhance the resource. In addition, fisheries managers with authority beyond regulation of fishermen may have some impact on the use of fresh and estuarine water resources which are the medium in which the fish play out a critical part of their life cycles, see e.g., RCW 75.20.050 *et seq*. The Institute has not discussed these broader forms of authority because its point is adequately made by reference to the more traditional view of fisheries management authority.

the managers can estimate the correlation between the numbers of any given stock permitted to pass through the various commercial and recreational fisheries to spawn on the one hand and the numbers of their progeny which will return at the end of the cycle on the other. As already stated, this relationship between spawners of one generation and adults of the next is more direct for salmon and steelhead than for most other fishes. Managers can then estimate the current escapement necessary to maximize the stock in the future. They can also estimate the minimum escapement necessary to ensure perpetuation of the stock.[16]

With information concerning escapement requirements in hand, the managers typically next turn their attention to making estimates of the size of the incoming adult runs. These estimates too are based on the history of the cycles involved; the escapement of adults during the preceding cycle; the environmental conditions in fresh and salt water during the past cycle; and other data bearing upon the survival of the salmon and steelhead during their life histories. Using these estimates, regulations for the fisheries during the upcoming season are developed and promulgated after public hearings. These regulations become the basis for management of the fishery. The regulations are, however, subject to substantial revision as the runs progress. The revisions are necessary as additional information becomes available during the course of the season concerning run size and changes in numbers of

16. Alverson, Dayton L., 1975. "Management of the Ocean's Living Resources: An Essay Review", in *Ocean Development and International Law Journal*, Vol. 3, No. 2, pp. 105-106.

fishermen and fishing success in order to adjust fishing activity and ensure adequate escapement.[17]

As this biological and statistical information flows in, the fisheries managers use the information to amend their regulations in order to better attain management goals. Because of the migratory habits of the fish, the characteristics of the fishery, and the increasing accuracy of statistical information as any given run progresses, time is critical. *The degree of success achieved by the managers in reaching escapement and other goals is very often a function of obtaining the very latest information, analyzing it, making decisions on regulations, and communicating the contents of these regulations to the fishermen, all in the shortest possible time period during the fishing season.* The sequence of these events sometimes must be accomplished in 12-24 hours.[18]

A factor that complicates this entire process is the intermixing of stocks. A given level of fishing effort may result in an appropriate harvest of one stock but cause over- or under-fishing for a second stock mixed with the first. Difficult management decisions are required in these circumstances.

Finally, the fisheries management agency must enforce its regulations. While this is an important task in the management of any fishery, it is particularly critical in a fishery

17. Existing methods for directly measuring the abundance of a group of fish are prohibitively expensive. Instead, as the runs progress, estimates are made based on the number of fish caught per unit of fishing effort per time interval. The statistical validity of this information improves dramatically as the stocks approach the mouth of their natal rivers and become more concentrated.

18. Carlton, Frank E., 1975. *Optimum Sustained Yield as a Management Concept in Recreational Fisheries.* Special Publication No. 9, American Fisheries Society.

for anadromous species such as steelhead and salmon because illegal fishing can quickly upset the delicate balance between catch levels and escapement goals. The absence of an effective enforcement system renders any salmon and steelhead management plan unworkable. Surveillance, monitoring, and appropriate sanctions are essential ingredients of an effective enforcement system.[19]

The management of salmon and steelhead resources is a complex task. The short-term economic interest of the fishermen lies in maximizing their catch. The managers must be concerned with a large number of unique stocks. Information about the size of each of these stocks is always imperfect, but increasingly accurate as the migrating fish congregate and move closer to their spawning grounds. Simultaneously, the fishermen are massing to concentrate on capturing the incoming fish. Based on the best information available, the managers must decide when, where, and how to allow the various fisheries to operate in order to obtain an optimum escapement, provide a target yield to the fisheries, and properly allocate the catch. These decisions must be rapidly and clearly communicated to the fishermen and there must be adequate enforcement. It is not a simple task.

B. *Existing Management Institutions*

This section sets out the authority of the institutions which presently exercise fisheries management power in the Pacific Northwest. Every entity which exercises control over salmon and steelhead fishermen fishing for stocks of salmon and steelhead which may be found at any stage of their life history within the case area is discussed.

19. Alverson and Paulik, *supra* note 14, at 1944.

1. State Agencies

The federal government through the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, has confirmed in the states of the United States power to manage and administer the natural resources, including fisheries resources, which are found within the boundaries of the respective states, 43 U.S.C. § 1311(a)(2). The boundaries of the Pacific coast states through which case area salmon and steelhead migrate—California, Oregon, Washington, and Alaska—extend from the coastline seaward for a distance of three geographical miles, 43 U.S.C. § 1301(b).

The courts have recognized that in the absence of conflicting Congressional legislation under the commerce clause of the U.S. Constitution, the police power of the states extends to the regulation of fisheries within the geographical area covered by the Submerged Lands Act, *Corsa v. Tawes*, 149 F. Supp. 771 (D. Maryland 1957), affirmed *per curiam*, 355 U.S. 37 (1957).

a. *Washington*

(i) Washington Department of Fisheries

The Washington Department of Fisheries, hereinafter referred to as "WDF", has traditionally exercised Washington's police power to manage salmon fisheries. Washington's salmon management authority in the waters of the state is found in RCW 75.08.012, which reads in part:

> "It shall be the duty and purpose of the department of fisheries to preserve, protect, perpetuate and manage the food fish and shellfish in the waters of the state . . . to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof."

State law also provides for a Director of WDF who is authorized and instructed in RCW 75.08.080 to exercise the state's police power to regulate salmon fisheries.

The Washington Supreme Court recently construed RCW 75.08.012 and .080, holding that the salmon fisheries management authority of WDF and its Director does not include the ability to regulate salmon fisheries for the purpose of allocating the catch among fishermen. In the case *Puget Sound Gillnetters v. Moos*, 88 Wn. 2d 677, 565 P. 2d 1151 (1977), the court decided at p. 682 that WDF and its Director have the authority to regulate the harvest of salmon for the purpose of conserving the resource but not for the purpose of allocating a share of the catch between competing claimants for those fish.

(ii) Washington Department of Game

The Washington Department of Game, hereinafter referred to as "WDG", is the state agency that exercises the state's police power to regulate steelhead fisheries. WDG is composed of a six-member Game Commission and a Director, RCW 77.-04.020. State policy is to preserve, protect, and perpetuate steelhead so that public recreational opportunities will be maximized but the supply will not be impaired, RCW 77.12.010. RCW 77.12.040 instructs the Game Commission to promulgate rules relating to the taking of steelhead.

b. *Oregon*

The Oregon state Fish and Wildlife Commission exercises Oregon's police power with respect to fisheries in Oregon state waters. The Commission, which is part of the state Department of Fish and Wildlife, ORS 496.080, has the authority to "formulate and implement the policies and programs [of Oregon] for the management of wildlife", ORS 496.138. In addition, the Commission has been delegated the following specific authority in ORS 506.036(2):

> "The duty of protection, preservation, propagation, cultivation, development and promotion of all fishes under its jurisdiction within the waters of [Oregon] is delegated to and imposed upon the [C]ommission."

c. *California*

In California a Fish and Game Commission is created by Section 20 of Article 4 of the state Constitution. The Commission's power to regulate the taking of fish is found in California Fish and Game Code sections 200 and 7701. In addition, California Fish and Game Code section 700 provides for a Department of Fish and Game administered through a Director. Under California Fish and Game Code section 702 the Department administers and enforces the provisions of the Fish and Game Code.

d. *Alaska*

The Department of Fish and Game exercises Alaska's police power through a Commissioner, its principal executive officer. The relevant functions of the Commissioner are found in AS 16.05.020(2), which reads in part:

"The commissioner shall . . . manage, protect, maintain, improve, and extend the fish, game and aquatic plant resources of the state in the interest of the economy and general well-being of the state."

2. The Treaty Tribes

The fisheries management authority of the Indian tribes located in the case area can be analyzed in two respects: on-reservation authority and off-reservation authority.

a. *On-reservation*

Surprisingly little has been decided by the courts with regard to tribal on-reservation fisheries management authority. It is apparently settled that the tribes have on-reservation authority over tribal fishing, see *Indian Hunting and Fishing Rights II*, Charles A. Hobbs, 37 George Washington Law Review 1251 (1969) at p. 1264. A second question is whether the tribal authority is exclusive or is to some extent concurrent.

The parties in *U.S. v. Washington* felt that tribal on-reservation management authority was exclusive

and that on-reservation tribal fishing was not subject to the state's normal police power, 384 F. Supp. at p. 341. However, Mr. Justice Brennan dissenting in *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), hereinafter cited as *"Puyallup III"*, felt that the relationship between state and tribe was not as clear as it had seemed to the parties in *U.S. v. Washington*. He said at p. 182:

"Nor has this Court ever decided whether a State has the power to regulate on-reservation fishing in the interest of conservation."

In contrast, Mr. Justice Stevens, writing for the majority in *Puyallup III* felt that tribal on-reservation authority was not exclusive. He said at pp. 176-177:

"[I]f Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights, they could interdict completely the migrating fish run and 'pursue the last living [Puyallup River] steelhead until it enters their nets.' . . . In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the rights of the non-Indian citizens of Washington recognized in the treaty of Medicine Creek. In practical effect, therefore, the [Puyallup tribe] is reasserting the right to exclusive control of the steelhead run that was unequivocally rejected in both *Puyallup I* and *Puyallup II*."

Based on the majority opinion in *Puyallup III*, the Institute's analysis is that tribal on-reservation management power is not exclusive. The state also has power, albeit unexercised, to manage on-reservation fisheries, at least for the conservation purpose referred to by Justice Stevens. To that extent, jurisdiction is concurrent.

b. *Off-reservation*

Tribal jurisdiction over off-reservation fishing has been a frequent topic of judicial consideration. The tribes have authority over their own members exercising treaty fishing rights at usual and accustomed off-reservation grounds, 520 F.2d at p. 686. See

also *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974). The remaining question revolves about state jurisdiction over tribal fishermen fishing off-reservation. The precise question is the overlap between state and tribal authority over those fishermen.

The first case in which the Supreme Court considered the question with regard to one of the six treaties which are now before the Court was *United States v. Winans*, 198 U.S. 371 (1905). That case involved the Indians' right to fish at off-reservation grounds rather than the tribes' or the state's power to manage those off-reservation fisheries. The Court did intimate, however, that the treaty right to fish off-reservation was subject to state regulation when it said at p. 384:

> "Nor does it [the right to fish at off-reservation locations] restrain the state unreasonably, if at all, in the regulation of the right."

The first case in which the Supreme Court dealt specifically with the off-reservation jurisdictional relationship between state and tribes was *Tulee v. Washington*, 315 U.S. 681 (1942). In that case a tribal fisherman argued that his treaty right to fish in off-reservation areas was free from state regulation of any kind. The state relied on its broad powers to conserve fish within its borders and asserted the authority to regulate off-reservation treaty fishing in the same fashion as it could regulate any other type of fishing at the off-reservation locations. Mr. Justice Black, speaking for the Court, said at p. 684:

> "We think the state's construction of the treaty is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

The Court went on to indicate at p. 685 that:

> "[I]t is clear that [the state's] regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program."

The suggestion was that treaty fishermen fishing off-reservation are simultaneously subject to two management authorities, that of their tribe for all purposes and that of the state for indispensable conservation measures.

The next case in which the Supreme Court considered state/tribal off-reservation fisheries management was *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), hereinafter cited as *"Puyallup I"*. The Court based its thinking on the state's police power and said at p. 398:

> "[T]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

In *Antoine v. Washington*, 420 U.S. 194 (1975), hereinafter cited as *"Antoine"*, the Court dealt with a treaty which is not at issue in these proceedings but clarified its "appropriate standards" language in *Puyallup I*. The Court said at p. 207 that the phrase meant that the state must demonstrate that its regulation is a reasonable and necessary conservation measure, *and* that its application to the Indians is necessary in the interest of conservation.

In *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1973), hereinafter cited as *"Puyallup II"*, the Supreme Court considered the meaning of "discrimination" with respect to state management of off-reservation Indian fishing and also elaborated on the conservation objective. With regard to the first question, the Court said at p. 48 that the state was not free to achieve conservation by restricting Indians alone. Rather, the state was obliged to strike a balance between regulation of Indian and non-

Indian fishermen such that conservation was achieved.

With respect to conservation, the Court said at p. 49:

> "Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."

Although the Supreme Court has discussed the relationship between state and tribal off-reservation fisheries management authority in the cases referred to above, the trial judge's opinion in *U.S. v. Washington* remains the most comprehensive discussion of the subject. The judge decided that (i) the treaty tribes have full power to manage the treaty fishery in the off-reservation usual and accustomed grounds, 384 F. Supp. at p. 403; (ii) tribal power is not exclusive, but is concurrent with that of the state, 384 F. Supp. at p. 342; and (iii) the state's concurrent power is a power to regulate the *exercise* of off-reservation treaty fishing rights for the purpose of conservation, 384 F. Supp. at p. 403. Prior to exercising its limited concurrent authority, the state must show to the satisfaction of the Indian tribe concerned or to the federal district court that the state regulation is reasonable and necessary to prevent demonstrable harm to the actual conservation of fish, 384 F. Supp. at p. 342.

The term "conservation" is limited to those measures which are reasonable and necessary for the perpetuation of a particular run or species of fish, 384 F. Supp. at p. 342. The state may regulate off-reservation Indian treaty fishing only if alternative means for achieving conservation, such as regulating non-Indians, are insufficient, 384 F. Supp. at p. 342.

The Court of Appeals approved the trial judge's discussion of off-reservation management jurisdiction, reasoning that the federal government, in executing the treaties with the tribes in the first instance had preempted the normal exclusive authority which states have to regulate fisheries, and had converted it into a concurrent authority, 520 F.2d at p. 684. The state's concurrent power is limited to measures designed to prevent the destruction of a run of a particular species in a particular stream, 520 F.2d at p. 685. The Court of Appeals cited *Antoine*, saying at 520 F.2d 686:

> "Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction."

In addition to defining the governing relationship between state and tribes which had been set out by the Supreme Court in the cases cited above, the trial judge in *U.S. v. Washington* went beyond what was the settled law and said at 384 F. Supp. 340:

> "[T]his court hereby finds and holds that any one of plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof."

The *exclusive* off-reservation tribal authority which was created by the judge was available to tribes which demonstrated the existence of six qualifications. These qualifications included the quality of the tribe's leadership and government, the existence of Indian enforcement personnel, the availability of fisheries experts, an approved tribal membership role, and a provision for a certification of tribal membership, 384 F. Supp. at pp. 340-341.

In addition, the trial judge ruled that any tribe which became fully and exclusively self-regulating was required to comply with three on-going conditions. These three conditions were that the tribe first, establish full and complete tribal fishing regula-

tions, which prior to adoption had been discussed with either WDF or WDG, and which included any state regulation which had been established to the satisfaction of the tribe or the court to be reasonable and necessary for conservation; second, permit monitoring of off-reservation Indian fisheries by WDG and WDF to the extent reasonable and necessary for conservation; and third, provide certain fish catch reports when requested by WDG or WDF, 384 F. Supp. at p. 341.

In reaching his decision with regard to exclusive self-regulating status, the judge relied on the Congressional policy of encouragement for the exercise of tribal autonomy and self-government, citing the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, 384 F. Supp. at page 340. The judge relied on his equitable power to implement Congressional policy and indicated he would enjoin the state's concurrent power over off-reservation treaty fishing with respect to self-regulating tribes, 384 F. Supp. at p. 414. To date two tribes have achieved self-regulatory status, the Yakimas and the Quinaults, 384 F. Supp. at p. 342.

The Court of Appeals affirmed the trial court's discussion of the self-regulating tribes. It made clear that the state's concurrent power had not been displaced, but merely enjoined, 520 F.2d at p. 686. The appellate court did express concern over the novel relationship which the trial judge had set up between the self-regulating tribes and the state. In the event that tribal self-regulation did not prove practicable, the Court of Appeals felt certain that the trial court would revise its judgment, 520 F.2d at pp. 686-687.

3. The Federal District Court

The federal district court retained continuing jurisdiction over the litigation in *U.S. v. Washington*, 384 F. Supp. at p. 408. The court has issued a series of orders which have affected the ongoing jurisdiction of both the state and the

tribes, and which have increasingly made the court responsible for fisheries management in the case area. The court is unquestionably now serving as a fishery management institution.

The court began its involvement by serving as a depository for the management regulations filed with respect to off-reservation treaty fishing by both the state and the tribes. The state was required to establish either to the satisfaction of all affected tribes or to the court that conservation was involved prior to utilizing its concurrent authority and promulgating its off-reservation regulations for members of all tribes other than the Quinaults and the Yakimas, 384 F. Supp. at p. 342. The tribes, on the other hand, were also required to file their off-reservation regulations with the court prior to the effectiveness of those regulations, 384 F. Supp. at p. 420.

In October of 1974 the court issued an order giving the state the authority to regulate off-reservation treaty fishing for more than the conservation purposes which the court had identified in its original decision. The court said that WDF and WDG could restrict tribal fishing to insure that the tribes did not exceed the catch share provided by the federal court, (R. ....).

In October of 1975 the trial judge established the Fisheries Advisory Board as an arm of the court. The Board was composed of one member selected by the state, one member selected by the plaintiff Indian tribes, and one non-voting member appointed by the court, (R. ....). The purpose of the Board was to promote the increased communication and cooperation which the court had requested in its original decision, 384 F. Supp. at p. 418. The Board had the power to consider any matter regarding the fish re-

source that was submitted to it by the court or by the parties.

In December of 1976 the court modified its order relating to the Fisheries Advisory Board. It left the composition of the Board intact, but gave the Board a more precise role in the promulgation and enforcement of the state's conservation regulations. The court ordered that state regulation of off-reservation fishing would only be valid if the proposed regulations were first submitted to the Board 48 hours prior to the effective date of the regulation. If any party so desired, the Board would convene 24 hours or more prior to the effective date of the regulation. Any party to the proceeding could immediately request a court review if dissatisfied with the Board's recommendation, (R. ....).

In August of 1977 the court issued another important ruling which affected management jurisdiction. The court itself made the allocations which were to prevail between treaty and non-treaty fishermen, (R. ....). In its 1974 decision the court had made a determination concerning the treaty language but had not initiated an actual allocation of the catch. The state still retained the ability to manage non-Indians in general and Indians for conservation purposes at off-reservation locations.

In June of 1978 the court issued a ruling which further involved the court in the management process. At that time the court took active control of the non-Indian fishery for allocation purposes, (R.....). The state retained exclusive jurisdiction over non-Indians for conservation purposes and concurrent jurisdiction for conservation purposes over off-reservation treaty fishing.

4. Regional Fishery Management Councils

The Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801, *et seq.*, hereinafter cited as "FCMA", created the Pacific and North Pacific Fishery Management Councils. The Councils are state/federal institutions responsible for developing fishery management plans for fisheries off the coasts of Washington, Oregon, and California (Pacific Council) and Alaska (North Pacific Council), 16 U.S.C. § 1852. The Councils' authority over salmon and steelhead fisheries begins 3 miles from the coast of the respective states, 16 U.S.C. § 1852, and extends throughout the range of the fish except when found within the fishery conservation zone or territorial sea of another nation, 16 U.S.C. § 1812.

The Secretary of Commerce adopts final regulations implementing the Councils' fishery management plans, 16 U.S.C. § 1855. The regulations are enforced by the National Marine Fisheries Service, and the Coast Guard, 16 U.S.C. § 1861. The Secretary has additional authority by virtue of 16 U.S.C. § 1856(b)(A) and (B) to preempt the states' management authority within three miles of the respective coasts in fisheries which are engaged in predominately beyond three miles. Preemption may occur after the Secretary has found that a state's action or inaction in managing fishery resources within three miles conflicts with the way in which those resources are managed by a Council beyond three miles. After the Secretary has preempted state jurisdiction, the FCMA contemplates that the appropriate Council will then assume jurisdiction, at least until the state's action or inaction no longer conflicts with the Council's management plan, 16 U.S.C. § 1856.

Secretarial preemption does not, however, extend to

state jurisdiction for the management of fisheries resources within the internal waters of the states, 16 U.S.C. § 1856 (b)(B). In Washington, Grays Harbor, the Strait of Juan de Fuca, and Puget Sound are internal waters.

5. International Pacific Salmon Fisheries Commission

The International Pacific Salmon Fisheries Commission, hereinafter referred to as "IPSFC", is an international agency which was established by Convention between the United States and Canada to manage the sockeye salmon fisheries for the stocks of the Fraser River in British Columbia. The Convention was signed on May 26, 1930, and entered into force on July 28, 1937, 50 Statutes at Large 1355, Treaty Series No. 918. A Protocol amending the Convention was signed on December 28, 1956 and entered into force on July 3, 1957, 8 UST 1057, TIAS 3867. The Protocol extended the Commission's authority to include pink salmon as well as sockeye salmon. In 1947 the United States enacted what was to become known as the Sockeye or Pink Salmon Fishing Act and which now appears as 16 U.S.C. §§ 776-776f. The Act, as amended, makes it unlawful for any person to engage in fishing for sockeye salmon or pink salmon in Convention waters in violation of the Convention, the Act, or any regulation of the Commission, 16 U.S.C. § 776a.

Pursuant to the terms of the Convention, the IPSFC has extensive power to manage sockeye and pink salmon fisheries for stocks bound for Canada's Fraser River. Specifically, the Convention authorizes the IPSFC to limit or prohibit the taking of sockeye and pink salmon in Convention waters by vessels of any nation, or on the high seas by vessels of the U.S. or Canada. Convention waters are located within the state of Washington in northern Puget Sound, as well as within the province of British Columbia, and are shown in Appendix III, *infra*.

The Convention contemplates the development of harvest regulations by the Commission and directs that fishermen of Canada and the U.S. each take 50% of the harvestable portion of the resource. The proposed harvest regulations are, in turn, approved by the two governments. Until 1976 the regulations pertaining to U.S. fishermen were then adopted and enforced by WDF pursuant to the authority contained in RCW 75.40.060.

In 1976 the Commission's proposed regulations contained the following language:

> "Insofar as the foregoing regulations prescribe the type of gear to be used during times open to fishing for sockeye and pink salmon, such regulations shall be implemented to the extent permissible under the laws of the Parties."

After U.S. approval, WDF adopted the proposed regulations.

The National Marine Fisheries Service interpreted the quoted language to mean that tribal members were entitled to fish in 1976 on IPSFC stocks at any time open for fishing by any type of U.S. gear, Federal Register, Vol. 41 No. 108, pp. 22392-22393, June 3, 1976. Enforcement of the IPSFC regulations in 1976 was provided jointly by federal and state enforcement officers.

In 1977 the United States approved the proposed IPSFC regulations except as they applied to treaty tribes. The National Marine Fisheries Service utilized its authority under the Sockeye Salmon or Pink Salmon Fishing Act and adopted the IPSFC regulations relating to non-treaty fisher-

men, Federal Register, Vol. 42, No. 117, pp. 30841-30842, June 17, 1977. The Bureau of Indian Affairs utilized its authority in 25 U.S.C. § 2 and § 9 and adopted federal regulations governing IPSFC fishing by treaty fishermen, Federal Register, Vol. 42, No. 119, pp. 31450-31453, June 21, 1977. All regulations were enforced by the federal government. The same procedure was followed in 1978, Federal Register, Vol. 43, No. 121, pp. 26737-26739, June 22, 1978 and No. 122, pp. 27187-27189, June 23, 1978.

The involvement of WDF in the IPSFC fishery has declined dramatically since 1976. WDF did not adopt the IPSFC's regulations in 1977 or in 1978. In both those years the implementation of the Commission's regulations has been essentially a federal activity. The Washington Supreme Court rendered a decision in *Purse Seine v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977), which further restricted WDF. The state court held that the grant of authority in RCW 75.40.060 for WDF to adopt the Commission's regulations did not give WDF the power to expand, diminish, or alter those regulations in any respect. Rather, the authority empowers WDF to incorporate in its regulations every provision of the IPSFC regulations and to do no more than that, 88 Wn.2d at p. 808.

6. Federal Agencies

Various agencies of the federal government now take an active role in fisheries management in the Pacific Northwest. The regulations of the Secretary of Commerce implement the fishery management plans of the Councils beyond three miles. The Pacific Council has such a plan in effect for the offshore salmon fishery.[20] The National

20. *Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California Commencing in 1978*, March, 1978.

Marine Fisheries Service and the Bureau of Indian Affairs adopt regulations for the IPSFC fishery for the non-Indians and Indians respectively. Enforcement of all federal regulations as well as of the orders of the federal district court in *U.S. v. Washington* is provided by the National Marine Fisheries Service and the Coast Guard.

7. Canada

Canadian fishery management authority is exercised by the Fisheries and Marine Services division of the Department of the Environment under the provisions of the Fisheries Act of Canada, Chapter F-14, Revised Statutes of Canada (1970). Canada claims a counterpart to the U.S. 200-mile fishing conservation zone. The U.S. disclaims authority over salmon and steelhead while in the Canadian zone, 16 U.S.C. § 1812.

IV. Scientific Argument

The current management system stands in the way of effective fisheries management. In view of the proliferation of regulators and regulations, the system is not capable in the long run of preserving the salmon and steelhead resources or accomplishing the more complicated objectives of maximization of the yield or allocation of the catch.

The jurisdictional defects in the present system are exacerbated by the special characteristics of the fish and the fishermen which the system is charged with managing. The fish are highly migratory, but uniquely vulnerable in that they congregate in areas where they may be easily and rapidly captured. The spawning cycle, the many distinct stocks to be protected, and the relationship in these species of numbers of spawners to numbers of progeny, all serve to increase the damage from over fishing and

complicate yield maximization and allocations among user groups. On the other side of the equation, the fishermen are numerous, far-flung, mobile, and efficient. A miscalculation or delay in developing and implementing a cohesive management plan can result in catches of fish that are far wide of the goals.

Salmon and steelhead fisheries present four special problems for resource managers. These problems relate first, to data collection and analysis, second, to regulation of fishermen for conservation, yield maximization, and catch allocation purposes, third, to the mixed stock character of the fishery, and fourth, to enforcement. Because of these problems, fragmented management authority over a common stock or stocks distributed among multiple jurisdictions, as currently exists, is an ineffective mechanism for managing fisheries.[21]

1. Data Collection and Analysis

Salmon and steelhead management depends on the collection and analysis of a wide variety of scientific data including data relating to catch and effort. The adjustments in regulations which occur while the fishery is in progress are based on these data. The catch and effort data must be rapidly collected from *all* fishermen and must be analyzed with equal dispatch to obtain accurate estimates of run size. The present system is characterized by the independent collection of catch and effort information by a variety of entities. If the data which are collected must be analyzed and transmitted among a mul-

21. Wenk, Edward Jr., 1972. *The Politics of the Ocean*, University of Washington Press, p. 304. See also Alverson and Paulik, *supra* note 14, at 1941-1942.

tiplicity of institutions, the critical decisions cannot be made in a timely fashion and interpretive and communicative mistakes will occur.

2. Regulation of Fishermen

Fishing regulations are designed to achieve conservation first, and yield maximization and allocation second. If different institutions manage different fishermen fishing on the same stocks, the achievement of these goals will be hindered. This will occur either because the institutions interpret the data differently, do not agree on the goals, or simply fail to successfully coordinate their efforts.

The key to successful management is prompt, coordinated regulation of all sources of fishing effort. If the regulations are not timely or if they do not result in control of fishing effort in the manner expected, the goals will not be achieved.

One of the specific goals of fishery management is allocation of the resource among user groups. This goal is especially unattainable under a fragmented system of management because different user groups fish in sequence and the earlier user groups fish on mixed stocks. In these circumstances the earlier fisheries must be restrained in a manner sufficient so as to permit an escapement of each stock sufficient to meet the allocation for subsequent fisheries as well as spawning requirements. This is nearly an impossible task unless the managers can make various "mid-course corrections" as the different user groups harvest the incoming resources. This in turn is fully possible only under a unified management system.

3. Mixed Stocks

Fisheries for salmon and steelhead occur while different stocks are mixed together. This factor presents fisheries managers with a unique problem. Because the different stocks do not tolerate the same harvesting rate, the mixed stock fisheries must be regulated in a coordinated fashion and in a manner which takes into account the fisheries which occur after the stocks have separated so that the overall harvest rate is consistent with management goals. The complex and coordinated decisions required to deal with this problem can best be accomplished by a unified management system which can exercise control over all the relevant fisheries. If the management of *all* fisheries, those that occur on stocks while mixed and those that occur when stocks have separated, is not consistent, over- and under-harvesting will occur to the subsequent detriment of the stocks.

4. Enforcement

Enforcement is critical to the success of a management regime, particularly one relating to anadromous species which are so vulnerable to over-fishing. When each agency, state, tribe, nation, court, regional group, or international body attempts to enforce its own regulations or orders against a discrete group of fishermen, serious problems arise. These result from the difficulties of distinguishing one fisherman from the next and of detecting and apprehending violations when they do occur. In addition, the multiplicity of jurisdictional boundaries complicates enforcement.

V. Summary of Legal Argument

1. *A Unified Management System is Necessary in Order to Best Effectuate Treaty Rights of Both Indians and Non-Indians.*

a. The treaty rights here under review are ones to "take fish." Diminution of the resource diminishes these rights. A unified management system offers the best chance that the resource will not be diminished.

b. The Court may find that, as a matter of law, treaty-right fishermen are entitled to an opportunity to take a certain percentage of the harvest. An inability to properly allocate this opportunity will necessarily deny one group or the other its treaty rights. A unified management system can best accomplish this allocation.

c. The Court's obligation is to determine treaty rights and to frame relief that will implement those rights. In order to fulfill the latter duty, the Court should take such steps as it can to see to the establishment of a unified management system.

2. *The Court Should Give Effect to Clearly Stated Congressional Policy with Regard to Fishery Resources and the Environment.*

a. The FCMA establishes a clear Congressional policy that salmon and steelhead should be conserved.

b. The Court should heed this Congressional policy in framing its decision in this case.

c. The FCMA also contains policy language favoring unified management systems.

3. *This Court Has Recognized a Judicial Duty to Conserve Renewable Fishery Resources.*

a. States have a common law duty to manage wild game and fish as a public trust for the benefit of the people.

b. This duty requires that the salmon and steelhead resources in the case area be managed so as to ensure their preservation.

c. This Court, in a number of cases, has implicitly recognized a judicial responsibility, in the nature of the public trust duty, to conserve renewable fishery resources.

d. These cases are clear precedent for the Court to take such steps as possible toward establishment of a unified management system in order to preserve the salmon and steelhead resources.

VI. Legal Argument

This section will discuss why, as a matter of law, this Court should seek the establishment of a unified management system.

1. A Unified Management System is Necessary in Order to Best Effectuate Treaty Rights of Both Indians and Non-Indians

The District Court and the Ninth Circuit have held that the treaties to be construed in this case represent a grant of rights from the Indians to the settlers and their descendants, and a reservation of rights not granted, 384 F. Supp. at p. 331, and 520 F.2d at p. 684, both quoting with approval *United States v. Winans, supra.*[22] In each case the right was, by the words of the treaties, one to "take fish". Whatever judicial gloss may be placed on these words, the Indians' and the non-Indians' rights to "take fish" can be exercised only so long as there are fish to take. If, as a result of mismanagement, the salmon resource is rendered extinct,

22. For purposes of the argument herein being made, it is irrelevant whether the non-Indians have a "right" to take fish or, as the District Court in this case found, only a a "privilege which may be granted, limited, or withdrawn by the state . . ." 384 F. Supp. at p. 332.

the net sum of the treaty rights of Indians and non-Indians would be extinguished. Analogously, diminution of the resource diminishes the net sum of treaty rights. The Institute has argued in previous sections that the structure of the management system is crucial to the conservation of the resource. A unified management system offers the best chance that the salmon or steelhead stocks will not be rendered extinct or greatly diminished due to management errors and thus the best chance that the treaty rights of both Indians and non-Indians can be implemented.

The Institute has also argued that the allocation of the harvestable yields of the salmon and steelhead among user groups can best be accomplished by a unified management system. It is possible that this Court will find that, as a matter of law, treaty right fishermen are entitled to an opportunity to take a certain specified percentage of the available harvest. In these circumstances, an inability of the management system to allocate this opportunity properly will necessarily deny one group or the other its fishing rights.

Viewed in this light, a unified management system is necessary in order to best effectuate the treaty rights of all persons fishing for salmon and steelhead in the case area. This Court's fundamental obligation in this litigation is to determine what those treaty rights are and to frame relief for the parties that will serve to implement those rights. In order to properly fulfill this duty, this Court should take such steps as it can to see to the establishment of a unified management system.

2. The Court Should Give Effect to Clearly Stated Congressional Policy With Regard to Fishery Resources and the Environment

The FCMA establishes a very strong and clear Congressional policy that anadromous species which spawn in U.S. waters should be conserved. Section 2 of the Act, 16 U.S.C. § 1801, provides in pertinent part as follows:

"(a) FINDINGS.—The Congress finds and declares the following:

> (1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and *the anadromous species* which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.
>
> ° ° °
>
> (5) Fishery resources are finite but renewable. If placed under *sound management* before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis." (Emphasis added.)

These words in the legislation embody the Congress's unmistakeable concern that the resources which are the subject of this litigation be "conserved and maintained". In addition, they indicate the Congress's belief that such conservation and maintenance is possible if the fishery resources are "placed under sound management."

Although the FCMA is perhaps the clearest expression of national policy with regard to salmon and steelhead conservation, the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, and the Endangered Species

Act of 1973, 16 U.S.C. § 1531 *et seq.*, also express clear Congressional policies in favor of resource conservation.

The Court, in resolving this dispute, is thus confronted with a Congressional policy that the salmon and steelhead resources are to be conserved. This Court may take judicial notice of federal statutes, *St. Louis, I.M. & S.R. Co. v. Starbird*, 243 U.S. 592 (1917); *Missouri, K & T.R. Co. v. Wulf*, 226 U.S. 570 (1913); *Spokane Falls & N.R. Co. v. Ziegler*, 167 U.S. 65 (1897), and in particular public policy as stated in federal statutes, *Helvering v. Sabine Transp. Co.*, 318 U.S. 306 (1943); *United States v. Darby*, 312 U.S. 100 (1941). Since the Court's ruling in this case will inevitably have a significant impact on resource conservation, the Court ought to heed the clear expressions of Congressional policy on this issue in framing its decision.

The FCMA also contains policy language which bears directly on the management issue. Section 301 of the Act, 16 U.S.C. § 1851, sets forth "national standards for fishery conservation and management." One of the national standards enunciated is the management of each stock of fish as a unit throughout its range. Section 301 provides in part as follows:

> "(a) IN GENERAL—Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following *national standards* for fishery conservation and management;
>
> ° ° °
>
> (3) To the extent practicable, an individual stock of fish shall be managed *as a unit throughout its range*, and interrelated stocks of fish shall be managed as a unit or in close coordination." (Emphasis added.)

A unified management system for the salmon and steelhead resources involved in this litigation would be consistent with and a substantial step towards fulfilling this declared national standard of managing the fish as a unit throughout their range.

3. This Court Has Recognized a Judicial Duty to Conserve Renewable Fishery Resources

In the landmark case of *Geer v. State of Connecticut,* 161 U.S. 519 (1896), this Court first clearly articulated the authority of the several states with regard to wild animals. The case concerned whether the state of Connecticut had the legal authority to regulate the interstate transportation of wild game killed within its borders. In deciding this question in favor of Connecticut, the Court found that wild game is a "common property" owned by the states which the states have the right to regulate "as a trust for the benefit of the people", 161 U.S. at p. 529.

The concept that wild animals and fish are "owned" by the states has been rejected by this Court in a series of cases in which states have attempted to rely on ownership to justify regulation of fish and wild game in a manner found to be inconsistent with the Constitution or federal legislation.[23] However, the concept that the state must exercise it regulatory authority as a public trust for the benefit of the people has never been seriously challenged. It is accepted law in the state of Washington, *State ex rel. Campbell v. Case,* 182 Wash. 334, 47 P.2d 24 (1935); *State ex rel. Bacich v. Huse,* 187 Wash. 75, 59 P.2d 1101 (1936).

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23. *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948); *Douglas v. Seacoast Products, Inc.,* 97 S.Ct. 1740 (1977).

The public trust doctrine received support in a recent District Court case, *State of Maryland, Dept. of N. Res. v. Amerada Hess Corp.,* 350 F. Supp. 1060 (D. Maryland 1972). This case concerned whether the state of Maryland could maintain a common-law action against a defendant tanker corporation and others for damages for pollution of state waters and consequent injury to natural resources. In finding that the state had standing to bring this suit, the court at p. 1067 quoted with approval from Justice Frankfurter's concurring opinion in *Toomer v. Witsell, supra:*

> "A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. 334 U.S. at 408, 68 S.Ct. at 1168."

The court then went on as follows:

> "It is just this 'technical ownership' that the State of Maryland has in its waters that gives it the legal right to bring suit on behalf of the public in order to serve the 'common good' of its citizens. The conclusion seems inescapable to this Court, that if the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered to bring suit to protect the corpus of the trust—i.e., the waters—for the beneficiaries of the trust—i.e., the public."

The public trust doctrine requires government to exercise its control over renewable resources for "the common good." The common good requires the preservation of the salmon and steelhead resources in the case area. Failure to manage these resources so as to ensure their preservation under present circumstances would be a clear breach of government's duty to its citizens.

The public trust doctrine has been couched by the

courts as a duty of the various states since these have been the governing units with the authority to regulate the fish and wild game in these cases. However, the courts implicitly have recognized that a duty to conserve applies to their judicial activities as well. In fact, this Court has in several important cases recognized a responsibility on its part to give heavy weight to resource preservation. It should be noted that in none of these was the Court dealing with any legislative enactments favoring preservation.

The first of these cases is *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916). This case involved Indian treaty fishing rights. The Seneca Nation in 1797 entered into a treaty with one Robert Morris, ceding certain land to him, "his heirs and assigns forever." The grant reserved to the Seneca nation and its heirs "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Three Seneca Indians were arrested for fishing off their reservation but on the ceded land in a manner contrary to the conservation laws of the state of New York. The Indians sought a writ of habeas corpus, arguing that the terms of the treaty created dual sovereignty to govern fishing activities on the ceded land. The Court rejected this argument, holding that the state had authority to regulate fishing on this property.

We wish to draw attention not to this result, but to the reasoning by which the Court reached it. The Court essentially reasoned that interpretation of the treaty to require dual sovereignty was unacceptable because such a result would destroy the resource. That is, the Court recognized a clear obligation to protect the resource even though this issue was not directly before the court nor mandated at the time by applicable federal law.

Chief Justice White, writing for the Court, put the matter as follows at p. 563:

> "It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both. . . . We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible."

Kennedy v. Becker is also the only case which the Institute has discovered in which this Court has expressed an opinion on the ability of a non-unified management system to ensure preservation of fishery resources. The Court believed that division of the power of conservation would "make its competent exercise impossible." The Institute believes the same is true today, and suggests that *Kennedy v. Becker* offers an excellent precedent for a similar conclusion from the Court here.

The Court has recently been called upon to resolve disputes in three related cases in which, like *Kennedy v. Becker*, the issue was the authority of states to regulate fishing by Indians guaranteed the right by treaty to fish "at all usual and accustomed places, in common with the citizens . . ." *Puyallup I, Puyallup II, Puyallup III, supra.* This Court in these cases consistently held that the states have the authority to regulate treaty right fishing in non-exclusive areas as necessary and reasonable for *conservation.* It is instructive to note that in similar cases the Court has held that state regulation for other purposes,

such as the collection of a license fee, is impermissable, *Tulee v. Washington, supra.*

Once again, we wish to call attention not so much to the holdings themselves as to the reasoning the Court employed. The *Puyallup* cases involve interpretations of treaty rights between sovereigns. The treaty makes no reference to resource conservation, but the Court in each case has interpreted treaty rights so as to assure preservation of the resource. Although never stated explicitly, what the Court has consistently done is recognize and give effect to a perceived duty to conserve the renewable fishery resources which were the subject of those disputes as well as the present proceedings. For all of the reasons already stated above, we believe this duty is correctly perceived.

The present controversy before this Court presents an opportunity for the Court once again to recognize and give effect to an important resource conservation issue. We submit that the judicial reasoning in the treaty rights cases which this Court has previously resolved provide an overwhelming basis for the Court in this controversy to take such steps as necessary to establish a unified management system in order to best ensure preservation of the salmon and steelhead resources.

VII. Conclusion

The Institute has argued that the current balkanized system for management of the salmon and steelhead resources of western Washington is inadequate. In part as a result of the lower court decisions in this case, management authority is spread among too many entities. As a result, the system is incapable of ensuring the preservation of the resources, optimization of yields, or allocation of the catch among user groups.

It is admitted that preservation of the salmon and steelhead resources, optimization of yield, and allocation are ancillary issues in this litigation. Nonetheless, they bear directly upon the treaty rights which are the fundamental issue before the Court. In addition, preservation of these resources is of itself a matter of great importance and one that this Court has recognized and given great weight to in past rulings.

The Institute has attempted to demonstrate that a unified managament system is essential in order to achieve the management goals of resource preservation, yield maximization, and user group allocation. Full realization of such a management system goes beyond the bounds of this litigation and the duties of the Court. It is undoubtedly true that the Court could seek to remedy the institutional fragmentation that has resulted in part from the lower court decisions by confirming greater authority in the District Court to oversee and manage the fisheries. This is an unnatural role for the judiciary, and one to which it is not well-suited. The Institute agrees with Judge Burns in his concurring opinion in the Ninth Circuit's ruling in *U.S. v. Washington*:

"Although I recognize that district judges cannot

> escape their constitutional responsibilities, however unusual and continuing the duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries", 520 F.2d at p. 693.

Creation of a unified management system for salmon and steelhead resources is a task for the United States Congress. There is no question but that this Court has the right to request that Congress legislate on this matter. Given, however, that a unified management system is a necessary condition to resource preservation and other management goals, and given that these goals are intimately bound up with the treaty rights here under litigation, the Institute submits that the Court has a duty to urge upon the Congress that it establish a unified management system for the fishery resources here being disputed. This Court can make an indispensable contribution by informing the Congress of the importance of such action from the Court's unique judicial perspective.

The Institute offers the following principles which the Court might use in requesting Congressional action:

1. The management system should have the capability to rapidly collect and analyze statistical information including catch and effort data from all fishermen exploiting the resource.

2. The management system should be capable of making coordinated decisions for regulating the activities of all fishermen and should have the authority to conserve the resources, maximize the yield, and allocate the permissible catch among user groups in a fair and equitable manner according to law.

3. The management system should be able to make

rapid and timely adjustments to regulations while each run and each fishery are actually in progress.

4. The management system should have the ability to enforce decisions and regulations with regard to all fishermen.

Respectfully submitted,

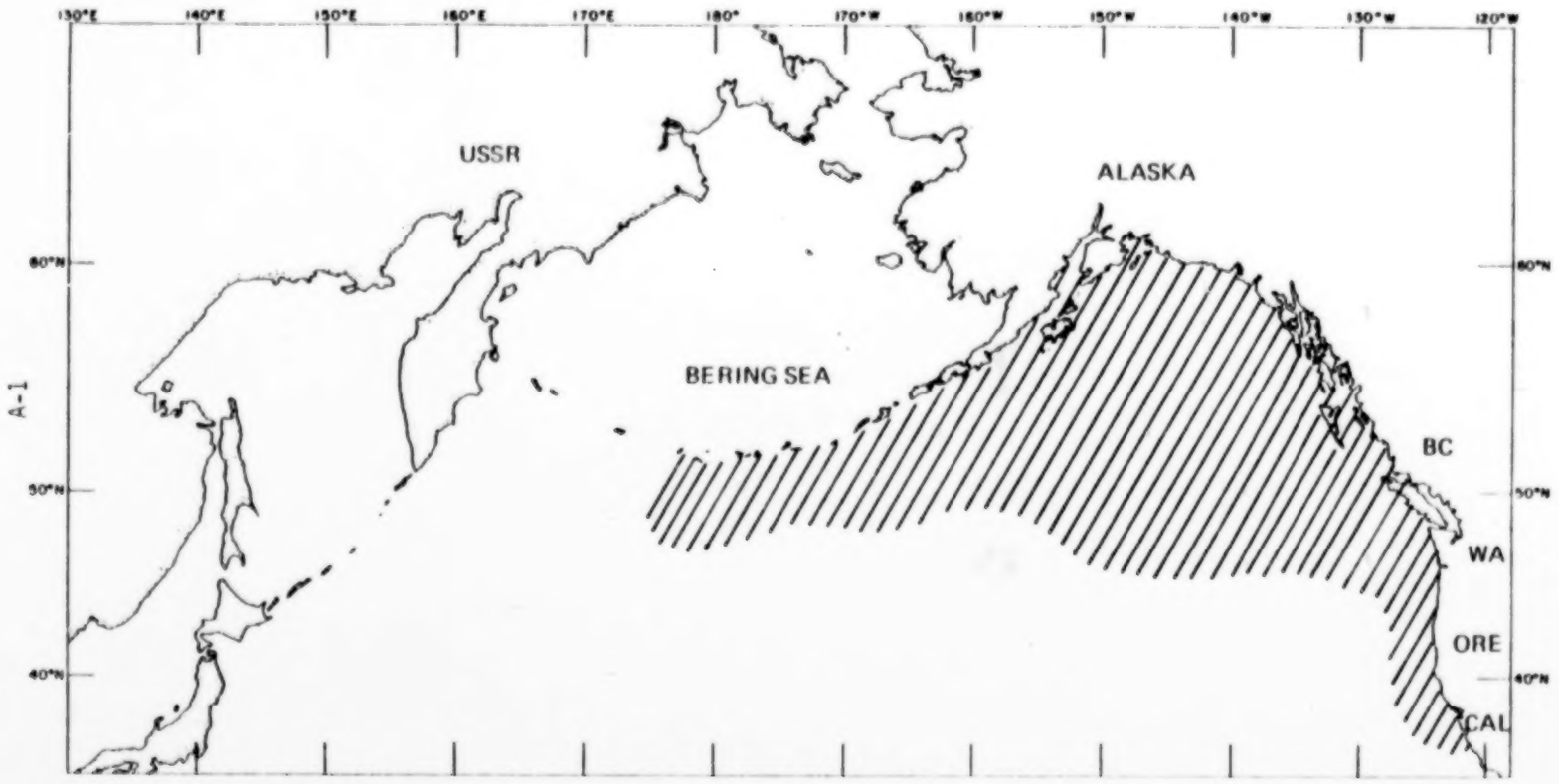
J. Carl Mundt
Henry H. Happel III
MUNDT, MACGREGOR, HAPPEL, FALCONER & ZULAUF
Counsel for *Amicus Curiae*

Seattle, Washington
November, 1978

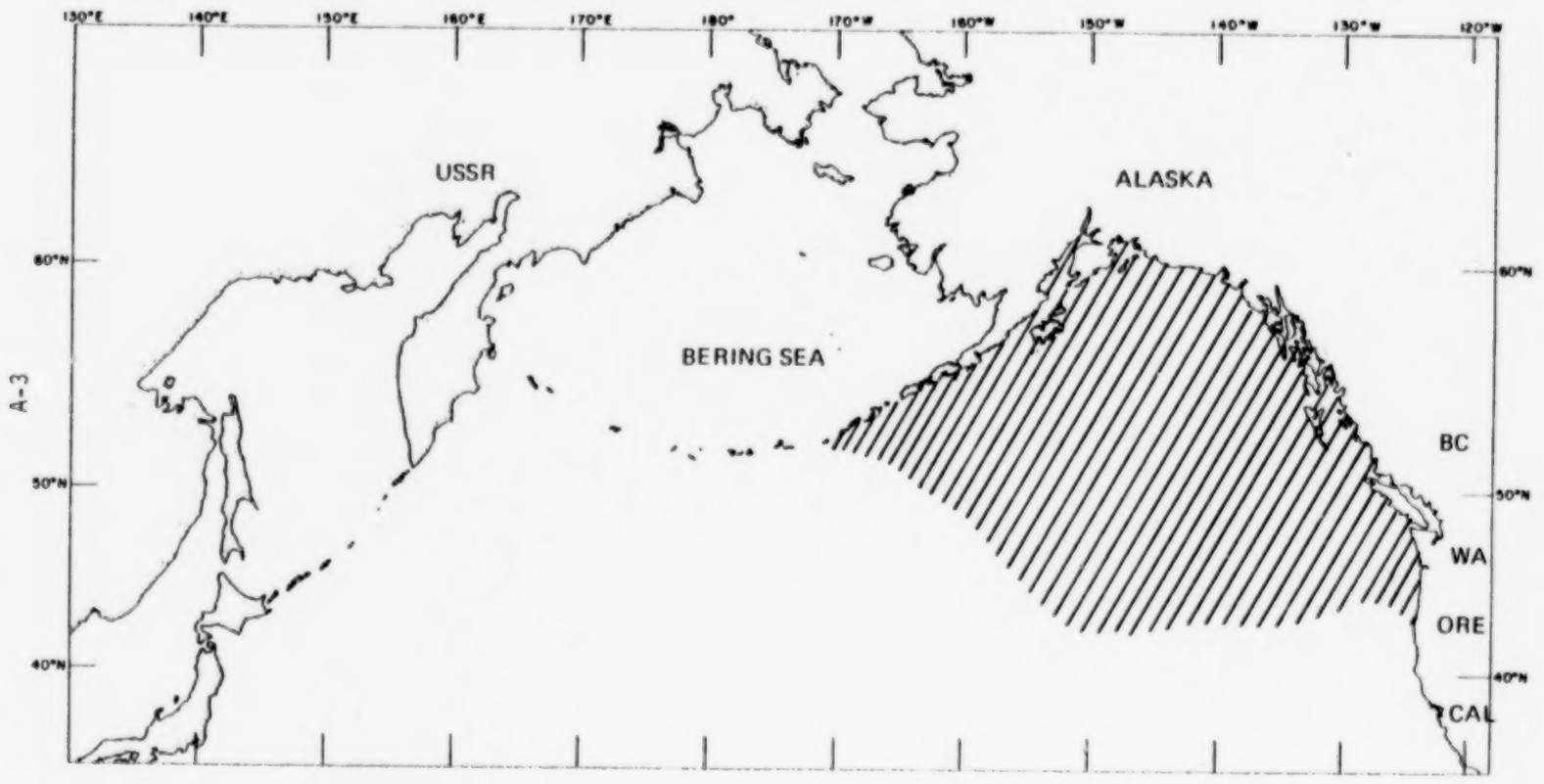
APPENDIX I

pages A1 - A6

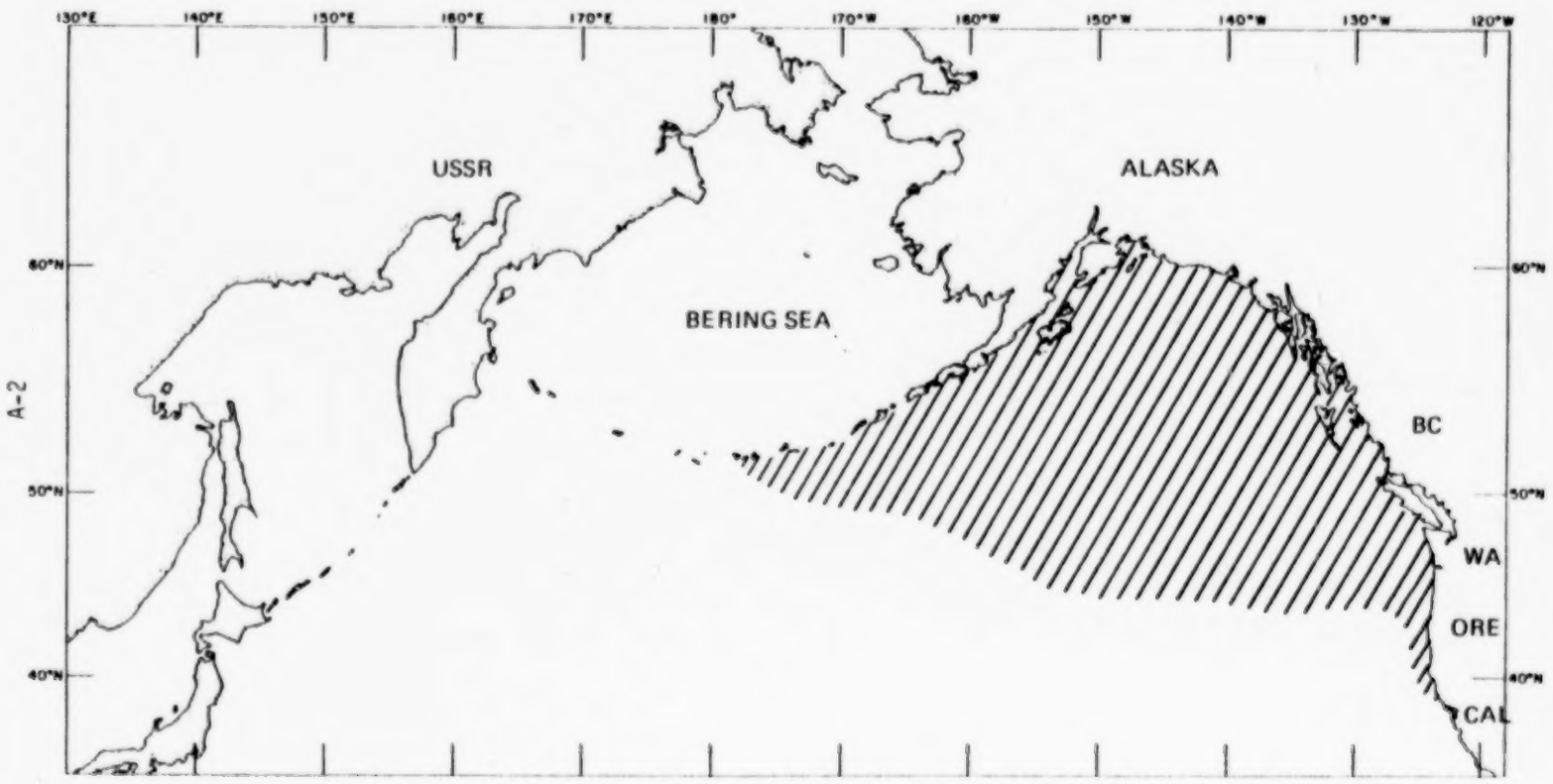
Ocean distribution of chinook salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington, Oregon, and California.



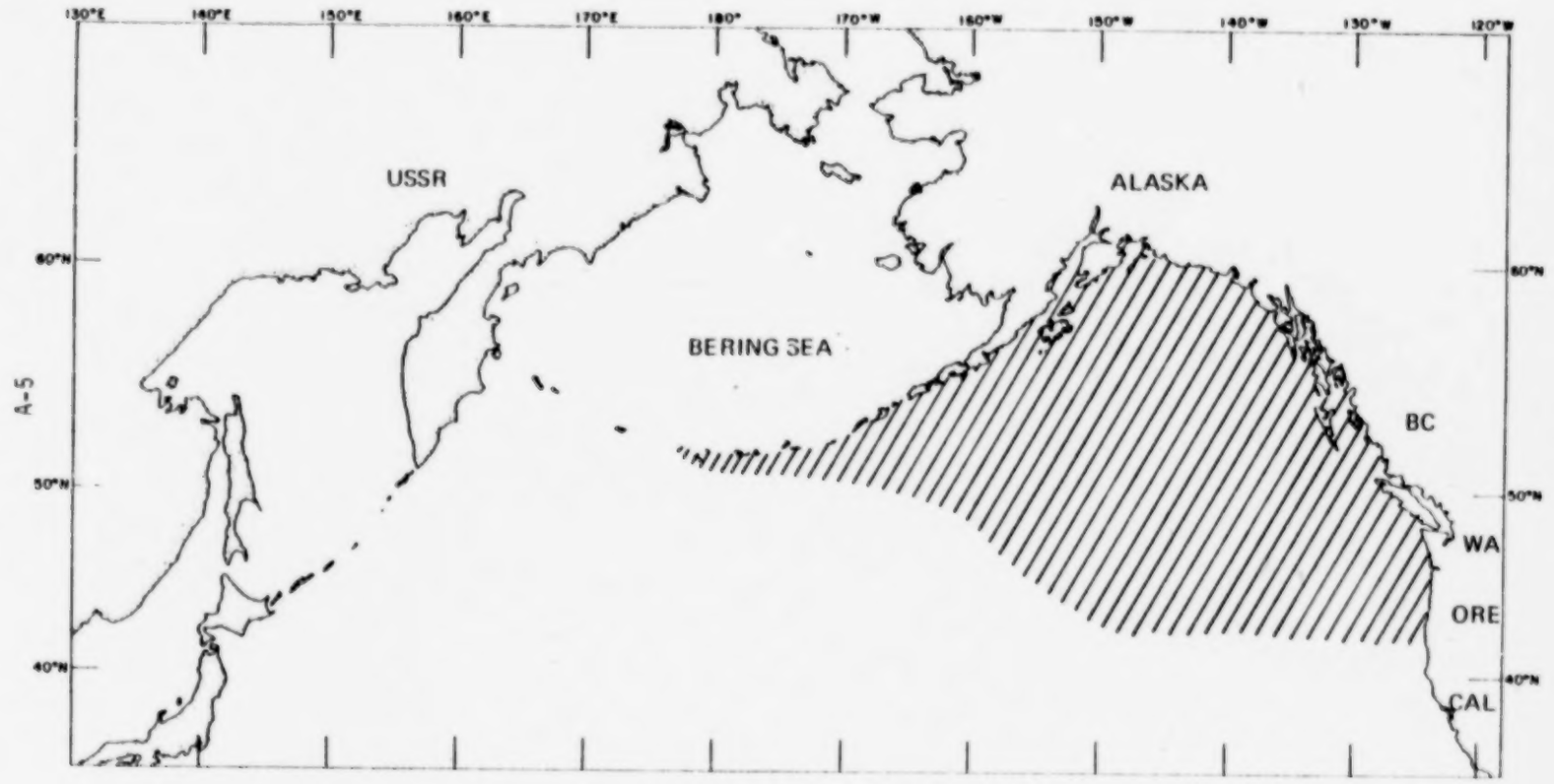
Ocean distribution of pink salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington.



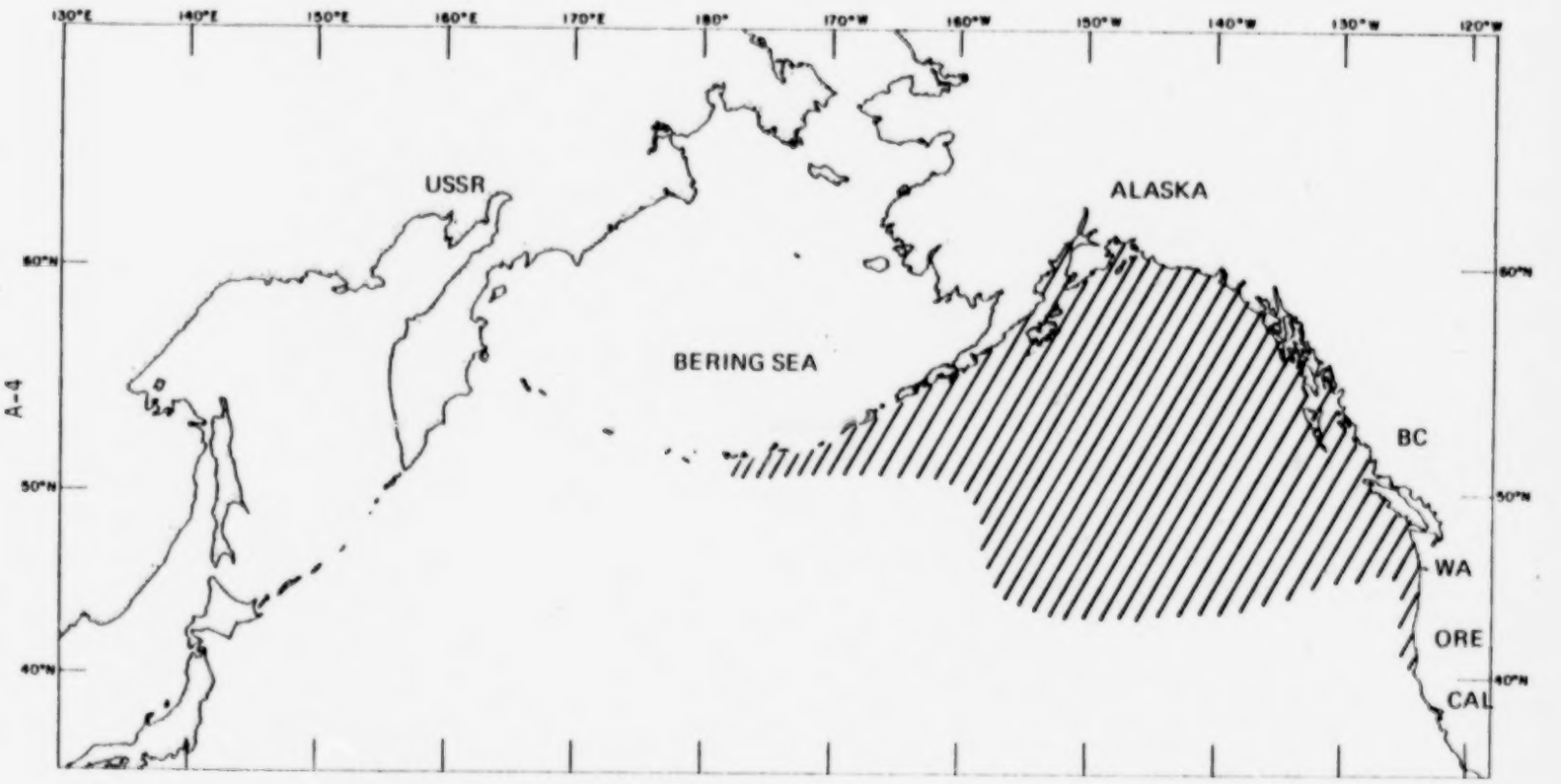
Ocean distribution of coho salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington, Oregon, and California.



Ocean distribution of sockeye salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington and Oregon.



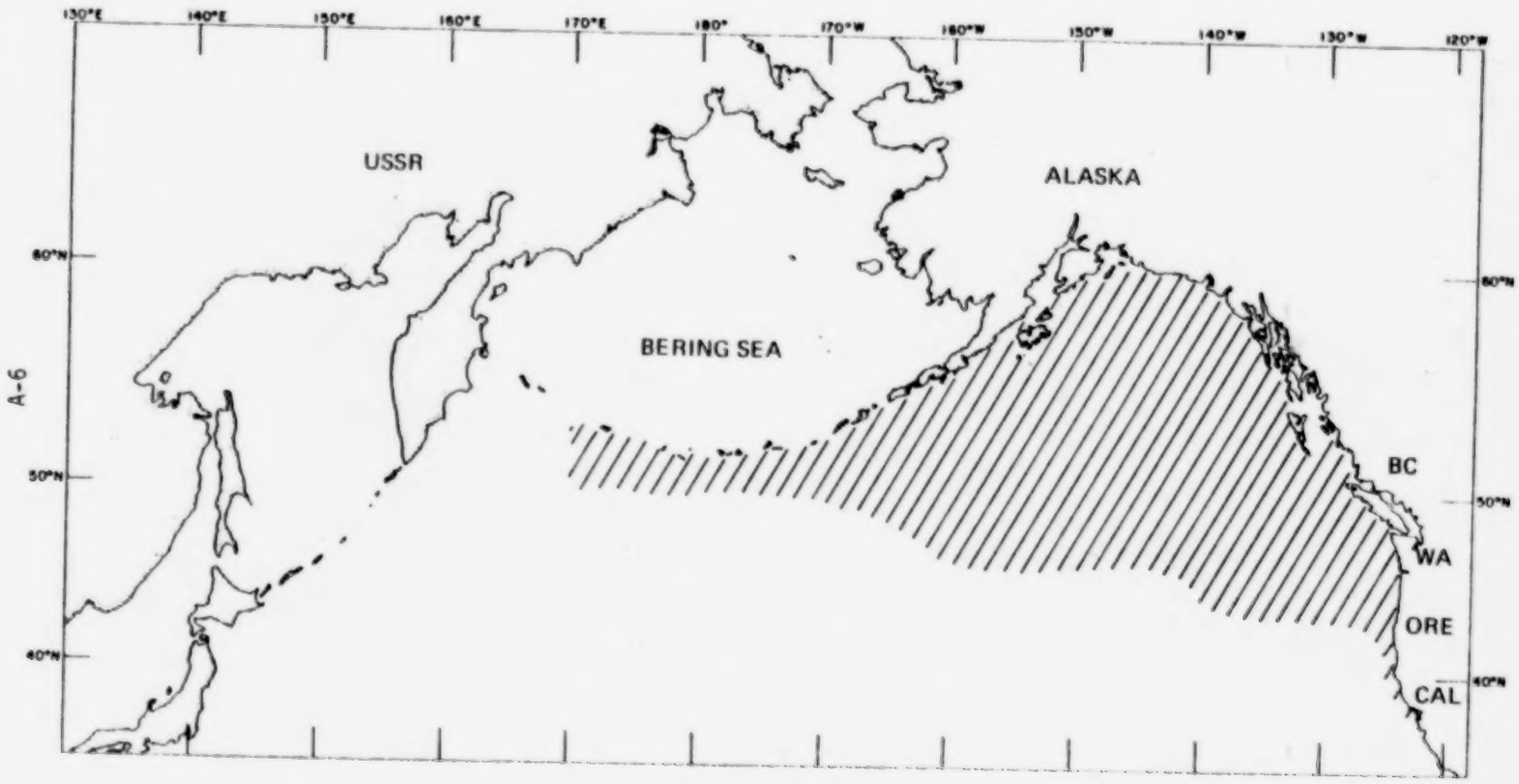
Ocean distribution of chum salmon from tributaries emptying into the Gulf of Alaska and from waters of Washington and Oregon.

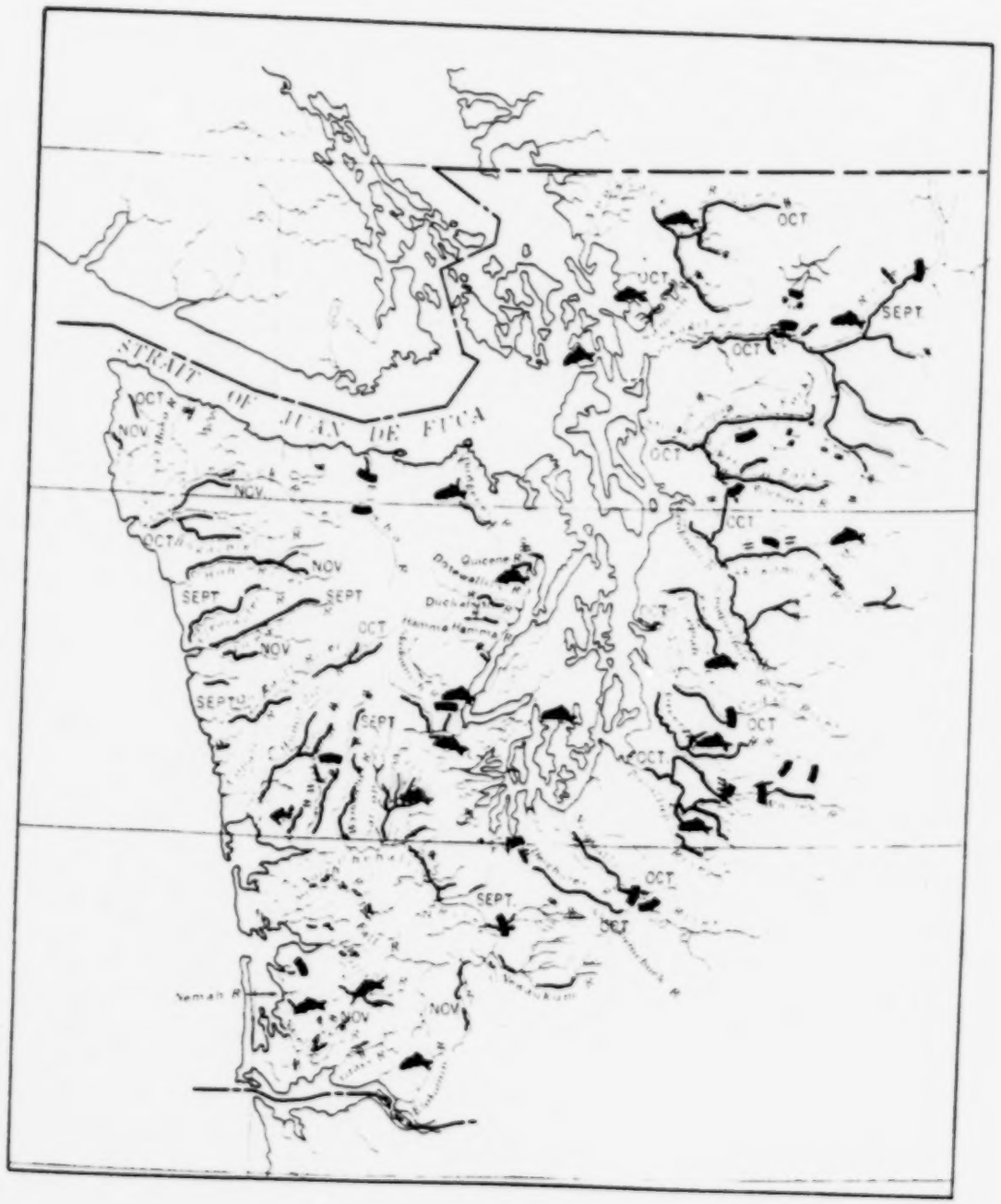


APPENDIX II

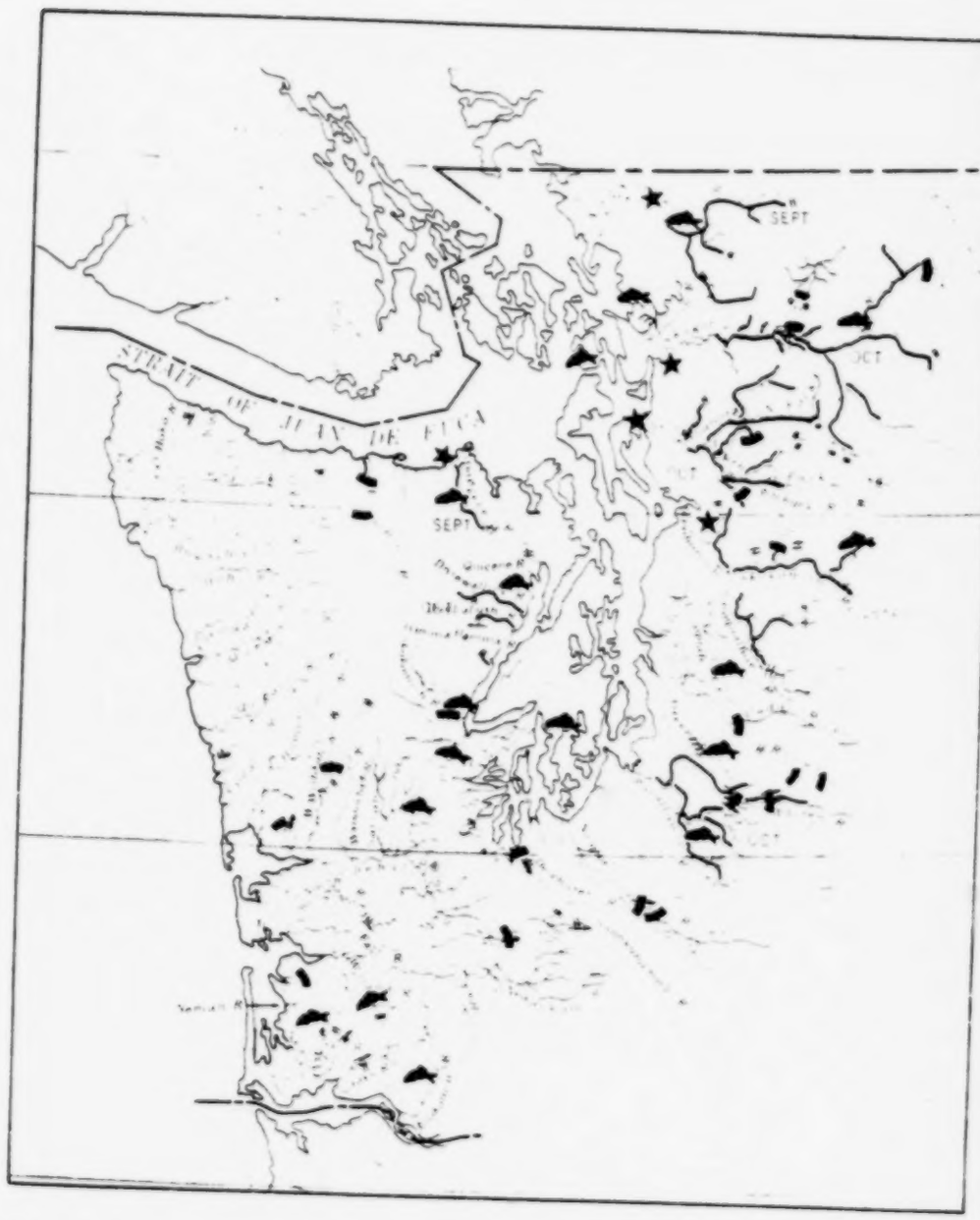
pages A7 - A11

Ocean distribution of steelhead trout from tributaries emptying into the Gulf of Alaska and from waters of Washington, Oregon, and California.

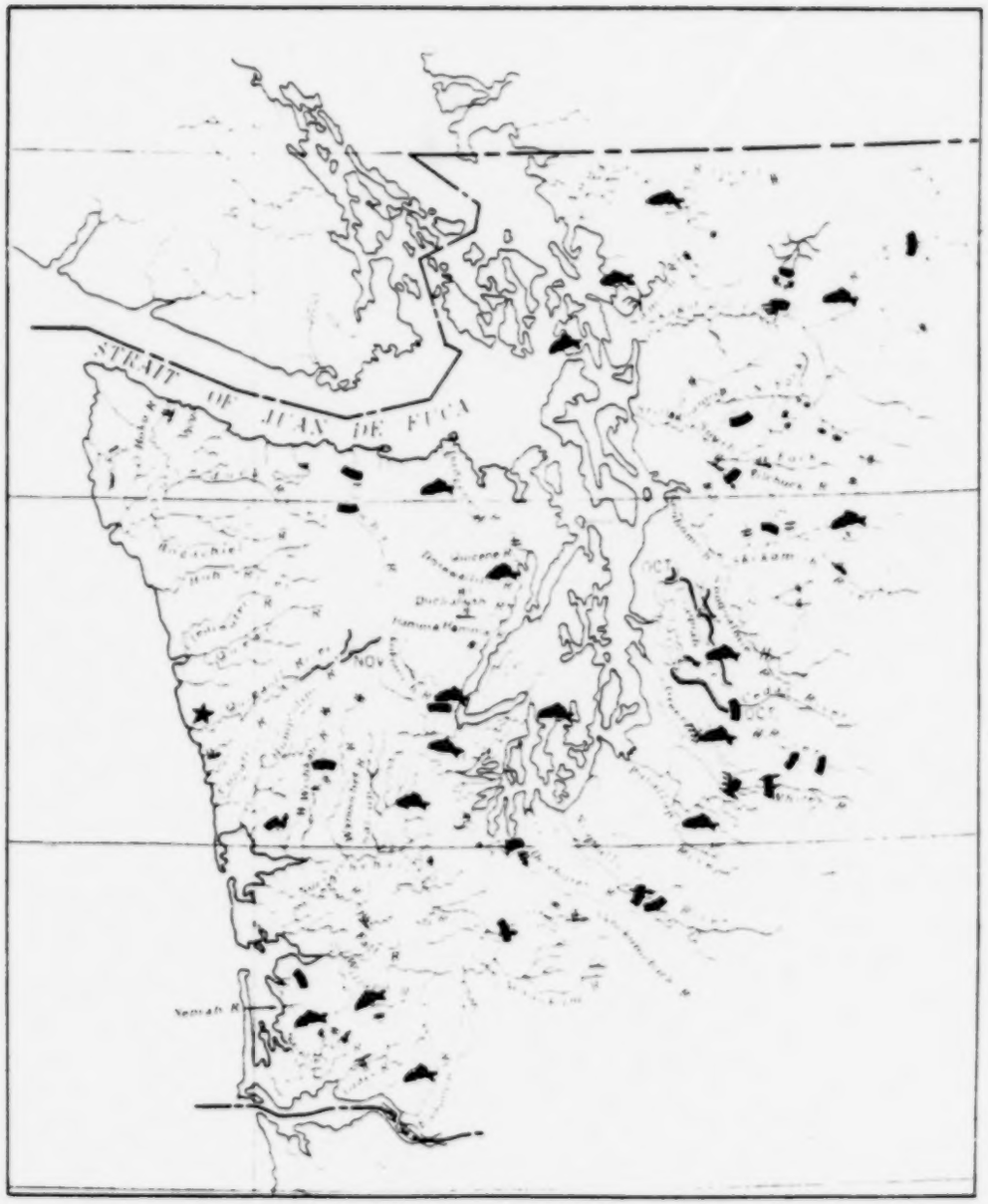




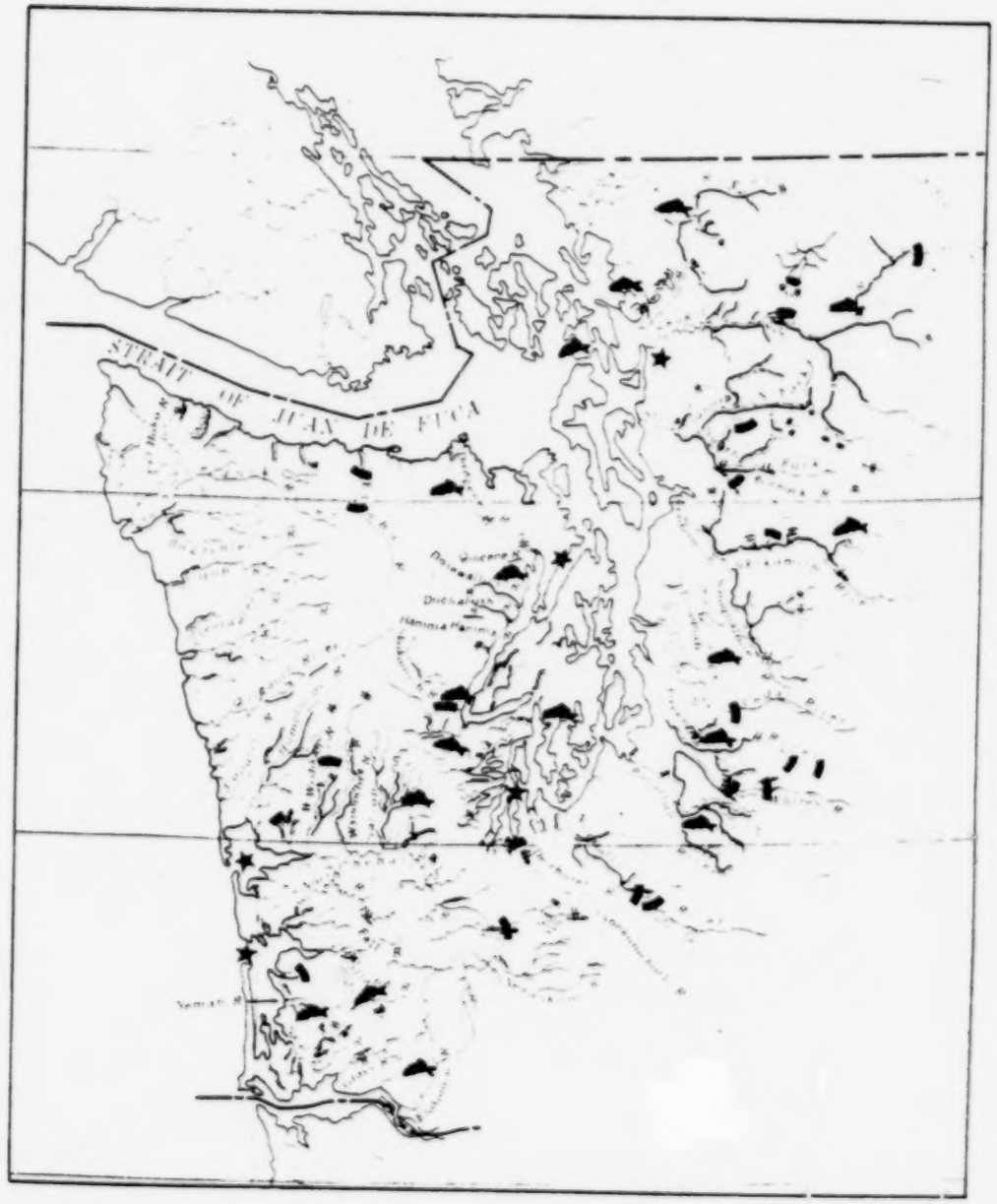
Spawning grounds of chinook salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



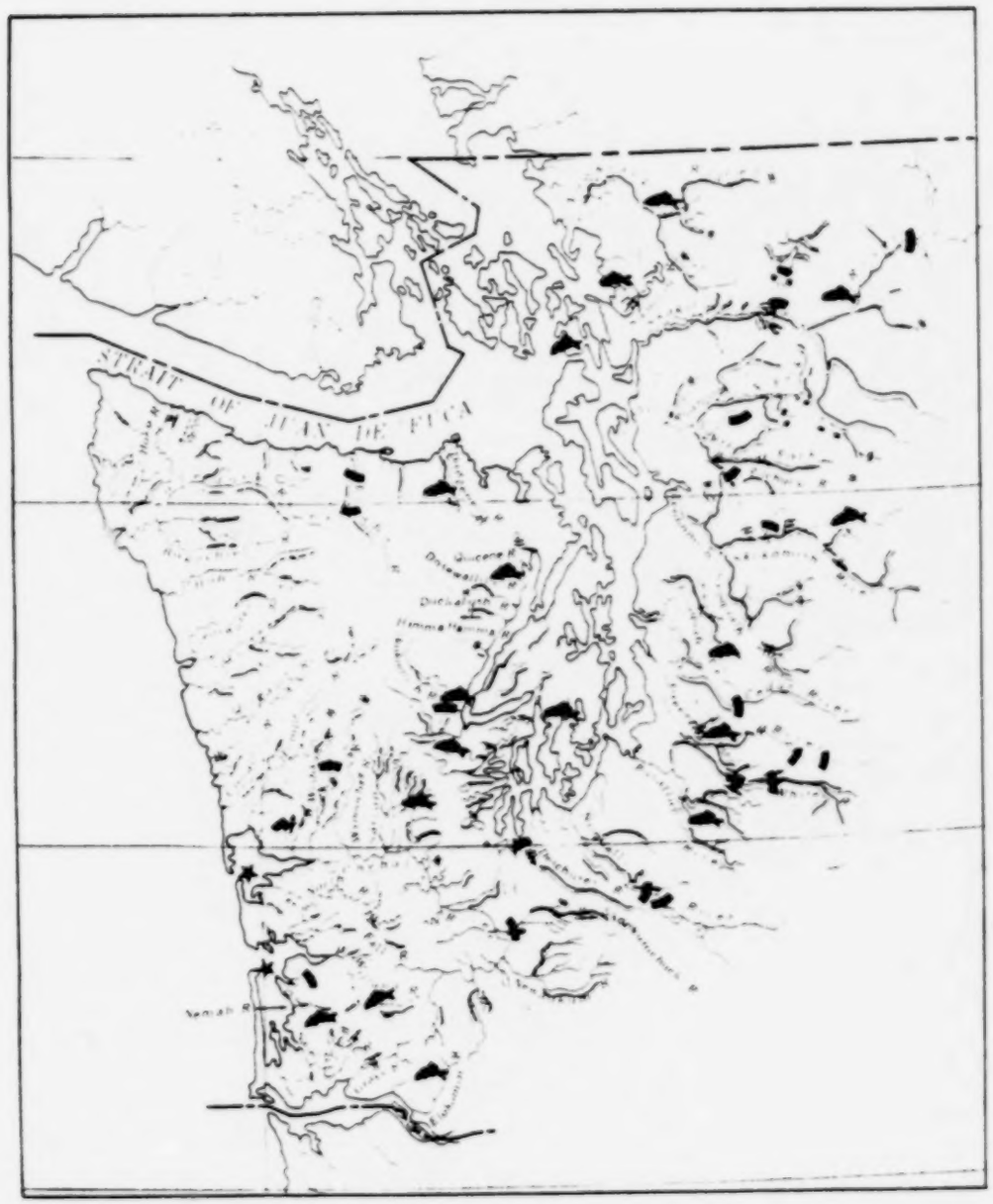
Spawning grounds of pink salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



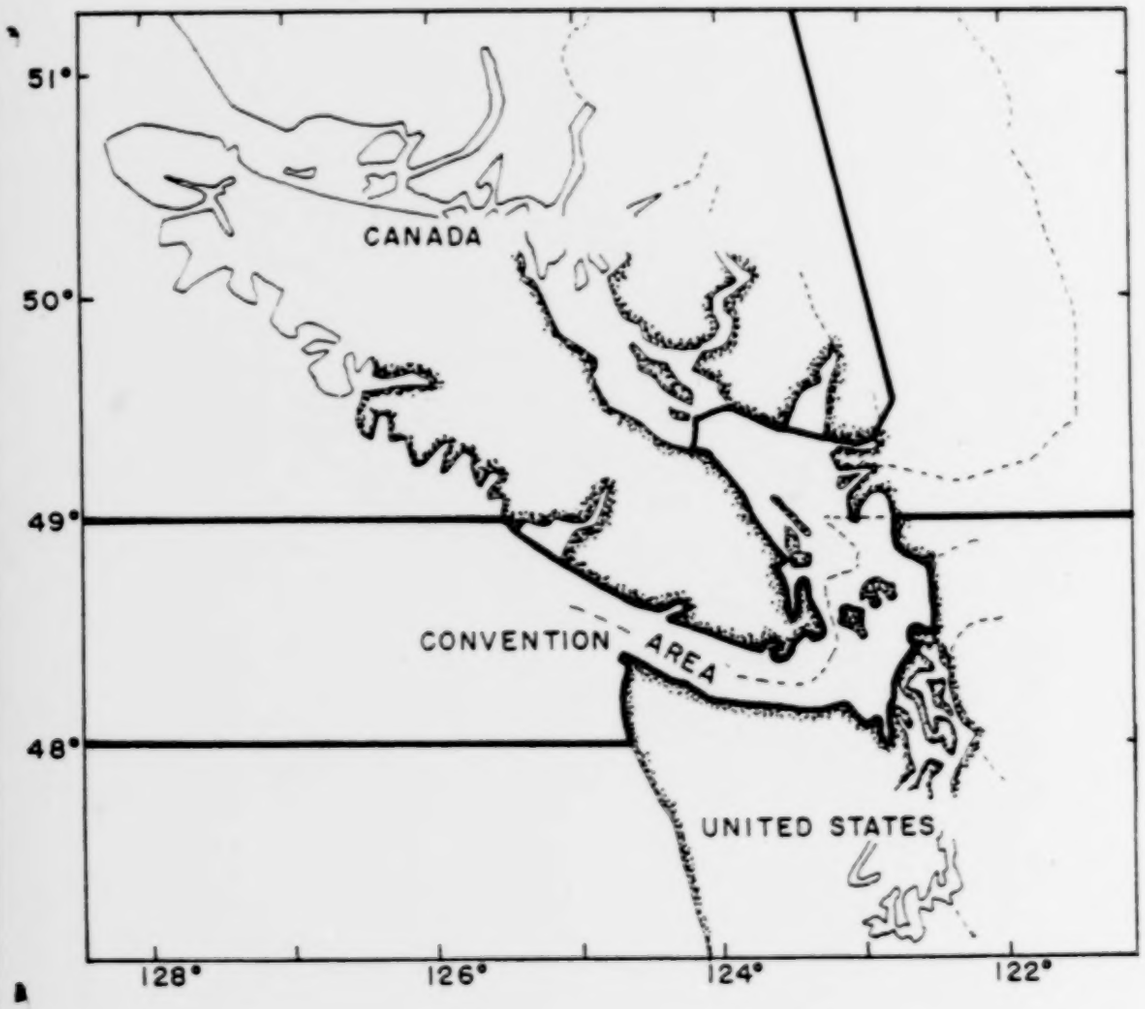
Spawning grounds of sockeye salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



Spawning grounds of chum salmon in Washington coastal wa (spawning areas shown by black lines along rivers).



Spawning grounds of coho salmon in Washington coastal waters (spawning areas shown by black lines along rivers).



Convention area of the International Pacific Salmon Fisheries Convention between Canada and the United States.

MOTION FILED
DEC 20 1978

Nos. 77-983, 78-119 and 78-139

In the Supreme Court

of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

BRIEF OF AMICUS CURIAE NORTHWEST STEELHEAD AND SALMON COUNCIL OF TROUT UNLIMITED

DON S. WILLNER
WILLNER, BENNETT, BOBBITT & HARTMAN
Council for Amicus Curiae

Suite 1400
One S. W. Columbia
Portland, Oregon 97258
Telephone: (503) 228-6611

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 41 12-78

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE
BRIEF OF AMICUS CURIAE
NORTHWEST STEELHEAD AND SALMON COUNCIL OF TROUT UNLIMITED

I. MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Northwest Steelhead and Salmon Council of Trout Unlimited is the largest organization of sports fishermen in Western Washington, the case area affected by these decisions. We were involved, on behalf of sports fishermen, in both of the two major previous cases. In the case of United States v. Washington, 520 F.2d 676 (1975), we were denied intervenor status by the District Court, but were granted intervenor status in the Ninth Circuit. We submitted a brief to the Ninth Circuit, participated in oral argument, and filed an unsuccessful petition for certiorari with this Court.

In the case of Department of Game v. Puyallup, 433 U.S. 165 (1977) (Puyallup III), we were granted intervenor status by the trial court and participated in

the trial, briefed and argued the case before the Supreme Court of Washington, briefed the case in this Court and participated in oral argument before this Court in April, 1976.

The Northwest Steelhead and Salmon Council of Trout Unlimited moves the Court for an order giving us leave to file this brief. We have received the written permission of the United States, the State of Washington, the Purse Seine Vessel Owners Association, the Respondent Indian Tribes (except Yakima Indian Nation), the Confederated Tribes of Warm Springs Reservation, and the Confederated Tribes of the Umatilla Indian Reservation. We have not yet received a response from the Washington State Commercial Passenger Fishing Vessel Association, the Washington Kelpers Association, and the Puget Sound Gillnetters Association.

The three cases upon which this Court has accepted certiorari do not have sports fishermen as parties, although they will have an important effect on the rights of sports fishermen. It is important for a full presentation of the issues that the views of sports fishermen be represented before this Court. The Northwest Steelhead and Salmon Council of Trout Unlimited is the logical representative of the interests of sports fishermen.

II. THIS COURT SHOULD DECIDE ALL ISSUES NOW

In our Petition for Certiorari in United States v. Washington and in our Response to Petition for Certiorari in Puyallup Tribe v. Department of Game (Puyallup III), we asked this Court to consider the basic issues in the controversy that has been raging in western

Washington over treaty Indian fishing rights. Certiorari was denied in U.S. v. Washington. Though this Court in Puyallup III reaffirmed the right of the state to regulate the Puyallup River treaty steelhead fishery in the interest of conservation, it did not expressly broaden its decision to other fish and other rivers. Federal Judge Boldt continues to manage the balance of the western Washington fishery and will not act on a motion that he consider the impact of Puyallup III. The result is chaos. The issues in U.S. v. Washington and Puyallup III should be decided now in a way that everyone understands.

We represented the viewpoint of the half a million sports fishermen of Western Washington in those appeals. Here we are only amicus curiae and will not be participants in oral argument. We ask this Court to give this brief the same full

consideration as if we were a party now as we were before.

III. INTRODUCTION TO ARGUMENT

This sequence of cases deals with two treasured resources, the salmon and the steelhead of western Washington.

The natural fish are born in the gravel spawning beds of coastal rivers, swim downstream and out into the ocean, then after several years return to the river of their birth to spawn and die (though some steelhead survive spawning). Sports fishermen catch salmon each year, with hook and line usually, from small boats in the waters of the Pacific Ocean or in Puget Sound. The sports salmon fishermen fish in marine waters along with commercial fishermen who use gill-nets, purse seines and other more

efficient ways of catching large numbers of fish. The 794 treaty Indian commercial fishermen are authorized to fish by their tribes. The other 6,600 commerical fishermen are required to obtain state licenses. In 1971 the salmon catch was 7,777,093. With proper management there are enough salmon for all.

Steelhead are a sea-going rainbow trout noted for their fighting qualities. Since 1933, they have been a game fish by Washington state law, which means that they cannot be caught for commercial purposes. RCW 77.08.020. Steelhead are caught by sports fishermen in the rivers of western Washington, either from the banks or in small boats. The 1971 catch was 264,599, or three percent of the salmon catch.

Since late 1973 when this Court, in Puyallup II, authorized treaty Indian

fishermen to ignore state law making steelhead a game fish, Indian gillnets have spread across the mouths of the rivers to catch the returning steelhead, and sports fishermen have caught only a tiny fraction of the total.

The natural runs of salmon and steelhead are augmented by fish developed in hatcheries which are then placed in rivers after one year of life, swim to the ocean, and return to the same location to spawn. Salmon hatcheries are paid for with the general fund monies of the taxpayers of Washington with specific tax contributions from non-treaty commercial and sports fishermen (treaty Indian fishermen do not pay those taxes). Steelhead hatcheries are primarily paid for with earmarked funds from the license fees and tags of sports fishermen.

United States v. Washington dealt

with both salmon and steelhead. The three cases before this Court now involve commerical fishing for salmon. But since Judge Boldt made no distinction in U.S. v. Washington or his continuing jurisdiction between the salmon and steelhead fishery, both resources need to be remembered by this Court.

IV. A FEDERAL JUDGE CANNOT BE A FISHMASTER FOR WESTERN WASHINGTON

The steelhead and salmon resource of western Washington need independent, expert, unified management with a proper definition of conservation. This can only occur if this Court requires Judge Boldt to accept the ruling of the Puyallup cases - that the state of Washington has the constitutional right and duty to manage its fishery in the interest of conservation.

The United States Constitution provides in the Tenth Amendment that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Puyallup I as later approved by Puyallup II and Puyallup III states:

> The overriding police power of the State expressed in non-discriminatory measures for conserving fish resources, is preserved. (391 U.S. 392, 398-399 (1968)).

Similar decisions were made by this Court in 1876, 1891, 1896, 1905, 1916, 1942, and 1962. McCready v. Virginia, 94 U.S. (4 Otto) 391 (1876); Manchester v. Massachusetts, 139 U.S. 240 (1891); Ward v. Race Horse, 163 U.S. 504 (1896); U.S. v. Winans 198 U.S. 371 (1905); Kennedy v. Becker, 241 U.S. 556 (1916); LaCoste v. Dept. of Conservation, 263 U.S. 545 (1924); Tulee v. Washington, 315 U.S. 681 (1942); Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

Fisheries management is a very important science at the University of Washington and 106 schools throughout the country. ROYCE, INTRODUCTION TO THE FISHERY SCIENCES, Preface I, X (1972). Regulatory decisions must be made by experts exercising great care. A mistaken prediction of escapement needs may show no effect at the time, but result in extinguishing an entire run after two or three life cycles have been completed. CRUTCHFIELD AND PONTECORVO, THE PACIFIC SALMON FISHERIES, A Study of Irrational Conservation, 167. For example, starting in 1880 in Southern California mistaken estimates of escapement needs and overfishing by commercial fishermen virtually eliminated salmon in that area of the state. NETBOY, THE SALMON, THEIR FIGHT FOR SURVIVAL (1974). Run size can change dramatically from year to year as can the

amount of water in the river. Conservation requires that certain methods of harvesting fish be avoided regardless of the numbers.

Though predictions can be made ahead of time, a run cannot be accurately estimated until it is about to enter a river and then management decisions have to be made quickly.

The Departments of Fishery and Game of Washington have many dozen fish biologists plus supporting staff who can supply the necessary expertness.

The Washington Supreme Court in Puyallup II defined conservation this way:

> "Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to ensure the perpetuation of the resource. The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and further, the manner of

> fishing itself must not be destructive. Department of Game v. Puyallup Tribe. 80 Wn.2d 561, 497 P.2d 171 (1972).

This definition was not commented upon by this Court in its reviewing decision.

In the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1802 (2) it is provided:

> (2) The term "conservation and management" refers to all of the rules, regulations, conditions, methods, and other measures (A) which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment; and (B) which are designed to assure that -
>
> (i) a supply of food and other products may be taken, and that recreational benefits may be obtained, on a continuing basis;
>
> (ii) irreversible or long-term adverse effects on fishery resources and the marine environment are avoided; and

(iii) there will be a multiplicity of options available with respect to future uses of these resources.

Judge Boldt himself recognized this definition:

"From a broad biological and managerial standpoint, conservation of fish resources means to protect and improve the habitat that produces the resource, to manipulate stocks of fish to achieve necessary spawning escapement so as to maintain, perpetuate and enhance the resource, and to put the harvestable portion of the resource to beneficial use." (384 F. Supp. 312 at 385).

But after recognizing that this was good fish biology and management, Judge Boldt then inconsistently limited regulation to measures necessary for spawning escapement. He has ruled that eleven Washington conservation statutes which apply to all other citizens of the state cannot be enforced against treaty fishermen. U.S. v. Washington, 384 F. Supp. 312, 415. This means that the following

conservation needs are now beyond the regulatory power of the State of Washington:

1. Regulating mesh size in salmon fishing which can prevent an incidental catch of steelhead which are smaller.
2. Regulating the timing of a fishing season which can prevent the depletion of already threatened wild native stock, since they may enter a river at slightly different times than hatchery fish.
3. Preventing underfishing which can damage a run by increasing the competition among the fish for spawning areas.
4. Preventing certain techniques of harvesting fish, such as dynamite charges which cause waste, and the fish wheel, which has the potential

of totally eliminating a run on a particular river.

5. Requiring the removal of nets from the water periodically, so that fish will not be wasted.

6. Varying fishing opportunities in different years, since on some runs all fish should escape for spawning, while on other rivers the run is so large that 85% or more can be safely harvested.

7. Preventing all fishing at the mouth of hatcheries when this would deplete the returning run necessary for the continuation of the hatchery program.

VAN CLEVE and JOHNSON, MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTH-WESTERN PACIFIC, 17 (1963); ROBINSON and ROLLINS, MANAGING AQUATIC RESOURCES, OUR CHANGING FISHERIES 136 (1971).

If Judge Boldt's limiting definition is intended somehow as an interpretation of the 1855 treaty, then it has now been replaced by Congress in the definition in the Fishery Conservation and Management Act of 1976.

Senior Federal Judge George Boldt, with the part-time assistance of a college professor and an advisory council, is now managing the fishery of western Washington, including allocating numbers of fish to various user groups. The state at first was submitting its orders to Judge Boldt for approval, but now is prevented by Washington Supreme Court from allocating fish contrary to state law which provides for an equal opportunity for all fishermen. State Superior Court Judge Brown is setting standards for the Washington Department of Game in managing the steelhead run on the Puyallup River pursuant

to remand in Puyallup III. The Quinalt and Yakima tribes are "self-regulating" their own fishery by decision of Judge Boldt, and other tribes have petitions pending for self-regulation. The state of Washington which always managed the salmon and steelhead resources up until early 1974, assists Federal Judge Boldt in those ways which are not enjoined by the Washington Supreme Court.

The full results will not be known until the returning runs are measured several years from now at the end of the life cycle of the salmon and steelhead .

In the meantime, we know that tribes in past years since the Boldt decision have placed their nets at the entrance to fish hatcheries to catch brood stock, such as at Minter Creek Hatchery for salmon and Chambers Creek Hatchery for steelhead.

On some rivers there has been

substantial overfishing. The best example is that in 1975 there was such overfishing by treaty fishermen on the Skokomish River that there was virtually no escapement of chum salmon. This has also happened during several recent years on the Nooksack River spring run of Chinook salmon. Tribal fishermen are now using weirs and fish traps which are forbidden by Washington state law, risking the elimination of an entire segment of a run and destroying a portion of the gene pool. The state of Washington has, on occasion, requested emergency conservation closures which have been kept under advisement by Judge Boldt until after the emergency has passed.

Judge Boldt is trained as a jurist and not as a fishmaster.

In the case of Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed.2d 1069 (1974), this Court struck down a school desegregation plan which would

have required perpetual regulation by the District Court. This Court there stresses:

> But it is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives. 94 S. Ct. 3112, at 3126, 3127)

The dissent of Mr. Justice Marshall in Milliken v. Bradley agrees that the District Court should not become a school superintendent, and argues that such usurpation of power will not occur on the facts of that case. The dissent states:

> Our cases, of course, make clear that the intitial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District

Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default. (94 S. Ct. 3112, at 3158).

Furthermore, there is no basis whatsoever for assuming that the District Court will inevitably be forced to assume the role of legislature or school superintendent. Were we to hold that it was its constitutional duty to do so, there is every indication that the State of Michigan would fulfill its obligation and develop a plan which is workable, administrable, financially sound and, most importnat, in the best interest of quality education for all of the children in the Detroit metropolitan area. (94 S. Ct. 3112, at 3159).

Multiple management can only grow worse as Judge Boldt gradually allows the other tribes to become self-regulating". These tribes often have fishing rights on more than one river, so in time the regulatory pattern could look like this:

Puyallup River - Muckleshoot Tribe,
Puyallup Tribe and
Yakima Tribe

Hoh River - Hoh Tribe, Quileute Tribe

Dickey River - Hoh Tribe, Quileute Tribe

Bogachiel River - Hoh Tribe, Quileute Tribe

Colawah River - Hoh Tribe, Quileute Tribe

Soleduck River - Hoh Tribe, Quieleute Tribe

Queets River - Hoh Tribe, Quileute Tribe

Quinault River - Hoh Tribe, Quinault Tribe

Big River - Makah Tribe, Sauk-Suiattle Tribe

Ozette Lake - Makah Tribe, Quileute Tribe

Carbon River - Muckleshoot Tribe, Yakima Tribe

Strick River - Muckleshoot Tribe, Yakima Tribe

White River - Muckleshoot Tribe, Yakima Tribe

Green River - Muckleshoot Tribe, Yakima Tribe

Black River - Muckeshoot Tribe, Yakima Tribe

Nisqually River mouth and surrounding bay - Nisqually Tribe, Yakima Tribe

Since many tribes are quite small,

e.g., the Hoh Tribe has 62 members, Nisqually - 61, Stillaguamish - 94, much of the burden of regulation and enforcement will have to be handled by the commercial Indian fishermen themselves, who can have little objectivity about their own short-run economic interest.

Such self-regulation is contrary to Kennedy v. Becker, 241 U.S. 556, 36 S. Ct. 705, 60 L. Ed 1166 (1916), where this Court allowed New York to regulate off-reservation hunting and fishing of the Seneca Tribe. The Tribe argued that it had sole sovereignty over its members when they were hunting and fishing on former tribal land conveyed with a reservation of the continuing right to hunt and fish. This Court there had to deal with the identical argument for extraterritoriality that is made by the Ninth Circuit in our case.

This Court said:

> It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both. (241 U.S. 556, at 563).

Kennedy v. Becker was recently cited with approval in Puyallup I.

At present the resource is managed by a non-expert (a federal judge), or by multiple user groups (the self-regulating tribes). What is needed is expert, unified, independent management by the state of Washington respecting all treaty rights as defined by this Court. The present bad fish management cannot be good law.

V. JUDGE BOLDT'S ALLOCATION FORMULA IS UNCONSTITUTIONAL, A MISINTERPRETATION OF THE TREATY, A VIOLATION OF THE DECISIONS OF THIS COURT, AND AN IGNORING OF THE EQUITIES OF THE SPORTS FISHERMEN.

The 1855 treaties contain this language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, [Two treaties, Point No Point, 12 Stat. 933, and Treaty with Makahs, 12 Stat. 939, refer to citizens of the United States] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, ...on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens. (12 Stat. 971, 927, 939, 933, 951, 10 Stat. 1132)

According to Judge Boldt as affirmed by the Ninth Circuit these words reserve to the treaty tribes:

a) All the fish they can catch on reservations, plus

b) All the fish they can eat; plus

c) All the fish they can use for ceremonies; plus

d) Fifty percent of all of the harvestable fish that reach their "usual and accustomed grounds and stations;" plus

e) All the fish they can catch by hook and line anywhere in Washington in the regular sports season; plus

f) All the fish they can catch with commercial gear anywhere in Washington away from "usual and accustomed grounds and stations;" plus

g) Extra fish to replace the fish caught by Washington fishermen that do not reach the "usual and accustomed grounds and stations."

This formula gives 794 treaty Indian fishermen far more than fifty percent of the steelhead and salmon of all western Washington.

Judge Boldt further held that all other fishermen have no rights to fish, but only a privilege.

This extraordinary result was reached by Judge Boldt by taking part of a dictionary definition of the words "in common" and using them to interpret the 1855 treaties.

The Ninth Circuit on the appeal of U.S. v. Washington upheld this division not as a matter of treaty interpretation but as a matter of equity. Then, in Puget Sound Gillnetters Association v. United States District Court, one of the cases now on review, Judge Goodwin justifies the allocation through analogy to a co-tenancy. Judge Kennedy in a concurring opinion questions the co-tenancy analogy, and adds:

> But it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation

of those treaty rights." 573 F.2d 1136.

Judge Wallace in his separate concurring opinion says:

> While I sympathetically agree with Judge Kennedy's statement that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights," I am compelled to join with Judge Goodwin based upon our prior decision in United States v. Washington, 520 F.2d 676 (9th Cir., 1975), cert. denied, 423 U.S. 1086, 96 S. Ct. 877, 47 L. Ed.2d 97 (1976).

Where only one of the three member Ninth Circuit panel agrees with the allocation formula and that opinion of Judge Goodwin uses a rationalization different from the earlier Ninth Circuit opinion and different from the District Court decision, the basis for the ruling is a little wobbly!

Incidentally, Judge Boldt has himself occasionally recognized the defects

in his allocation formula. In 1975 he said that he would consider the "historic" reservation catch in the formula, rather than giving the tribes an unlimited reservation catch. Where a reservation is at the mouth of a river, an unlimited reservation catch could wipe out the up-stream sports fishermen. In 1977, he changed the formula at the request of the United States to forty-five percent on certain runs for certain tribes and fifty-five percent for other fishermen. Though such changes made sense as far as they went, they can hardly be supported by Judge Boldt's own interpretation of the treaty.

On some rivers, the rights of the sports fishermen to a fair share of the catch that was set forth by this Court in Puyallup II have been completely disregarded. The most striking example is the steelhead catch on the Nisqually River for 1975-1976: treaty fishermen - 3,695;

sports fishermen (including the majority of Washington Indians who have no treaty fishing rights) - 238.

A measure of what is happening to the rights of sports fishermen is that the number of steelhead fishermen has declined from 155,671 in 1973 before the Judge Boldt decision, to 129,787 in 1977.

The historical evidence discussed at length in the State of Washington brief, shows that the Indians before 1855 allowed other tribes to fish at their usual and accustomed fishing sites. Fish were plentiful and no one was seeking to define rights in numbers of fish.

Upon agreeing to move to reservations, the tribes wanted to protect their right of access to their off-reservation fishing sites, or as called in the treaty "grounds and stations." "In common" referred to the equal opportunity to use specific

sites not to a specific catch of fish.

The Supreme Court of Washington has pointed out that Judge Boldt's interpretation of "in common" was not supported by language in other treaties written at the very same time.

The concurring opinion of Justice Rosellini in Puyallup II says:

> The treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and the United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says
>
> > [t]hat the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to

them. [emphasis added]

> It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of 'exclusive rights' and 'rights secured in common' with the citizens of the United States. (548 P.2d 1058, 1076-77).

In the 1855 treaty with the Yakimas immediately preceding the typical paragraph about "in common" fishing rights it says:

> Article III. And provided, That if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways. (12 Stat. 951 (emphasis added)).

No one contends that the Yakimas have the right to fifty percent of the highways in Washington. How can the use

of fishing "in common" in the preceding paragraph of the same treaty mean fifty percent of the fish?

The best evidence of the contemporaneous meaning of the words "in common" is this comparison with the Walla Walla and Yakima treaties.

The Washington Supreme Court not only interpreted the treaties differently from Judge Boldt and the Ninth Circuit, it also held that regardless of treaty interpretation, giving special rights to citizens who are Indians over citizens who are not Indians violates the equal protection provisions of the Fifth Amendment:

> Granted the equal protection clause of the Fourteenth Amendment does not mandate complete equality. But it cannot be seriously argued that an allocation of more than 50 percent of a natural resource of a state to a group of citizens comprising a little more than .029 percent of the population does not deny such protection.

Fishing Vessel Ass'n v. Tollefson, 89 Wn. 2d 276, 281 (1977).

This is especially true when a construction can be given these treaties whcih does not violate the Constitution.

This Court in Puyallup II, involving the same treaty set forth these elements of a proper allocation formula for steelhead:

> What formula should be employed is not for us to propose. There are many variables -- the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people. (38. L.Ed.2d 254 at 258 (emphasis supplied)).

All of these elements were totally

ignored by Judge Boldt and the Ninth Circuit.

Mr. Justice White in the concurring opinion in Puyallup II has stated:

> On the other hand, the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen. (414 U.S. 44, 49).

Mr. Justice Douglas writing for the majority, does not disagree with the concurring opinion. He says:

> We know from the record and oral arguments that the present run of steelhead trout is made possible by the planting of young steelhead trout called smolt and that the planting program is financed in large part by the license fees paid by the sports fishermen. (414 U.S. 44, 47).

Thereafter, this Court in Puyallup III let stand the following steelhead allocation formula of the Supreme Court of Washington. The Washington court interpreted the treaty to exclude the hatchery produced steelhead, which could not have

been intended for inclusion by the parties in 1855 since the hatchery program started in 1933, and was unknown in 1855. The Washington court held:

> The artificial propagation of steelhead through the hatchery program on the Puyallup River did not commence until 1933. Therefore, just as the inexhaustible supply of fish at the time of the Treaty makes it inconceivable that the parties contemplated controls and limits on the fishery, it is also inconceivable that either the tribe or the government intended the Treaty to create any rights beyond the natural run. However, by examining the Treaty itself, we do find evidence which specifically relates to this issue. Even though the Treaty obviously makes no reference to artificially propagated steelhead, which were unknown at the time, it does set forth Indian rights with regard to artificially cultivated shellfish. There is an explicit proviso in article 3 that follows the language securing "the right of taking fish." The proviso states "[t]hat they [the Indians] shall not take shellfish from any beds stated or cultivated by citizens. . ." Treaty of Medicine Creek, (10 Stat. 1132, 1133). This plain language demonstrates that the rights secured to the tribe under the Treaty did not encompass artificially propagated

> sources of fish. Department of Game v. Puyallup Tribe, Inc., 86 Wash.2d 664, 548 P.2d 1058 (1976).

The court further held that the hatchery steelhead equitably belonged to the sports fishermen who paid for them with license fees and tags. The court stated:

> The evidence below demonstrated that the steelhead program conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily via license and other "user fees"[3] It would be manifestly unfair to give one group of citizens a superior opportunity to enjoy a resource thusly provided while denying other citizens, who provide the necessary funding, equal treatment. To allow the Indians to take hatchery fish by the use of nets would be to subsidize them to the extent that other state citizens are paying for the hatchery program, while being limited solely to the much less effective hook-and-line method of fishing.[4] The Indian Treaty does not demand such a subsidy. See Puyallup II at 49, 94 S. Ct. 330 (White, J. concurring).
>
> We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead

other than those enjoyed by all citizens of the state. To hold otherwise would be to put the State to a Hobson's choice; either to continue the hatchery program and thus provide the Indians with additional steelhead guaranteed to be caught in their nets; or, to discontinue the program altogether and thus deny the benefits of such a resource program to all citizens of the state. Our holding in no way discriminates against the Indians because they, like all other citizens, are still free, as they have always been, to catch hatchery fish by the hook-and-line method as provided under the regulations of the State Department of Game. Department of Game v. Puyallup Tribe, Inc., 86 Wash.2d 664, 548 P.2d 1058, 1071-72 (1976).

The Washington Court then feeling bound to make an allocation because of Puyallup II, affirmed fifty-five percent to the sports fishermen and forty-five percent to the tribe.

There is no question that the 1855 treaties have effect today. The question, however, is what do they mean.

First of all the hatchery fish should be excluded as a matter of treaty

interpretation. The hatchery steelhead should further be excluded since they are primarily paid for with the earmarked license fees and tags of sports fishermen.

The words "in common" in the treaty protect the rights of treaty fishermen to fish at usual and accustomed places off reservation. No one can exclude them from such sites on a river bed even if they border on private lands. No monopoly can be allowed in preferred fishing sites, such as the location of reef nets. The state cannot charge them a license fee. They cannot be subjected to any discrimination in fishing opportunity. The descendants of the treaty tribes can fish along with the descendents of the settlers who were moving into the Washington Territory. Both have rights of equal opportunity and of fair access to the fish and neither can hinder the other.

In the steelhead river fishery on the natural run, even though Indians need not abide by the state law forbidding a commercial catch (Puyallup II), their catch can be regulated by the state as this Court said:

> The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets. (414 U.S. 44, 49).

In the marine fishery, there is nothing equivalent to the gillnet across the mouth of the river. No one can catch all the fish in the ocean. Therefore, equal opportunity in the marine fishery does not require any allocation formula between treaty and non-treaty commercial fishermen since they both fish with the same gear in the same areas. So long as the more efficient commercial gear leaves fair access to the hook-and-line sports

fishermen the rights of all parties are being respected.

CONCLUSION

Northwest Steelhead and Salmon Council of Trout Unlimited respectfully urges that these elements be included in a decision by this Court:

1. Restore state control of the fishery with standards set by this Court;

2. A proper definition of conservation;

3. An exclusion of hatchery fish from the treaty fishery; and

4. A holding that "in common" means equal opportunity for all fishermen.

Respectfully submitted
WILLNER, BENNETT, BOBBITT & HARTMAN

By: _____
Don S. Willner
Attorneys for Amicus Curiae

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Nos. 77-983, 78-119 and 78-139

IN THE

Supreme Court of the United States

October Term, 1978

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

BRIEF OF *AMICUS CURIAE* PACIFIC SEAFOOD PROCESSORS ASSOCIATION

PAUL W. STEERE OF
BOGLE & GATES
Attorney for Amicus Curiae, Pacific Seafood Processors Association

Of Counsel
Ronald T. Schaps

Office and Post Office Address:
22nd Floor, Bank of California Center
Seattle, WA 98164
Telephone (206) 682-5151

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF PACIFIC SEAFOOD PROCESSORS ASSOCIATION

This motion of the Pacific Seafood Processors Association for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42. Consent to the filing of this brief has been granted by counsel for petitioner State of Washington, petitioner/respondent Puget Sound

Gillnetters Association, petitioner/respondent, Purse Seine Vessel Owners Association, respondent, Washington State Commercial Passenger Fishing Vessel Association, and respondent United States. Consent has been withheld by the Indian tribes who are parties.

Pacific Seafood Processors Association is an association of canners and processors of seafood, including salmon, in the case area. Individual processors engage in commercial canning and packing, buying fish for their own account, or provide canning and processing services for others. The association's members buy fish from both Indian and non-Indian fishermen.

The pacific salmon is one of the nation's most valuable fish resources. The association and its members are obviously vitally concerned about the preservation and enhancement of the commercial qualities and value of that fishery. They have a vital interest in the receipt at their respective facilities of fish of adequate quality and quantities, and receipt of these fish in an orderly and non-wasteful manner. The members are also concerned with the preservation of the free market conditions affecting or which may affect the supply and cost of fish for processing.

The parties of record deal with the issues in this case essentially in the context of their interests, fisheries management and the competing interests of the fishermen themselves. Pacific Seafood Processors Association is concerned that the broader impacts of these issues on other industrial segments and the community at large be expressed.

Pacific Seafood Processors Association requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

PAUL W. STEERE OF
BOGLE & GATES

Of Counsel:
Ronald T. Schaps

Attorneys for Amicus Curiae, Pacific Seafood Processors Association

December, 1978.

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

BRIEF *AMICUS CURIAE* OF PACIFIC SEAFOOD PROCESSORS ASSOCIATION

INTEREST OF *AMICUS*

The interest of *amicus* is set forth in the preceding motion for leave to file this brief.

INTRODUCTION

The facts of this case as set forth in detail in the opening briefs of the State of Washington, Puget Sound Gillnetters Association, Purse Seine Vessel Owners Association and Washington State Commercial Passenger Fishing

Vessel Association are hereby adopted. However, certain salient points should be emphasized to show the extreme nature of the interpretation placed upon the Stevens treaties by the federal courts below:

1. The commercial salmon industry as it developed prior to the initial decision in *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (the "Boldt decision"), was predominantly a marine fishery, with the initial exploitation by ocean trolling, followed by net fishing in the Straits of Juan de Fuca and the waters of Puget Sound.

2. The treaty Indians engaged in little marine fishing and their accustomed grounds and stations were generally rivers and marine terminal areas (those areas near the mouth of a river).

3. Under the Boldt decision, the treaty Indians (.028% of the population IN THE CASE AREA) are given a permanent inheritable right to all of the salmon they can catch on their reservations; all of the salmon they claim for subsistence purposes; all of the salmon they catch for ceremonial purpose; and 50% of all remaining harvestable fish, to be caught at their accustomed grounds and stations. *In addition*, the treaty Indians are permitted to engage freely in all sport and commercial fishing permitted to non-treaty citizens.

4. The catch of treaty Indians who engage in the non-treaty fisheries is not to be considered part of their treaty share. In practical effect, their catch is to be deducted from the number of salmon non-treaty citizens are to be permitted to catch.

5. In order to guarantee that the treaty Indians catch their allotted number (in excess of 50%) of fish from each

run at their accustomed grounds and stations, non-treaty commercial and sports fishing is to be restricted and curtailed on the earlier marine phases of the run.

6. Under the Boldt decision, as modified on appeal, salmon caught beyond the State's three-mile limit are to be deducted from the non-treaty citizens' share if caught by a Washington resident or if landed in Washington.

SUMMARY OF ARGUMENT

It is the position of *amicus* that the difficulties that have been incurred stem from a fundamental error in the federal decisions below; namely, the adoption of a quantified ownership concept in measuring Indian rights under the Stevens treaties. This has led to a most awkward and discriminatory interpretation of the Stevens treaties, with an aftermath of serious confusion and civil dissention. The federal courts below have not dealt with the situation as one calling for the application of equal protection principles in the context of a common fishery.

The arguments of *amicus* can be summarized in the following three points:

1. The District Court and Circuit Court decisions as to the meaning of the treaty language are unsupportable by the authorities, treaty language, Findings of Fact or logic.

2. Federal enforcement of the treaties as presently interpreted would be inconsistent with the Fishery Conservation and Management Act of 1976.

3. The present interpretation and application of the treaty language is unconstitutional.

ARGUMENT

I. The District Court and Circuit Court Decisions are Unsupportable by the Authorities, Treaty Language, Findings of Fact or Logic

The different Stevens treaties all use substantially the same language:

> The *right of taking* fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians, *in common with all citizens*. . . .

(Emphasis supplied)

Except for these reserved rights, the Indians ceded sovereignty over all lands and waters outside their reservations. They reserved no rights to fish other than at their "usual and accustomed grounds and stations", agreed that non-Indians could fish in common with them at their usual and accustomed fishing grounds and placed no restrictions on the non-Indians' use of ceded lands and waters or access to the common fisheries.

The district court expressly found that the Treaty Indians understood the restrictive nature of "usual grounds and stations" (F.F. 24, Joint App. 11-112), and made further findings that the Indians understood that fish were neither guaranteed nor exclusively theirs.

> . . . the Indian's harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of Indian fishing gear.

(F.F. 5, Joint App. 101)

. . . George Gibbs noted that:

> As regards the fisheries, they are held in common and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties. as the Indians move about, on the sound particularly, from one to another locality, according to the season.

(F.F. 13, Joint App. 105)

> . . . The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but the white man would also be allowed to fish . . .

(F.F. 20, Joint App. 109)

> . . . there is no evidence at the time of the treaties that either party intended to restrict the other party's fishing . . .

(F.F. 28, Joint App. 113)

Conversely, there was no finding whatsoever that there was any Indian cultural concept or understanding of being entitled to own or catch any fixed quantum or proportion of fish.

Notwithstanding, the district court ruled, as a matter of law, that the words "in common with" give the Indians a permanent right to catch over 50% of the harvestable fish. The only basis for this ruling, other than a reliance on treaty interpretation rules which enjoin liberality, and the only legal precedent ever cited by the court or the plaintiffs for this startling interpretation of the treaty words "in common with" is a definition of the word "common" from 1828 and 1862 editions of Webster's American Dictionary of the English Language (F.F. 24, Joint App. 111). The full language of this definition reads:

> 1. 1. *Belonging equally to more than one, or to many indefinitely;* as life and sense are common to man and beast; *the common privileges of citizens;* the common wants of man. 2. *Belonging to the public; having no separate owner.* The right of a highway is common. 3. General; serving for the use of all . . .

1828 ed. Webster's American Dictionary of the English language. (Emphasis supplied)

The district court also held, contrary to established law, that fishing by non-Indians is a mere privilege, not a right, and as such is revocable at will. The significance of this premise in the framing of the district court's decision is that it facilitates the restriction and curtailment of the non-Indian's fishing rights and his access to the common fishery in state waters, with impunity and, we submit, without regard for constitutional protections.

The premise that a citizen's right to fish is a mere privilege is erroneous. *Martin v. Lessee of Waddell,* 16 Pet. 367 (1842); *Smith v. Maryland,* 18 Howard 71 (1855); *McCready v. Commonwealth of Virginia,* 94 U.S. 391 (1877); *Geer v. Connecticut,* 161 U.S. 519 (1896); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948). See also: *Department of Game v. The Puyallup Tribe,* 414 U.S. 44 (1973). As noted, there is nothing in the language of the treaties themselves or in the findings of fact to indicate any intent to treat the non-Indians' right to fish "in common" as inferior to the Indians or to permit the Indians, through the agency of the court, to impose or require restrictions on non-Indian fishing activities in the ceded territory. If anything, the record indicates that such positions were contrary to the understandings and cultural concepts of both parties to the treaties.

As previously noted, the district court also held that *in addition* to the 50% the Indians are also entitled to: 1. all the salmon they catch on their reservations; 2. all they catch for ceremonial purposes; 3. all they catch to eat; 4. all they catch as participants in the all-citizen fishery; plus 5. an "equitable" adjustment for the number of fish caught by non-Indians outside the jurisdiction of the state of Washington.

The Court of Appeals for the Ninth Circuit did not rule on the propriety of the district court's holding that the words "in common with", as a matter of law, entitled the Indians to 50% of all harvestable salmon and steelhead plus the various additional allotments. The court of appeals instead rested its affirmance on a theory of its own creation. It analogized the treaty language to a cotenancy in the fish and the litigation to a request for a partition. This application of "ownership" principles is foreign to cultural concepts and understandings of all parties to the treaties as established by the district court's findings of fact. Furthermore, the court of appeals failed to apply the same theory and standards of accountability to the Indians as "co-tenants" with regard to their fishing activities—particularly away from the usual and accustomed grounds and stations. *U.S. v. Washington*, 520 F.2d 676 at 687 (9th Cir. 1975).

Ultimately, the court of appeal's decision rests upon a purported affirmance of the district court's exercise of "discretion" so as to "best protect the interests of all parties, as well as those of the public". *U.S. v. Washington,* 520 F.2d 676 at 687 (9th Cir. 1975). In fact, the district court did not, and did not purport to, exercise any discretion—it ruled on the treaty language as a matter of law, relying

on a misapplied interpretation of a definition in an 1828 English language dictionary.

Aside from a somewhat paternalistic mention in Finding of Fact 29 that "fishing is also important to some non-Indians" (Joint App. 113) the findings of fact and opinion basically ignore the circumstances of the 99.72% of the citizens in the case area who are not Indians. Nowhere in the findings of fact or opinion—which deal at great length with the importance of salmon to the Indian—is there any adequate analysis of the importance of the salmon to the non-Indian or of the impact of the mandated closures and restrictions upon the non-Indian. There is no real recognition that the Pacific salmon is a treasured public resource, the most valuable fishery in the United States, of all floating fish; and no word that the Pacific salmon is a subject of intense international competition with aggressive fishing competitors as Japan, Russia and Korea, requiring the enterprise of American fishermen and sensitive international compacts, all exerted in our national interest.

Nor, is there any consideration or analysis of the impact of this treaty interpretation upon the processing and utilization of this important food resource, as a result of the modification of a predominantly marine commercial fishery, with staggered phases of harvesting, into one with greatly increased emphasis on a terminal area fishery.

Congress itself, in passing the Fishery Conservation and Management Act of 1976 (16 U.S.C. § 1801, *et seq.*), recognized the vulnerability of the United States' commercial fishing industry to destruction as a viable competitive factor. 1976 U.S. Code, Congressional and Administrative News, Vol. 2, Legislative History at pp. 602-606. When a

very small minority is given exclusive rights to over one-half of a fishery resource and the right to utilize their fishing capacity to compete with independent fishermen for the remaining allowable catch, it is just a matter of time until many, if not all, independent fishermen are driven out of the industry. The monopolization, or even substantial restraint, of the supply of salmon for commercial processing must, and will, adversely impact the processors, consumers and the community as a whole. The federal trial court's decision, based as it is upon a concept of an inheritable right to a permanent percentage of the catch, repudiates any mechanism or considerations which could permit adjustments to prevent such consequences.

The granting of a permanent ownership in anadromous fish, in excess of 50%, to tribal members is necessarily arbitrary and illogical. A quantified ownership bears no relationship to the number of Indians who actually fish, of all Indians, or to the number of Indians who fish compared with the number of non-Indians who fish, or to the number of Indians who fish now as compared to in 1855, or to the importance of fish in their livelihood now as compared to in 1855 or to any other standard. If but one single Indian remained he would still have a hereditary right to 50% plus of all fish in his ancestral fishing grounds, whether he fished or not. The fallacy here lies not in the selection of any particular percentage. It lies in deciding this question in terms of *any* permanent percentage, and in interpreting the language of the Stevens treaty in terms of ownership concepts which are foreign to the treaty language, established law and Indian cultural concepts.

It is significant to note that neither the district court nor the court of appeals analyzes this result from the stand-

point of equal protection principles which this Court has recognized as being required in the application of the specific language and treaties now before this Court.

> . . . [We] add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with"

Puyallup Tribe v. Department of Game, 391 U.S. 392 at 403 (1968).

> The case was remanded for determination of . . .
>
> "the issue of equal protection implicit in the phrase 'in common with'" as used in the Treaty.
>
> . . .
>
> What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the *rights of other people.*

(Emphasis supplied) *Department of Game v. Puyallup Tribe,* 414 U.S. 44 at 45, 48-49 (1973).

See also Puyallup Tribe v. Department of Game, 433 U.S. 165 at 177 (1977).

By injecting the concept of a quantified ownership of in excess of 50% of the fish, this case presents a classic example of adding wholly new provisions to an Indian treaty to ameliorate a claimed injustice. This Court has repeatedly held that such interpolations are improper. In *Choctaw Nation of Indians v. United States,* 318 U.S. 432 (1943), this Court, after acknowledging the liberal view of interpretation relied on below, went on to say, in reversing the lower

court decision which was based upon "findings" of Indian intent:

> But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. (Citing cases) . . .

318 U.S. at 432.

Also:

> But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as an injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government . . . to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law.

United States v. Choctaw Nation, 179 U.S. 494 at 532-533 (1900).

Also:

> But the context shows that the Justice meant no more than the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress.

Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 at 353 (1945).

II. Federal Enforcement of the Treaties as Presently Interpreted Would be Inconsistent with the Fishery Conservation and Management Act of 1976

Congress has established a fishery conservation zone from the seaward boundary of each coastal state (3 miles) to a line 200 nautical miles into the ocean (16 U.S.C. § 1811) and has provided that the United States shall exercise exclusive fishery management authority in that zone (16 U.S.C. § 1812). The statute provides for fishery management plans to be developed by regional councils and establishes the following manadatory national standards:

> Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management:
>
> (1) Conservation and management measures shall prevent over-fishing while achieving, on a continuing basis, optimum yield from each fishery.[1]
>
> . . .
>
> (4) Conservation and management measures *shall not discriminate between residents of different States.* If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, *such allocation shall* be (A) *fair and equitable* to *all* such fishermen; (B) reasonably calculated to promote

1. "Optimum" yield is defined in 16 U.S.C. § 1802 (18) as:

"The term 'optimum', with respect to the yield from a fishery, means the amount of fish–

(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and

(B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor."

> conservation; *and* (C) carried out in such manner that *no particular individual, corporation or other entity acquires an excessive share of such privileges.*

(16 U.S.C. § 1851(a), emphasis supplied.)

Congress carefully preserved the management jurisdiction of the States within their own boundaries unless a State has taken action, or omitted to take action, the results of which would adversely affect the fishery management plan. If, as here, the United States purports to assert control over state waters, its regulation within the state waters must comply with the fishery management plan—including the mandatory national standards quoted above (16 U.S.C. § 1856).

Congress has recognized the concept of a "common fishery", the rights of all citizens to exploit the common fishery without discrimination and under equal protection concepts, and the need to prevent the restraint and monopolization of this vital industry through undue concentration of fishing rights.

The district court's interpretation of these treaty rights is in conflict with these principles so recently enunciated and reaffirmed by Congress. It requires discrimination against residents of the State of Washington; it repudiates concepts of allocation on a basis fair and equitable to *all* fishermen; it places ownership of over 50% of the state's, ~~and the nation's,~~ most valuable fishery in the treaty tribes, who constitute less than one percent of the population, and hands to them the economic power to force many, if not all, non-treaty commercial fishermen out of the industry and to dominate that industry; it ignores all concepts of national and community benefit with regard to food production and recreational opportunities; and it effectively

repudiates as irrelevant all factors relating to over 99% of the population in the case area.

III. The Present Interpretation and Application of the Treaty Language is Unconstitutional

The Constitution of the United States is of course binding upon all branches of the government—legislative, executive and judicial. There is no doubt that treaty provisions must comply with or give way to the provisions of the U.S. Constitution:

> . . . It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of its states. . . .

Geofray v. Riggs, 133 U.S. 258 at 267 (1890).

> . . . There is nothing in this language [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . .

Reid v. Covert, 354 U.S. 1 at 16 (1957).

The federal decisions before this Court effectively deny non-treaty fishermen in the State of Washington constitutionally protected rights. Citizens and residents outside the State of Washington continue to assert and exercise, on a non-discriminatory basis, their right to exploit the common fisheries. Salmon off the western coast of the United States run in mixed stock—salmon caught in the ocean off the State of Washington are returning to spawning streams in California, Oregon, Washington and Canada. Conversely, salmon returning to spawning streams in the State of Washington are caught in ocean waters off the coasts of Alaska, Oregon, California and Canada by citizens and residents of those states and that nation. Citizens and residents of Alaska, Oregon and California continue

to enjoy their right to fish off the coast of Washington and to catch Washington spawned fish off the coasts of other states.

On an argument raised for the first time some 120 years after the signing of the treaties, based upon a unique interpretation of treaty language, the non-treaty citizens and residents of the State of Washington are now judicially restricted from equally exercising those same rights. As to these citizens and residents, there now exists a discriminatory restriction upon their use of the common fishery in order to make a permanent allocation of over 50% of the state's salmon and steelhead resources to a small (.028%) ethnic minority of the citizens of the state.

This is so in spite of the precept that all citizens of the state have:

> . . . a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and (may) not, without injury to their right, be restrained of it. . . .

Martin v. Lessee of Waddell, 16 Pet. 367 at 412 (1842).

Nowhere in the Enabling Act of February 22, 1889, 25 Stat. 676, under which Washington became a state, do the citizens disclaim or surrender their rights to the common fisheries, particularly of the marginal seas.[2] That Enabling Act declares that:

> . . . the proposed states . . . shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

(Section 8)

The right of all citizens, Indian and non-Indian alike, to participate in the common fisheries in the marginal seas

2. They disclaimed only title to the *lands* reserved to the Indians (Section 4, Second).

is subject to the protection of Art. IV, Section 2 and the Fifth and Fourteenth Amendments of the U.S. Constitution. *Toomer v. Witsell,* 334 U.S. 385 (1948); and *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948).

In *Toomer* this Court held:

> [W]e hold that commercial shrimping in the marginal seas . . . is within the purview of the privileges and immunities clause . . .

334 U.S. at 402-403.

In *Takahashi,* the plaintiff challenged a California statute which denied plaintiff the right to a commercial fishing license because, although he was a long-time resident and had been a commercial fisherman for 27 years, he was "a person ineligible to (United States) citizenship." The Court struck down the statute as being an unconstitutional deprivation of rights in violation of the Fourteenth Amendment.

> [Its supposed "ownership" of the fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing . . . while permitting all others to do so.

334 U.S. at 421.

It is to be noted that the treaty before this court, by use of the word "in common with", by its own expression repudiates the idea that it was intended to, or could, create discriminatory classifications.

At least since the adoption of the Fourteenth Amendment in 1865, and certainly since the enactment of the Indian Citizenship Act (43 Stat. 253), the Indian inhabitants of Washington have not only had the right to fish at their usual and accustomed places and on their reserva-

tions, but have also had the right to participate freely and equally with non-Indians in the common fishery on marginal seas. As noted, inhabitants of other states have also exercised rights to fish in the marginal seas of their states and in Washington waters, and, as the lower court recognized and found, they catch substantial numbers of salmon outside of Washington waters and jurisdiction which would otherwise have been available to inhabitants of this State. Salmon, being an anadromous fish, is no respector of state boundaries and fishermen fishing the marginal seas (Indian and non-Indian alike) catch salmon running in mixed stocks which would otherwise return to a number of different states or to Canada.

Yet, under the district court's ruling, the State is *required* to enact and enforce discriminatory fishing regulations directed against over 99% of the population in the case area and the State is ordered to divert fishery resources owned by all citizens so as to establish a monopoly control of well over 50% of those resources in the private hands of a small minority of its citizens. In addition, the State is required to permit this ethnic minority to compete freely with the majority of the citizens in exploiting the remaining fishery resources. If a member of a treaty tribe fishes in the all-citizen fishery, that individual's catch will not count toward the tribal off-reservation share but rather becomes a further reduction in the number of fish non-treaty citizens are to be permitted to catch.

In short, under the district court's treaty interpretation and rulings, which are strained and unnecessary in the first place, non-Indians in this state are deprived of privileges and immunities held by other citizens and deprived of the equal protection of the laws with regard to their access to

and utilization of the common fisheries on the marginal seas.

Obviously, the federal district court's assumption of direct regulation and control of fisheries would not eliminate any of the constitutional defects. The protections from state action to which the non-treaty citizens of the state are entitled under the Fourteenth Amendment are also guaranteed to those citizens, as to federal actions, under the Fifth Amendment. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977).

CONCLUSION

It is believed that this is one of the most important Indian treaty cases to be presented to this Court. A full review by this Court is necessary not only to correct errors on substantive issues but also to re-establish constitutional rights of non-treaty citizens and to re-establish the State of Washington in its proper role in the management and conservancy of a sensitive public resource.

Respectfully submitted,

PAUL W. STEERE OF
BOGLE & GATES
Attorneys for Amicus Curiae, Pacific Seafood Processors Association

Of Counsel:
Ronald T. Schaps

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

CHARLES S. SIMS
BRUCE J. ENNIS
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016
DAVID H. GETCHES
University of Colorado
School of Law
Boulder, Colorado 80309
Attorneys for Amici Curiae

Of Counsel:
BURT NEUBORNE
STEPHEN L. PEVAR
GEORGE KANNAR

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The American Civil Liberties Union, the American Civil Liberties Union of Washington, and the National Congress of American Indians respectfully move, pursuant to this Court's Rules, for leave to file the within brief. Counsel for the Respondents United States and Indian Tribes and Petitioner State of Washington have consented to the filing of this brief; counsel for the Commercial Passenger Fishing Vessel Association, the Gillnetters Association, and the Purse Seiners Association have refused consent.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, and the American Civil Liberties Union of Washington is its affiliate operating in Washington State. The ACLU is dedicated to preserving and defending rights secured by the Constitution of the United States, and protecting the power of federal courts as the primary guarantors of those rights.

The National Congress of American Indians is the oldest and largest advocacy organization for American Indians in the United States. Comprised of 160 Indian tribes throughout the country, the NCAI seeks to preserve and protect rights under Indian treaties with the United States and to promote the common welfare of American

Indians.

These cases raise questions regarding treaty interpretation in which the NCAI has a particular interest. But they also raise a broader, more fundamental question concerning the continued efficacy of federal courts in protecting the rights of all Americans whether the recalcitrance of state officials and state courts who oppose federally guaranteed rights can prevent those rights from being enforced. Unless firmly rejected, the doctrine of interposition adopted sub silentio by state officials and the state courts here will hinder the vindication of these and other statutory, treaty, and Constitutional rights for years to come. Just as the ACLU has opposed state interference with the Constitutional rights of school children in the last two decades, we submit, with the NCAI, this brief in support of the historic remedial power of Article III courts.

Respectfully submitted,

BRUCE J. ENNIS
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorney for Amici Curiae

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Arizona v. California 373 U.S. 546 (1962) 15

Bell v. School Board of Powhatan County, 321 F.2d 494 (4th Cir. 1963) 34

Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) 27

Board of Supervisors of Carroll County v. United States ex rel. Reynolds, 85 U.S. (18 Wall.) 71 (1873) 34

Bradley v. School Board, 51 FRD 139 (E.D. Va. 1970) 34

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Bush v. Orleans Parish School Board, 194 F.Supp. 183 (E.D. La. 1961), aff'd. sub nom. Gremillion v. United States, 368 U.S. 11 (1961) 31

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Dayton Board of Education v. Brinkman,
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-983

STATE OF WASHINGTON, et al.,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, et al.,

Respondents.

No. 78-119

STATE OF WASHINGTON, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE STATE OF WASHINGTON, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS, AMICI CURIAE

Interest of Amici

The interest of amici appears in the foregoing motion.

Statement of the Case

Amici adopt and rely on the statements of the case set out in the Briefs for the United States and the Respondent Indian Tribes.

Summary of Argument

The District Court correctly interpreted and applied the critical provisions of the treaties at issue here. Those provisions are to be read in light of the purposes for which fishing rights were reserved, and the circumstances of the negotiating parties. So construed, the reservations of fishing rights were designed to secure for the tribes an economy and culture based on fishing (Point I.A.). Actions of the state and of commercial fishermen, however, have violated those reserved rights, in some

cases almost completely preventing the Indians from catching any salmon at all. (Point I.B.). Accordingly, the District Court found it necessary to allocate salmon between the two parties - the treaty tribes, and the non-treaty fishermen (Point I.C.). That allocation does not violate the Equal Protection Clause, because classifications on the laws of tribal membership are political, not forbidden racial, distinctions. State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, No. 77-388, 47 U.S.L.W. 4111, 4121 (January 16, 1979) (Point I.D.).

In light of the demonstrated recalcitrance of state officials, the District Court did not abuse its equitable discretion or violate constitutional requirements by enjoining the state from interfering with the court-ordered allocations (Point II). If necessary to effectuate its decisions, the court had indisputable power to enjoin state officials notwithstanding contrary provisions of state law. North Carolina Board of Education v. Swann, 402 U.S. 43 (1971) (Point II.A.). Nor is that power thrown into doubt by the Tenth Amendment or generalized principles of federalism. Where, as here, a federal court precisely tailors its remedy to

restore victims of illegal conduct to their full rights, and finds that displacement of local authorities is necessary to remedy the violation, such displacement is permissible. Hutto v. Finney, 57 L.Ed.2d 522 (1978); Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) (Point II.B.).

Finally, the judgments of the Washington courts in No. 77-983 must be reversed. The Supremacy Clause forbids state officials and state courts from relying on provisions of state law to block enforcement of federally protected rights. Abelman v. Booth, 62 U.S. (21 How.) 506 (1859) (Point III).

ARGUMENT

I. THE DECISION IN UNITED STATES v. WASHINGTON CORRECTLY INTERPRETED AND APPLIED RIGHTS RESERVED IN THE TREATIES.

The Court has held that Indian rights reserved by treaty should be construed as sufficient in scope to fulfill the purposes for which they were reserved. These purposes can be found by examining the intentions and understandings of the parties. "How the treaty in question was understood may be gathered from the circumstances." United States v. Winans, 198 U.S. 370, 381 (1905).

To find the intention and understanding of the parties as to the treaty reservation of fishing rights, the district court sifted thousands of pages of contemporaneous documents and records and studied the reports and testimony of expert witnesses. It found that the dominant purpose of the treaty was to enable Indians to continue fishing as they had been, but to allow non-Indians to fish as well. Fulfillment of this purpose today means that Indians cannot be prevented from access to any more than half of the fishery in which their rights were reserved.

A. The Purpose and Intent of the Treaties Was to Secure the Tribes' Ability to Continue an Economy and Culture Based on Fishing.

In the mid-nineteenth century, the United States sought out the Indians of the Northwest in order to persuade them to relinquish their claims to what we now know as the State of Washington. Non-Indians were settling there in increasing numbers, and the Indians' agreement was sought to prevent friction and facilitate settlement. National policy dictated that Indian title should be extinguished by negotiation rather than conquest. Joint App. 108-09; Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). Treaties were concluded in 1854 and 1855 by which the Indians gave up their rights to most of the area.

Consistent with the objectives of the United States, Indians were to be provided with places where they could reside permanently with means to remain economically self-sustaining, and maintain their way of life. These purposes are addressed in most treaties or documents by which Indian rights or lands were reserved. See, e.g., The Kansas Indians, 72 U.S. (5 Wall.) 737, 752, 754 (1886); Winters v. United States, 207 U.S. 564 (1908); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 88-89 (1918);

United States v. McGowan, 302 U.S. 535, 537 (1938); United States v. Shoshone Tribe, 304 U.S. 111, 117-18 (1938); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 686 (1965); Menominee Tribe v. United States, 391 U.S. 404, 406 (1968); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 174 (1973).

Indian treaties have been construed consistently with these purposes. Thus, in Alaska Pacific Fisheries v. United States, supra, this Court sought out the purposes of a reservation of the Annette Islands in Alaska for the Metlakahtla Indians. The islands had been selected because the Metlakahtlans "were largely fishermen and hunters, and. . . the fishery adjacent to the shore should afford them a primary means of subsistence and a promising opportunity for industrial and commercial development." 248 U.S. at 88. Accordingly, although the statute set aside only "the body of lands known as the Annette Islands," the Court concluded that Congress and the Indians intended that the adjacent fishing grounds be included in the reservation. The Court required that an otherwise lawful fish trap operated by non-Indians in the area which would "materially reduce the natural supply of fish accessible to the Indians"

be removed, because it encroached upon the exclusive fishery implied in the Indians' reservation of adjacent waters. 248 U.S. at 87.

Similarly, the Northwest Indian treaties reflect the unique circumstances of the Pacific Northwestern tribes. Because much of the region is unsuited to agriculture, it was not practical to provide the Indians with reservations of large parcels of land where they could be self-sufficient. Moreover, fishing was necessary not only for food and trade, but for the cohesion of the Indians' culture. Consequently, the treaties made special provision for continuing the pursuit of fishing by reservations of another kind:

> Reservations were not of particular parcels of land, and could not be expressed in deeds. . . . The reservations were in large areas of territory. . . . There was an exclusive right of fishing reserved within certain boundaries. There was a right outside those boundaries reserved "in common with the citizens of the territory." United States v. Winans, 198 U.S. 370, 381 (1905).

The findings of the District Court, supported by a vast array of documents and reports of experts, reveal the tremendous importance of these reservations of fishing rights to the Indians at the time of the

treaties. (Joint App. 99-113). Fearing that they would be unable to continue using their fishing places as they had in the past, the Indians were reluctant to give up their claims to the territory, which now comprises much of the State of Washington. The Indians offered to cede half their land, retaining the rest to continue their traditional fishing and food gathering, but they were advised by the United States negotiators that they would fare better ceding virtually all of their land and retaining small tracts for homes and the right to fish throughout the ceded areas. (Joint App. 330-31). 1/

The United States negotiators knew that the Indians had engaged in a substan-

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1/ The treaty minutes quote an Indian negotiator as saying:

> I wish to speak my mind as to selling the land - Great Chief. What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food.

After being assured that the small land reservation was only for their homes, and that they would remain free to fish as before at all their usual places, the Indians assented to the treaty. See Skokomish v. France, 320 F.2d 205, 210 (9th Cir. 1963).

tial trade in fish among tribes over a wide area historically, and at the time of the treaties they were the major supplier of fish to other non-Indians. (Joint App. 102, 329, 334, 369-372, 374). The negotiators recognized the contribution of Indian fishers to the territorial economy and believed that the Indians should be encouraged to continue trading in fish. (Joint App. 102, 333-34, 382).

Besides sharing the intention that Indian fishing should continue as an important economic activity, both the government and Indian negotiators understood that fishing was an essential ingredient of Indian social structure and culture. Seasonal movements, living patterns, religious activity, and family and community organization centered around the fish resource. (Joint App. 100-01, 365, 368-69, 375, 377-79, 382). Neither party to the negotiations intended that allowing non-Indians to fish would interfere with traditional Indian fishing or perceived any need for restricting Indian fishing. (Joint App. 113, 383).

B. Non-Indian Fishing and State Law Have Operated to Defeat the Purposes of the Treaties.

The growth of a lucrative non-Indian fishing industry later brought pressures to bear on what had seemed to be an inexhaustible resource. At first, Indians were blocked from access to their fishing places because land ownership had been transferred to non-Indians. This problem was confronted in United States v. Winans, supra, where the Court held that the treaties reserved to the Indians a right of access to their fishing places, and rejected a lower court holding that Indians' rights under the treaty were no greater than the rights of other inhabitants. Then, as a state regulatory regime grew and non-Indians began using other techniques and gear, most of the fish were captured by others before reaching Indian fishing areas. Fish that reached the Indians were typically considered necessary for spawning escapement and therefore unavailable to Indian fishers for conservation reasons. The Court has encountered this second problem - limitations upon Indian treaty fishing resulting from state regulatory schemes and non-Indian fishing - more recently, and has invalidated restrictions on Indian treaty fishing, and

preemption of fishing by non-Indians, except where strictly necessary in the interests of conservation. 2/

Washington has urged that the only special treaty fishing right enjoyed by Indians outside their reservations is the right of access to their fishing places enforced in Winans. But physical access is meaningless if there are few or no fish there to be harvested. Non-Indians fishing under Washington law have been able to interdict almost all of the fish available for harvest before they reached usual and accustomed Indian fishing places. (Joint App. 122, 179-80). Remaining fish have been denied Indian fishers on conservation grounds. (Joint App. 180). At the time of the trial below, only about 5% of the harvest was being taken by Indians at their

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2/ See, e.g., Tulee v. Washington, 315 U.S. 681 (1942) (state license fee may not be charged as a condition on the exercise of Indian treaty rights); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (treaty fishing may be limited by state law only if necessary for conservattion); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973)(limitation to hood and line fishing for steelhead, preventing commercial net fishing by the Indians, invalidated as discriminatory against Indian treaty rights); Puyallup Tribe v. Department of Game, 433 U.S. 164 (1977)(approving allocation of 45% of fish to Indian fishermen on one river as a means of avoiding discrimination). See also Antoine v. Washington, 420 U.S. 194 (1975).

off-reservation "usual and accustomed" grounds. Exhibit PL-74. 3/ As the Court of Appeals concluded,

> In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory.
>
> 520 F.2d at 685.

This result, no less than that in Winans, "is certainly an impotent outcome to negotiations and convention, which seemed to promise more and give the word of the Nation for more." 198 U.S. at 380.

The Court in Winans condemned monopolization of the fishery by non-Indians licensed by the state to operate a fish wheel which intercepted most of the fish before Indians had an opportunity to take them. The regulatory scheme struck down by the courts below had the same effect, and was equally objectionable. The fishery as it existed prior to the decision below was not the "in common" fishery intended by the treaties. If it were, then the Indians reserved nothing "but

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3/ This figure includes "special" Indian treaty fisheries which the Department of Fisheries had instituted to assure tribes of a "fair share" of the fishery (Joint App. 132, 136, 143, 152, 175-76) as well as harvests by tribes with usual and accustomed places located in areas where non-Indian harvests could not so completely deplete the runs. (Joint App. 164).

such as they would have without the treaty," a result held impermissible in Winans. 198 U.S. at 380.

C. The District Court Correctly Enforced the Purpose of the Treaties by Allocating Fishing Opportunity.

In Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II), this Court proposed that the available fish be "fairly apportioned" between Indian and non-Indian fishing. Subsequently, a state court allocation of 45% of the Puyallup fishery to the treaty fishers was sustained in Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (Puyallup III). Here, the District Court found that to give the intended meaning to the treaty reserved rights, Indians must have an opportunity to fish for up to half the harvestable fish destined for their usual and accustomed places. 4/ The District Court's construction of the Indian rights reserved in the treaties comports

4/ The Court excluded from the allocation of opportunity fish needed for escapement, fish taken pursuant to a separate treaty right on the reservations, and fish taken off-reservation for subsistence and ceremonial purposes. The latter exception was not challenged on appeal. 520 F.2d at 690.

with the evidence and applicable legal principles.

Reserved rights to natural resources are broad enough to encompass the full extent of the Indians' reasonable needs. As the Ninth Circuit observed, Indian water rights cases furnish the closest legal analogy. Even where they are implied, rather than (as here) express, the Court has held that reserved rights can only be limited in amount to the total reasonably required by the needs of the reserving party from time to time indefinately in the future. See Arizona v. California, 373 U.S. 546 (1962). Reserved rights are otherwise unlimited, absent a specific qualification, Alaska Pacific Fisheries v. Unites States, supra, even where enforcement of the reserved right has an adverse effect on others. Id.; Winters v. United States, 207 U.S. 564 (1908)(land reservation carries implied reservation of water sufficient for full Indian needs, notwithstanding competing needs of non-Indians).

Here, the reservation was express, but it was also qualified by a grant of rights to non-Indians to fish "in common" with Indians. Therefore, Indian rights are non-exclusive. To what extent does this allow them to be limited?

The District Court held that Indian treaty fishing could be limited by:

(a) The number of fish required for spawning escapement and any other requirements established to be reasonable and necessary for conservation, and

(b) The number of harvestable fish non-treaty fishermen may take at the tribes' "usual and accustomed grounds and stations" while fishing "in common with" treaty right fishermen.

(Joint App. 88).

The first limitation on reserved "in common" Indian treaty fishing rights had been announced in Puyallup I. The second was added in recognition of the treaty parties' understanding of the"in common" grant. The Court found that the tribes attached primary significance to the need for fish for traditional tribal ceremonial and personal subsistence and would not have granted away their right to meet these needs. These tribal needs, like needs for spawning escapement, were to be deducted before determining the scope of the fishing right granted to the government for the benefit of non-Indians. The remainder, "harvestable fish," which are available for commercial fishing, were to be equally available to treaty and non-treaty fishers. Thus, it was decreed that

"non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations." (Joint App. 89).

At the time of the treaties no one anticipated any restriction or interference in seeking the abundant fish resource. (Joint app. 113). The District Court had to determine what limitations would be compatible with the purposes of the Indians' reservations of fishing rights, given the unforseen competition for fish. Several reasons support the Court's decision that the Indians' fishing opportunity could be limited to as few as half the fish. First, the parties were each sovereigns with equal dignity in the negotiations. Although the Indians were more numerous than non-Indians in the territory and all parties understood that they would do most of the fishing, the Indians' grant of rights was not made relative to the number of fishers or interest in fishing by individuals represented by either sovereign. Now that Indians have been outnumbered[5/] and there is more pres-

5/ The record does not disclose actual numbers of Indian fishers at present. The figures used by the state and the fishing groups which challenge the Indians reflect only those Indians who fished at the time United States v. Washington was tried. At

(continued on next page)

sure by non-Indian individuals to fish, the same principle dictates no greater rights for non-Indians. The tradition of Indian sovereignty, the backdrop against which treaties must be read, McClanahan v. Arizona State Tax Commission, 411 U.S. 164 1973), requires that tribal treaty rights continue to be analyzed as the rights of the succeeding political entities rather than as the several rights of constituent individuals. Id., 411 U.S. at 481. Second, the Court supported its finding as to the intent of the parties by reference to documents and expert testimony and to treaty era dictionaries for the definition of "common." 6/

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that point, Indian fishing had been vigorously suppressed by state action, and many Indians who fished off-reservation, other than as a part of the "all citizen" fishery, were considered to be fishing illegally. See Joint App. 115, 122, 128, 143, 144, 158, and 170-71.

6/ The State has suggested that it would have been more appropriate for the Court to have utilized notions of English common law which employed a concept known as a "common of piscary." State Br. 48-53. For a number of reasons that concept is not useful here: (1) it defined rights of individuals in a public resource vested in the government, rather than rights which exist as a result of reservations or grants in transactions between sovereigns. (2) The Indians should not be held to have understood the niceties of the English

(continued on next page)

Any allocation to less than an equal opportunity would have been untenable. If the tribes had ceded half, rather than virtually all, of their territory to the United States as suggested by one Indian negotiator, their remaining reservation would have carried with it the right to an exclusive fishery in half their former territory. Menominee Tribe v. United States, 391 U.S. 404 (1968); Alaska Pacific Fisheries v. United States, supra. But the United States treaty negotiators persuaded the Indians that they would be in a more advantageous position by retaining only small, residential tracts, and reserving the right to fish "in common with the

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common law. Indian treaties are to be construed as they understood them and "as justice and reason demand. . . without regard to technical rules." United States v. Winans, 198 U.S. 370, 380-8 (1905); Jones v. Meehan, 175 U.S. 1, 10-11 (1899); Choctaw Nation v. Oklahoma, 397 U.S. 620, 630 (1970). (3) The common law in this area was the subject of considerable confusion in terminology. State Br. 50 n. 28; see also Tribes' Br. As such, ambiguities in construction of reserved rights must be resolved in favor of the Indians. United States v. Winters, 207 U.S. 564 (1908); Seufert Bros. v. United States, 249 U.S. 194, 199 (1919)(rejecting "the artificial meaning which might be given [the treaty] by the law and by lawyers.").

citizens" at all their usual and accustomed places throughout the vast ceded area. (Joint App. 330). For the reserved right to fish in common with citizens at usual and accustomed places to be better than an exclusive right to fish in half of the areas formerly claimed by Indians, Indians could not be relegated to less than an opportunity to take half the fish destined for those places.

If the treaty reserved right to fish was to fulfill its purpose, the Court had to fashion an equitable remedy broad enough to assure that the equal allocation of fishing opportunity was effective but narrow enough to prevent substantial disruption of resource management. These goals were correctly met by an injunction preventing the state from adopting or enforcing

> any regulation which effectively limits the harvest by treaty tribes on future runs unless the state's regulatory scheme provides an opportunity for tribes to take, at their usual and accustomed fishing places, by reasonable means feasible to them, an equal share of the harvestable number of each species of fish that may be taken by all fishermen, provided that for the present time defendants shall not be required to achieve mathematical precision in so allocating the fish.
>
> (Joint App. 223).

D. The Equal Protection Clause Does Not Bar Enforcement of Indian Treaty Rights by Allocation.

The Washington Supreme Court held, in No.77-983, that the Equal Protection Clause of the Fourteenth Amendment forbids allocation of fishing opportunity or creation of any special rights for Indians. Washington State Commercial Passenger Fishing Vessel Ass'n. v. Tollefson, 89 Wash.2d 276, 571 P.2d 1373 (1977); Puget Sound Gillnetters Association v. Moos, 88 Wash.2d 677, 565 P.2d 1151 (1977). See also Purse Seiners Vessel Owners Association v. Moos, 88 Wash. 2d 799, 576 P.2d 205 (1977). That holding is manifestly incorrect.

This Court has regularly sustained legislation and treaties singling Indians out for special treatment. Just this term, in rejecting an argument that laws classifying on the basis of tribal membership are impermissible racial classifications, the Court held:

> "[T]he unique legal status of Indian tribes under federal law" permits the Federal Government to enact legislation singling out tribal Indians legislation that might be otherwise constitutionally offensive. State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, No. 77-388, 47 U.S.L.W. 4111, 4121 (January 16, 1979) (citation omitted).

Representative of the numerous cases rejecting the equal protection argument exhumed here by Washington is Morton v. Mancari, 417 U.S. 535 (1974), where the Court upheld a federal statute providing employment preferences in the Bureau of Indian Affairs (BIA) for qualified Indians, 26 U.S.C. §472. The Court observed that the preference was "granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities." 417 U.S. at 554. Dismissing an equal protection argument, the Court stated:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.
>
> 417 U.S. at 552.

See also Fisher v. District Court, 423 U.S. 382 (1976)(denial of Indian access to state courts not an impermissible racial classification); United States v. Antelope, 430 U.S. 641 (1977)(federal criminal statutes

do not violate equal protection guarantees by subjecting individuals to federal prosecution by virtue of their status as Indians. 7/

In deciding the Puyallup cases, this Court has specifically sustained the unique nature of Indian fishing rights under the treaties. In Puyallup I, the Court held that regulation of treaty fishing was permissible only when it was "necessary for conservation," 391 U.S. at 399, 401, and that "the measure of legal propriety of those kinds of measures is distinct from the federal constitutional standard concerning the scope of police power of the state." 391 U.S. at 401 n. 14.

Far from holding the special treaty fishing right of Indians unconstitutional, the Court has insisted that this right be afforded protection equal to that afforded the fishing rights of politically powerful non-treaty fishermen. Equal protection does not require that every person have

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7/ This term the Court denied certiorari on the question of whether equal protection principles are violated by a statute (25 U.S.C. §194) imposing the burden of proof "in trials about the right of property...upon the white person" whenever an Indian is a party on the other side. Wilson v. Omaha Indian Tribe, Nos. 78-160, 78-161, 47 U.S.L.W. 3326 (Nov. 13, 1978). Certiorari was granted on other issues in the case.

rights equivalent to those of every other, but rather that those rights which one does have be enforced equally, without constitutionally unjustifiable distinctions. In Puyallup I, this Court remanded the case for the state court to find whether the regulation was a "reasonable and necessary" conservation measure, warning that "any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'." 391 U.S. at 403. This caveat led the state and its courts to believe that the Supreme Court had endorsed a meaning of "in common" which demanded equal rights for all, Indian and non-Indian. But when Puyallup II was decided, any apparent ambiguity in the equal protection directive of Puyallup I was clarified. The Court overruled a state court judgment that a ban on net fishing was a reasonable and necessary conservation measure which satisfied the Court's standards. Even though, as the state contended, the ban applied equally to all persons, Indians and non-Indians, the Court held the regulation to be discriminatory as to the Indians' treaty right to fish. 414 U.S. at 48. No doubt was left that equal protection analysis in this context requires consideration of the unique

circumstances (and different legal rights) of the parties. The Court suggested a solution in the form of an allocation of fishing opportunity between Indians and non-Indians.

Thereafter, in Puyallup III, the Court reversed the state Supreme Court's holding that the allocation of a specific percentage of fish to treaty tribes would violate the Equal Protection Clause, and sustained an allocation of 45% of the steelhead run in the river to the Indian net fishers.

In short, the Court has rejected both the general argument that legislation singling out Indian tribes is ipso facto based on impermissible racial factors, and the application of that argument to the specific facts of the treaties at issue here.

II. IN LIGHT OF THE STATE OF WASHINGTON'S FAILURE TO ADOPT REGULATIONS PERMITTING INDIAN FISHERMEN TO HARVEST THEIR TREATY SHARE OF FISH, THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE DISCRETION BY ENJOINING THE STATE FROM INTERFERING WITH THE COURT'S ALLOCATION.

Throughout American history, states have occasionally asserted a power to defy federal judicial power. On each occasion, this Court has staunchly reaffirmed the remedial powers of Article III courts to vindicate federally protected rights, "anything in the Constitution or laws of any State to the Contrary notwithstanding." See, e.g., Abelman v. Booth, 62 U.S. (21 How.) 506 (1859); Cooper v. Aaron, 358 U.S. 1 (1958). Without the capacity to provide effective relief to litigants, the exercise of jurisdiction by a federal court would be inconsistent with Article III. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). The court's power to resolve the merits flows from its responsibility effectively to resolve "cases and controversies," Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803). Failure to provide a necessary remedy strikes at the heart of the judicial function and cannot be reconciled with Chief

Justice Marshall's interpretation of jucicial power and responsibility.

Accordingly, once the District Court resolved the merits of the controversy - by holding that the defendants had violated tribal treaty rights to a fair apportionment of the fish that normally would pass through the tribes' usual and accustomed off-reservation fishing stations - the Court was obligated to afford plaintiffs an effective remedy. Marbury v. Madison, supra; Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); United States v. Richardson, 418 U.S. 166, 191 (1974) (Powell, J., concurring); Jacobs v. United States, 290 U.S. 13 (1933). Moreover, as the Court of Appeals observed, the enforcement of the tribal fishing rights presented no remedial issues that had not previously been resolved by this Court in related areas of the law. See, e.g., Brown v. Board of Education (II), 349 U.S. 294 (1955), Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), and Milliken v. Bradley (II), 433 U.S. 267 (1977) (school desegregation); Reynolds v. Sims, 377 U.S. 533 (1964) (re-apportionment); Hutto v. Finney, 57 L.Ed.2d 522 (1978) (cruel and unusual prison conditions); Hills v. Gautreaux, 425 U.S. 284 (1976) (housing); Lemon v. Kurtzman, 411 U.S. 192 (1973) (religious aid to public schools).

Relying on the principles of those cases, the district court originally entered a non-intrusive order requiring state officials to issue regulations necessary to assure the tribes, who had prevailed in the liability phase of the lawsuit, their fair apportionment of fish. As time went on, however, it became increasingly clear that the state would not implement the federal court judgment.[1/] The district court thereupon undertook a carefully measured series of additional approaches, before finally withdrawing the tribal allocation of fish from state regulation.[2/] The state and the commercial fishermen attack the present injunction as unlawfully requiring state officials to perform activities not authorized by state law, and as unlawfully invading the sovereign powers of the state over the fishery resource in Washington State. Neither of these contentions has merit.

1/ The State's contention that it "could not" implement the federal decree because it is prevented by state law from doing so, is answered by the Supremacy Clause. See, infra, at 29-35.

2/ The State concedes that "[t]he determinations by the Washington State courts...rendered it impossible to enforce" the initial federal decree, and that the more detailed orders of August, 1977 challengeed here were a response to those decisions. The circumstances leading to the August, 1977 orders are extensively detailed in the statement of the case in the briefs of the United States and the Indian tribes.

A. The District Court Properly Exercised Its Equitable Power to Protect Indian Fishing Rights, Notwithstanding the Absence of Any Statute Specifically Authorizing Enforcement of Indian Fishing Rights.

The District Court faced "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century," as a result of state court orders enjoining state officials from enforcing the federal judgment by which they were bound. [3/]

The court could have directly ordered state officials to perform acts that the state courts had improperly enjoined, and imposed contempt sanctions of coercive fines, or imprisonment, for failure to do so. Instead, the Court dissolved its previous mandatory orders so as to avoid "a direct confrontation that would have raised serious questions of federalism." [4/] The court prohibited the state officials from interfering with the treaty allocations, and undertook, with expert assistance, the difficult and thankless task of exercising control over the fish harvest and treaty allocations. [5/]

3/ United States v. Washington, 573 F.2d 1123, 1126 (9th Cir. 1978).

4/ Id. at 1129.

5/ Memorandum Order and Preliminary Injunction, August 31, 1977, St. Pet. App. at 35.

Based on these facts, amici suggest that these cases do not raise the question whether the court exceeded its equitable or constitutional powers by directing state officials to perform functions that under state law they lack authority to perform, for the court has not done so.

Nevertheless, if the Court reaches the question, long-settled law makes clear the power of the federal court to enforce, under equitable principles, rights guaranteed by federal law notwithstanding any contrary provision of state law.

The Supremacy Clause is a complete answer to the objection of the state and commercial fishermen: it establishes "this Constitution, and the Laws of the United States...and all Treaties made...under the Authority of the United States" as the "Supreme Law of the Land,...any thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Constitution, Art. VI (emphasis added). State officials, and state judges, are bound by the Supremacy Clause. Cooper v. Aaron, 358 U.S. 1 (1958).

It is a settled principle that federal courts may enjoin state officials from using power that has been delegated to them, or require state officials to undertake tasks

not authorized or forbidden them by state law, when necessary to effectuate decisions on the merits. See, e.g., North Carolina Board of Education v. Swann, 402 U.S. (1971) (invaliding state anti-busing statute); Griffin v. Country School Board of Prince Edward County, 377 U.S. 218 (1964) (ordering levy of a tax); Bush v. Orleans Parish School Board, 194 F.Supp. 183 (E.D. La. 1961), aff'd sub. nom. Gremillion v. United States, 368 U.S. 11 (1961), id., 191 F.Supp. 871, aff'd 367 U.S. 908 (1961), id., 190 F.Supp. 871, aff'd 366 U.S. 212 (1971), id., 188 F.Supp. 916, aff'd 365 U.S. 569 (1961), Lee v. Macon County Board of Education, 267 F.Supp. 458, aff'd 389 U.S. 215 (1967), Poindexter v. Louisiana Financial Assistance Com., 296 F.Supp. 686, aff'd 393 U.S. 17 (1968), Hall v. St. Helena Parish School Board, 197 F.Supp. 649, aff'd 368 U.S. 515 (1962), South Carolina State Board of Education, 296 F.Supp. 199, aff'd 393 U.S. 222 (1968)(integration ordered notwithstanding state law effectively denying officials power to operate biracial schools); Labette County Commissioners v. U.S. ex rel. Moulton, 112 U.S. 217 (1884)(ordering tax levied in contravention of state law); Graham v. Folsom, 200 U.S. 248 (1906)(ordering compliance with a contract by local officials notwithstanding state law forbid-

ding such compliance); Tacoma v. Taxpayers Of Tacoma, 357 U.S. 320 (1958) (municipality permitted to apply for federal license to dam waters despite state law withholding such power); Milliken v. Bradley (II), 433 U.S. 267 (1977) (ordering remedial expenditures of funds with no warrant in state law.) 6/ The contention that lack of state-granted authority renders federal enforcement impossible is contradicted directly by the Supremacy Clause. It is precisely this lack of authority that has often necessitated federal court enforcement of federally protected rights. Compare, e.g., Ex Parte Rice, 273 Ala. 712, 143 So.2d 848 (1962) (holding that Alabama state courts are powerless to order reapportionment), with Reynolds v. Sims, 377 U.S. 533 (1964) (affirming Alabama federal district court's

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6/ See also West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951), where this Court, faced with an argument based on a state court interpretation of the state constitution denying effect to federally protected rights, met the issue head-on by reading the state constitution differently than had the state court. In an opinion by Mr. Justice Frankfurter, the Court said, "[D]eference is one thing; submission... is another." Id. at 28. The interpretation of state law here, permitting the state to allocate fish except for the enforcement of federally protected rights is similarly without fair support. See generally Hill, The Inadequate State Ground, 65 Col.L.Rev. 943 (1965).

order to reapportion state legislative districts). An announcement by the State of Washington that, as a matter of state law, there is no authority to allocate fish to the treaty tribes can no more prevent effective remedy of tribal fishing rights than could North Carolina' announcement that, as a matter of state law, its officials had no authority to operate integrated schools. See North Carolina Board of Education v. Swann, supra. 7/ If the state intends to manage its fishery resource, the Supremacy Clause requires that it operate its fishery in conformity with federal treaty law, "anything in the...Laws of any state to the contrary notwithstanding." 8/

7/ As Chief Justice Burger there explained for a unanimous Court:

> [S]chool authorities have wide discretion in formulating school policy.... However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall. State policy must give way when it operates to hinder vindication of federal constitutional guarantees. 402 U.S. at 45. (emphasis added).

8/ Circuit Judge Henley has stated in a similar context, "[T]he obligation of the Respondents does not depend on what the Legislature may do.... If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States." Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971), aff'd sub nom., Hutto v. Finney, 57 L.Ed.2d 522 (1978).

Of course, when a state has directed certain of its officials to exercise portions of its plenary power, courts should ordinarily respect the state's own allocation of power and responsibility. 9/ But it defies reason, and the consistent jurisprudence of this Court, to assert that a state could thwart its constitutional responsibility to conduct its fisheries in a manner consistent with federal treaty rights by announcing, as a matter of "state law," that its officials had no power to do otherwise. North Carolina

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9/ See, e.g., Bell v. School Board of Powhatan County, 321 F.2d 494, 499 (4th Cir. 1963); Thaxton v. Vaughan, 321 F.2d 474, 477 (4th Cir. 1963); Wright v. Greensville County School Board, 309 F. Supp. 671, 677 (E.D. Va. 1970), rev'd on other grounds, 442 F.2d 570 (4th Cir. 1971), rev'd. 407 U.S. 451 (1972); Bradley v. School Board, 51 FRD 139, 142 (E.D. Va. 1970). These cases are cited by the commercial fishermen (Gillnetters Br. at 52) for the erroneous proposition that the state can escape altogether its plenary power and responsibility to operate its fisheries in conformity with federal law by announcing that no officials have the power to obey federal law. Missouri ex rel. Laclede Gas Light Co. v. Murphy, 170 U.S. 78 (1898); United States ex rel. Johnston v. County Court, 95 U.S. (5 Otto.) 769 (1878); and Board of Supervisors of Carroll County v. United States ex rel. Reynolds, 85 U.S. (18 Wall) 71 (1873), also erroneously cited by the Gillnetters for this proposition, are in fact cases holding simply that mandamus is not the correct remedy to enforce compliance by a state official with an unclear federal right. Indeed, at least one of these cases suggests that injunctive relief would be available to enforce such compliance. See United States ex rel. Johnson v. County Court, supra.

Board of Education v. Swann, 402 U.S. at 45; Cooper v. Aaron, 358 U.S. at 17; United States v. Peters, 5 Cranch (9 U.S.) 115, 136 (1809). The treaty right operates as a direct restraint on the state and its officials, "no matter what was said in local statutes." Id.; Ward v. Love County, 253 U.S. 17, 21 (1920). The District Court did not act improperly in requiring state officials to take measures necessary to enforce rights they had violated, despite contrary provisions of state law.

B. The District Court Properly Exercised Its Equitable Power to Protect Indian Fishing Rights by Removing the Treaty Allocation from Control of Recalcitrant State Officials, and Assuming Control of That Portion of the State Fishery.

The state has raised, but not briefed, the remedial question whether the district court's assumption of responsibility for allocating fishing opportunity to treaty fishers violates the Tenth Amendment or principles of of federalism. Amici suggest that the question need not be decided. Because the state concedes that it will undertake in good faith to enforce any treaty rights declared by this Court - and because all parties agree that such state administration is desirable - continued federal court management of the

fishery resource will not be necessary. In these circumstances the question is moot.

If the Court does reach the question, however, the orders of the District Court should be upheld.

The state has initial authority by virtue of its police power to regulate the taking of fish and game, Geer v. Connecticut, 161 U.S. 519 (1896). But the sovereign power of a state in this field must yield to an exercise of paramount federal power. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) (Congressional power, under the Commerce Clause, to authorize dams that will destroy existing runs of fish); First Iowa Hydro-Electric Co-Op. v. FPC, 328 U.S. 152 (1946) (same); Missouri v. Holland, 252 U.S. 416, 432 (1920) (preemption of state control over fish under treaty power).[10/]

10/ Congress has never sought to exercise, and this Court has never sanctioned, the scope of federal control over state schools, Dayton Baord of Education v. Brinkman, 433 U.S. 406, (1977), Milliken v. Bradley, 418 U.S. 717 (1974); police, Rizzo v. Goode, 423 U.S. 362 (1976), Kelly v. Johnson, 425 U.S. 238 (1976); or prisons, Hutto v. Finney, 57 L.Ed.2d 522 (1978), as has been common in the field of fish and game resources.

Even assuming that the Court's decisions concerning the scope of federal equitable power to displace local authorities in areas of sovereign state functions are directly applicable, those decisions support the carefully measured response of the district court to "the state's extraordinary machinations in resisting the decree." United States v. Washington, supra, 573 F.2d at 1126.

The governing principles are familiar. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad...." Swann v. Charlotte-Mecklenburg Borad of Education, 402 U.S. 1, 14 (1971). The decree must be remedial in nature, Milliken v. Bradley (II), supra, 433 U.S. at 290, and the Court must tailor the scope of the remedy to fit the nature and extent of the state violation of supreme federal law. Dayton Board of Education v. Brinkman, supra, 433 U.S. at 420. Finally, the federal courts must take into account the interest of state and local authorities

in managing their own affairs, consistent with the Constitution. Milliken v. Bradley II, 433 U.S. at 291; Hutto v. Finney, 57 L.Ed.2d at 532 n. 9.

Clearly, principles of federalism prohibit federal courts from exercising the prerogatives of local officials except to remedy a violation of supreme federal law, and then only as a last resort, for only so long as is necessary. Milliken v. Bradley II, 433 U.S. at 291. Hutto v. Finney, 57 L.Ed.2d at 532 n. 9. Cf. Mitchum v. Foster, 407 U.S. 225, 238-42 (1972) (federalism does not limit judicial power to enforce civil rights under 42 U.S.C. §1983). However, the court below attempted for nearly three years to remedy the violation of federally protected treaty rights only to find the recalcitrance of state officials prevented any remedy less intrusive than the temporary displacement of state authorities. Compare Cooper v. Aaron, supra; Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976) (South Boston High School receivership). See also Hutto v. Finney, 57 L.Ed.2d at 532 & n. 9; Milliken v. Bradley II, 433 U.S. at 410; Reynolds v. Sims, supra. The District Court's remedy was precisely tailored to restore the victims of illegal conduct to the position they would have occupied in the absence of such conduct. Milliken v.

Bradley I, 418 U.S. at 744; Dayton Board of Education v. Brinkman, 433 U.S. at 420. As the Court observed just last term, in affirming a comprehensive order displacing the prerogatives of local officials,

> [S]tate and local authorities have primary responsibility for curing constitutional violations. If, however, "[t]hose authorities fail in their affirmative obligations... judicial authority may be invoked..." Once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies...." In this case, the District Court was not remedying the present effects of a violation in the past. It was seeking to bring an ongoing violation to an immediate halt. Cooperation on the part of Departmental officials and compliance may justify elimination of [federal court oversight] in the future, but it is entirely appropriate for the District Court to postpone any such determination until the Department's progress can be evaluated. Hutto v. Finney, 57 L.Ed.2d at 532 n. 9.

Where, as here, the necessity for displacing local authorities is "established by factual proof and justified by a reasoned statement of legal principles," Dayton Board of Education v. Brinkman, 433 U.S. at 410, principles of federalism do not bar such displacement.

Nor is the Tenth Amendment's reservation of non-delegated powers to the state implicated by a federal court judgment enforcing rights based on treaties enacted under the

exclusive treaty power, U.S. Constitution, Art. II, §2, cl. 2. Compare Milliken v. Bradley II, 433 U.S. at 291. Equally with the Fourteenth Amendment, the treaty power is a prohibition of unlawful state conduct. Because of the Supremacy Clause, and the clear delegation of the treaty powers to the United States by the Constitution, a state's claim of sovereignty based on the Tenth Amendment or general federalism principles cannot overcome enforcement of Indian treaty rights. Worcester v. Georgia, 31 U.S. (6 Peters) 515 (1832). Indeed, a decision to the contrary would require that Worcester, a cornerstone of constitutional law, be overruled. 13/

The District Court has not attempted to alter permanently the structure of local governmental entities, cf. Milliken v. Bradley I, supra, or to mandate a particular structure of state or local financing, cf. San Antonio Independent School District v.

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3 / The state of Washington's reply to the federal courts in these cases recalls Andrew Jackson's challenge to this Court after Worcester v. Georgia:

> John Marshall has made his decision.
> Now let him enforce it.

Morison, The Oxford History of the American People, at 450 (1965).

Rodriquez, 411 U.S. 1 (1973). Nor has it interfered in the functioning of a state agency on a broad, prophylactic basis, without regard to the necessity of carefully matching its remedy to suit the violation. Cf. Rizzo v. Goode, supra. It has, rather, sparingly and carefully used its equitable discretion, with due regard for the principles of federalism, to provide the only remedy that will effectively remove a condition that "offends the Constitution," and remedy those whose rights have been infringed. As such, the chosen remedy constitutes a valid and necessary exercise of its equitable jurisdiction, and should be affirmed.

III. THE STATE OF WASHINGTON MUST MANAGE AND REGULATE ITS FISHERIES SO AS TO ENSURE THAT FEDERALLY GUARANTEED FISHING RIGHTS ARE PROTECTED; STATE COURT JUDGMENTS PREVENTING AND OBSTRUCTING SUCH ENFORCEMENT ARE VOID UNDER THE SUPREMACY CLAUSE.

Amici have argued that the federal District Court was obligated to provide an effective remedy for defendants' violations of treaty fishing rights. Moreover, in light of the recalcitrance of state officials, the remedy chosen was consistent with settled principles of federalism and Tenth Amendment jurisprudence. As a necessary corrollary to those propositions, amici submit that the Washington state courts acted improperly by obstructing the enforcement of Supreme federal law in the cases on review in No. 77-983. By restraining state officials, as a matter of state law, from obeying a federal judgment and decrees that had been affirmed and rendered final by denial of certiorari in this Court, the state court acted in plain disregard of the requirements of the Supremacy Clause. Cooper v. Aaron, 358 U.S. 1 (1958); Abelman v. Booth, 62 U.S. (21 How.) 506 (1859); Prigg v. Pennsylvania, 41 U.S. (16 Pet.)

539 (1842). 14/

It is not surprising, and highly relevant, that the state's brief does not seek affirmance of the state court judgments, does not raise or even mention those judgments in its carefully drawn list of questions presented, and does not brief the propriety of the state court's assumption of jurisdiction over officials already bound by federal judgments and decrees. Nor does it contend that the state courts had power to adjudicate and destroy the rights of treaty tribes and treaty fishermen over whom it had not assumed jurisdiction. Indeed, the state concedes that the Washington Supreme Court may not rely on state law to obstruct enforcement of the rights estab-

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14/ There is another ground, as well, on which to reverse the state court decisions. Amici suggest that the constitutional provisions preventing the exercise of state jurisdiction over Indian tribes and their protector, the United States, prohibit exercise of state court jurisdiction to construe the rights of treaty tribes and their members when no tribal members are before the Court, and when the state court is advised that an action construing those rights is pending in a federal forum in which all interested parties may participate. Cf. Fed.R.Civ.P. 19(b) (indispensible parties). Although the Court has held that the Constitution does not deprive the state courts of all jurisdiction over off-reservation activities of Indians, Puyallup Tribe v. Washington Game Dept., 391 U.S. 392, 296-97 n. 1 (1968) (Puyallup I), and has sanctioned state court suits to construe treaty language when the treaty beneficiaries were before the state courts, id., those decisions do not support the state court's actions here.

lished in the federal actions:

> Whatever the decision of this Court, we will implement it. The state believes that after a decision by this Court it will be in a position to comply with the District Court orders...we do not believe the state could or would take a different point of view. Wash. Br. at 96.

The state's concession is well advised. This Court has consistently held that state courts may not rely on provisions of state law to block enforcement of federally protected rights, a rule compelled by the very language, and meaning, of the Supremacy Clause.

Thus, in Martin v. Hunter's Lessee, 1 Wheat. 304 (U.S. 1816), the Court established that a Virginia law providing for forfeiture of all lands of British subjects could not withstand a federal treaty providing that there would be no such confiscations.

In Prigg v. Pennsylvania, supra, and Abelman v. Booth, supra, the Court struck down state statutes which obstructed the right to re-capture fugitive slaves secured by federal statutory and constitutional law. In Ward v. Love County, 253 U.S. 17 (1920), the Court struck down a state law that prevented enforcement of Cherokee rights guaranteed by Congress. In Testa v. Katt, 330 U.S. 386 (1947), the Court held

that state law could not justify a state court's failure to enforce, and provide a forum for enforcement, of a federal statutory right. And in Antoine v. State of Washington, 420 U.S. 194 (1975), the court invalidated state laws conflicting with the exercise of hunting and fishing rights guaranteed by federal treaties. See also Dice v. Akron, C. & Y. R.R. Co., 342 U.S. 359 (1952) (rejecting Ohio claim that state rule, preventing full enforcement of federal rights, could be enforced); Graham v. Folsom, 200 U.S. 248 (1906) (invalidating state attempt to avoid Contract Clause rights by depriving municipality of power to comply); Labette County Commissioners v. United States ex rel. Moulton, 112 U.S. 217 (1884) (ordering city to levy tax to enforce federal right, despite violation of state law); General Oil Co. v. Crain, 209 U.S. 211, 228-29 (1908); Riggs v. Johnson County, 6 Wall. 166, 195 (U.S. 1867); Von Hoffman v. Quincy, 4 Wall 535 (U.S. 1866); Amy v. Supervisors, 11 Wall. 136 (U.S. 1870); Dick v. United States, 208 U.S. 340 (1908).

State courts may not interpret the federal Constitution, to render federal judicial power nugatory "[T]he federal judiciary is Supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. at 18. Even less can they rely on state law to do so:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution becomes a solemn mockery. United States v. Peters, 5 Cranch 114, 136 (U.S. 1809).

Where, as here, state law - as interpreted by state courts - prevents state officials from taking necessary steps to enforce federal court decrees by which those officials are lawfully bound, such state law is invalid. The state court judgments are invalid because they restrain defendants from obeying federal law.

CONCLUSION

The judgment and orders of the lower federal courts in Nos. 78-119 and 78-139 should be affirmed; the judgments of the state courts in No. 77-983 should be reversed.

Dated: January 25, 1979

Respectfully submitted,

CHARLES S. SIMS
BRUCE J. ENNIS
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

DAVID H. GETCHES
University of Colorado
School of Law
Boulder, Colorado 80349

ATTORNEYS FOR AMICI CURIAE

Of Counsel:

BURT NEUBORNE
STEPHEN L. PEVAR
GEORGE KANNAR

MOTION FILED
JAN 26 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL
PASSENGER FISHING VESSEL ASSOCIATION, *et al.*,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NEZ PERCE TRIBE OF IDAHO IN SUPPORT OF THE UNITED STATES AND RESPONDENT INDIAN TRIBES

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

ROBERT E. STROM
120 West Main
Craigmont, Idaho 83523

Attorneys for Amicus Curiae.

Of Counsel:
W. RICHARD WEST, JR.
LEROY W. WILDER

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

WASHINGTON STATE COMMERCIAL
PASSENGER FISHING VESSEL ASSOCIATION, *et al.*,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42(3), the Nez Perce Tribe, a federally recognized Indian tribe, moves the Court for leave to file the attached brief *amicus curiae* in support of respondent Indian tribes in the above-captioned cases. The

respondent Indian tribes, the United States and petitioner State of Washington have consented to the filing of this brief; the petitioners Puget Sound Gillnetters Association, *et al.*, Purse Seine Vessel Owners Association, *et al.* and respondent Washington State Commercial Passenger Fishing Vessel Association have refused so to consent.

The Nez Perce Tribe of the Nez Perce Reservation in Idaho entered into a treaty with the United States in 1855 in which it reserved an off-reservation fishing right in the Columbia River identical in purpose and scope to the treaty rights that are the subject of this review. Treaty of June 9, 1855, 12 Stat. 951. In litigation to which the Nez Perce Tribe was a party, along with a number of other tribes with fishing rights on the Columbia River, the federal district court in Oregon issued an opinion and order securing 50% of the Spring Chinook Salmon run to the treaty Indians and the remainder to the non-treaty fishermen in the states of Oregon and Washington. The decision, but not the order, is reported as *Sohappy v. Smith,* 302 F. Supp. 899 (D. Ore. 1969). The ruling and order were upheld in *United States v. Oregon,* 529 F.2d 570 (9th Cir. 1976).

At the present time the tribes, the State of Oregon and, ironically, also the State of Washington are operating under a bilateral agreement entitled "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam." The plan, *inter alia,* allocates all anadromous fish in the Columbia River among the parties and has been in successful, as well as amicable, operation for several years.

Because of the existing agreement which guarantees to the Nez Perce Tribe the full measure of its treaty right, these cases present issues which are of great and continuing concern to the Tribe. Simply stated, the treaty construction advanced by the State of Washington, if adopted by the Court, undoubtedly would have the effect of undercutting the fishing right now enjoyed by the Nez Perce Tribe.

Indeed, if Judge Boldt's allocation order is struck down, the legal basis for the present operating agreement between the Columbia River tribes and the States will be substantially diminished and thus future implementation of its provisions may be jeopardized. Similarly, the equal protection arguments advanced by non-treaty fishermen in the present cases, if adopted by the Court, will provide a justification for the State of Washington to repudiate the agreement.

Each of the foregoing issues, therefore, is addressed by the Nez Perce Tribe in the attached *amicus curiae* brief. Specifically, the brief is offered to assist the Court in recognizing that: (1) the treaty provision reserving off-reservation fishing rights to the Indians may not be limited to mere protection of "access" to traditional fishing sites; (2) the State of Washington's authority to regulate fishing for conservation purposes may not be invoked to eliminate the Indians' unique treaty fishing right and if enforcement of State regulations does discriminate against the treaty right, allocation of the fish between treaty and non-treaty users is necessary and appropriate; and (3) allocation of 50% of the harvestable catch to the treaty Indians does not violate concepts of

equal protection. Since these issues are of critical significance to the Nez Perce Tribe, and since such discussion may be helpful to the Court, the Tribe requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Suite 1000
Washington, D.C. 20037

ROBERT C. STROM
120 West Main
Craigmont, Idaho 83523
Attorneys for Amicus Curiae.

Of Counsel:
W. RICHARD WEST, JR.
LEROY W. WILDER

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, *et al.*,
Respondents.

BRIEF *AMICUS CURIAE* OF THE NEZ PERCE TRIBE OF IDAHO IN SUPPORT OF THE UNITED STATES AND RESPONDENT INDIAN TRIBES

INTEREST OF *AMICUS CURIAE*

The Nez Perce Tribe of Idaho is a federally recognized tribe of American Indians which occupies and governs the Nez Perce Reservation in the State of Idaho. The Tribe

entered into a treaty with the United States in 1855 in which it reserved an off-reservation fishing right in the Columbia River identical in purpose and scope to the treaty rights that are the subject of this review. Treaty of June 9, 1855, 12 Stat. 951.

In litigation to which the Nez Perce Tribe was a party, along with a number of other tribes with fishing rights on the Columbia River, the federal district court in Oregon issued an opinion and order securing 50% of the Spring Chinook Salmon run to the treaty Indians and the remainder to the non-treaty fishermen in the states of Oregon and Washington. The decision, but not the order, is reported as *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969). The ruling and order were upheld in *United States v. Oregon*, 529 F.2d 570 (9th Cir. 1976).

In marked contrast to the reaction of the State of Washington to Judge Boldt's orders in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), the State of Oregon has complied with the decisions of the lower courts in the *Oregon* and *Sohappy* cases. At the present time the tribes, the State of Oregon, and, ironically, also the State of Washington are operating under a bilateral agreement entitled "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and Its Tributaries Above Bonneville Dam." The plan, *inter alia*, allocates all anadromous fish in the Columbia River among the parties and has been in successful, as well as amicable, operation for several years.[1] As testimony to the validity and success of the arrangement, the State of Oregon has not seen fit to file a brief *amicus curiae* in this case in support of the State of Washington.

[1] Rather than a precise 50/50 split of salmon, however, the Indians take only 40% of the Spring Chinook run and 60% of the Fall run.

Because of the existing agreement which guarantees to the Nez Perce Tribe the full measure of its treaty right, these cases present issues which are of great and continuing concern to the Tribe. Simply stated, the treaty construction advanced by the State of Washington, if adopted by the Court, undoubtedly would have the effect of undercutting the same fishing right now enjoyed by the Nez Perce Tribe. Indeed, if Judge Boldt's allocation order is struck down, the legal basis for the present operating agreement between the States of Oregon and Washington and the Columbia River tribes will be diminished and thus the future implementation of its provisions may be jeopardized. Similarly, the equal protection arguments advanced by non-treaty fishermen in the present cases, if adopted by the Court, will provide a justification for the State of Washington to repudiate the agreement.

Each of the foregoing issues, therefore, is addressed by the Nez Perce Tribe. Specifically, the following brief is offered to assist the Court in recognizing that: (1) the treaty provision reserving off-reservation fishing rights to the Indians may not be limited to mere protection of "access" to traditional fishing sites; (2) the State of Washington's authority to regulate fishing for conservation purposes may not be invoked to eliminate the Indians' unique treaty fishing right and, if enforcement of State regulations does discriminate against the treaty right, allocation of the fish between treaty and non-treaty users is necessary and appropriate; and (3) allocation of 50% of the harvestable catch to the treaty Indians does not violate concepts of equal protection of the laws.

STATEMENT OF THE CASE

The amicus curiae adopts the full statement of the case presented by the United States in its brief on the merits. A summary of the proceedings necessary to consider the arguments presented by *amicus curiae* is set forth below.

The cases before the Court derive directly or indirectly from an action filed in 1970 by the United States as trustee for several western Washington Indian tribes. Other tribes subsequently intervened in the action bringing the total number of tribes involved to 14. The complaint alleged, *inter alia*, that the State of Washington's regulation of its fisheries was destroying the tribes' off-reservation treaty fishing rights. The rights were secured to the tribes when, in granting vast areas of their territory to the United States in the mid-nineteenth century, they reserved the right to take fish at their "usual and accustomed" places off their reservations "in common with" other citizens.[2]

The present cases are but the most recent examples of the recurring conflict which, almost since the treaties were signed, has surrounded off-reservation fishing rights reserved by the Indians. For the most part, this controversy has reached the courts in the context of persistent attempts by the State of Washington to regulate its fisheries—or in some cases its failure to regulate non-treaty fisherman—in derogation of the Indians' treaty

[2]Each treaty contained a provision which in substance stated the following:

> The right to take fish, at all the usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. . . . [Treaty of Medicine Creek, Art. III, 10 Stat. 1132]

rights.[3] In this instance, virtually the entire regulatory scheme of Washington's Departments of Fisheries and Game[4] was challenged by the tribes as violating their treaty rights.[5]

In the threshold opinion herein, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), Senior District Judge Boldt, after a lengthy trial during which extensive expert and lay testimony was taken, struck down those Washington laws and regulations which he found to discriminate against the Indians' treaty rights and to be unnecessary

[3]This Court first issued an opinion to protect the Washington Indians' off-reservation fishing rights over 70 years ago. United States v. Winans, 198 U.S. 377 (1905). Subsequently, the Court has had occasion to address the same conflict in numerous opinions. *See* Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (*"Puyallup I"*); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (*"Puyallup II"*); Puyallup Tribe v. Department of Game, 433 U.S. 165 (1977) (*"Puyallup III"*). Moreover, this Court denied the petition for a writ of certiorari filed by the State of Washington to review the original decision of the Ninth Circuit in the *Washington* case, which affirmed Judge Boldt's holding. *See* United States v. Washington, 423 U.S. 1086 (1976), *rehearing denied*, 424 U.S. 978 (1976).

[4]In the State of Washington, the Department of Fisheries has jurisdiction to regulate salmon fishing while the Department of Game is responsible for regulating steelhead fishing. Both species are anadromous fish that traditionally were taken by the Indians and are the subject of the treaty rights.

[5]The State concedes that the treaty rights secure to the Indians the right of access to their fishing sites and freedom from paying a fee to the State for the privilege to fish. The State, however, has no choice but to make the concessions in light of the holdings in United States v. Winans, 198 U.S. 377 (1905) and Tulee v. Washington, 315 U.S. 681 (1942).

to perpetuate a particular species of fish or run.[6] Moreover, the Judge enjoined further actions of State authorities which violated the Indians' treaty rights.

Finally, in the absence of any reasonable allocation by the State, Judge Boldt quantified the Indians' off-reservation fishing rights. He found that the treaty language "in common with" meant sharing equally the opportunity to take fish. The district court concluded, therefore, that the treaty fishermen must have an opportunity to take 50% of the "harvestable" fish.[7] 384 F. Supp. at 343.[8]

As part of his comprehensive ruling, Judge Boldt promulgated an Interim Plan for a cooperative Indian/State fisheries management effort. 384 F. Supp. at 420. Additionally, a mechanism was established to facilitate out-of-court settlements of disputes between the parties.[9]

[6]Judge Boldt found that the "application of current laws and regulations of the State to restrict the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes is unlawful for the reasons that, a) they have not been established to be necessary to preserve and maintain the resource; b) they operate to discriminate against the tribes' treaty right to fish; c) they have been adopted and enforced in violation of appropriate standards; and, d) they have been adopted and enforced in derogation of the meaning and purposes of the treaty provision at issue in this case." 384 F. Supp. at 403.

[7]As noted earlier, the same conclusion was reached by Judge Belloni in 1969 in the treaty fishing rights case to which *amicus curiae* was a party. Sohappy v. Smith, 302 F. Supp. 899 (D. Ore., 1969).

[8]An important distinction must be made regarding precisely which fish are included in this right. The treaty fishermen have the right to take 50% of the harvestable runs which ordinarily pass by their usual and accustomed fishing sites. They do not have the right to 50% of the anadromous fish in Washington's waters.

[9]A Fisheries Advisory Board, which is composed of representatives of the State and the Indians, was formed to hear and resolve technical disputes between them arising out of the Judge's order.

Almost before the ink was dry on Judge Boldt's order, however, efforts were undertaken to circumvent his ruling. Two state court actions, initiated by private organizations comprised of non-treaty fishermen, led to injunctions prohibiting Washington's Department of Fisheries from regulating the fisheries in the manner necessary to carry out Judge Boldt's order.[10]

These rulings resulted in massive non-compliance with the federal orders, which necessitated further relief by Judge Boldt to protect the exercise of the treaty rights, including a number of restraining orders enjoining non-treaty fishermen from fishing in violation of such rights. Specifically, when the Washington Supreme Court held in *Gillnetters* that State authorities could not allocate fish between treaty and non-treaty fishermen, Judge Boldt undertook to supervise the allocation. Furthermore, when the State specifically refused to regulate non-treaty fishing in a manner calculated to protect the treaty rights, Judge Boldt enjoined non-treaty fisher-

[10]These actions ultimately resulted in the Washington Supreme Court decisions now before this Court on review in No. 77-983. The first case, Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, 89 Wash. 2d 276, 571 P. 2d 1373 (1977) ("*Vessel*") was filed in the Thurston County Superior Court in 1974. The second action, Puget Sound Gillnetters Association v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (1977) ("*Gillnetters*"), was filed directly in the Washington Supreme Court. The *Gillnetters* opinion held that Washington's officials had no statutory authority to issue regulations to implement the federal district court's allocation ruling. In *Vessel*, the court determined that the Indians' treaty rights, as interpreted by Judge Boldt, denied non-treaty fishermen the equal protection of the law.

In light of the position taken by the State of Washington in the cases now being reviewed by this Court, *amicus curiae* cannot let pass unmentioned the essentially collusive nature of the state actions. Specifically, the State, a defendant in those cases, adopts precisely the same legal position as its "opponents", the plaintiffs.

men from fishing in violation of those rights.[11] Finally, when the Chief Justice of the Washington Supreme Court ordered the State to open non-treaty fishing areas when consistent with State law, but without requiring the State to consider the effect on treaty rights, Judge Boldt enjoined promulgation of regulations authorizing such openings absent an opportunity for the district court to consider the effect on treaty rights.[12] In doing so, Judge Boldt specifically recognized the State's right to close a fishery when necessary to conserve the resource.

The various appeals from the district court orders were considered by the Ninth Circuit in *Puget Sound Gillnetters Ass'n v. District Court*, 573 F.2d 1123 (9th Cir. 1978), where the orders were upheld. This Court subsequently granted the petitions for writs of certiorari to review the Ninth Circuit's decisions and the decisions of the Washington Supreme Court in the *Vessel* and *Gillnetters* cases.

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[11] On August 31, 1977, the district court entered an order explaining that the State was unwilling or unable to manage the fishing in conformity with the court's previous orders. The order specifically cited the State's 1977 Puget Sound commercial fishing regulations as ignoring entirely the district court's directives which previously had been issued to protect Indian treaty rights.

[12] The State's determined effort to evade the orders of the district court led Judge Goodwin, in writing for the majority in Puget Sound Gillnetters Ass'n v. District Court, 573 F.2d 1123 (9th Cir. 1978) to conclude:

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

573 F.2d at 1126.

SUMMARY OF ARGUMENT

The treaty fishing right at issue in this litigation was reserved by the Indians when large grants of land were made by them to the United States in the mid-nineteenth century. The property reserved was the same unfettered right to fish enjoyed by the signatory tribes before the treaties were negotiated. In light of the fundamental nature of the treaty right, as well as the manifest intent of the Indians to preserve off-reservation fishing, this Court historically has struck down efforts by the State and individuals to limit its exercise.

More recent opinions of the Supreme Court attest to the continuing validity of the foregoing decisions. Thus, the treaty opponents' contention that the treaties merely secured to the Indians a right of "equal access" to their traditional off-reservation fishing grounds cannot be supported. Furthermore, apart from the specific precedents of this Court, which negate this limited interpretation of the treaty right, the principles of Indian treaty construction require rejection of Washington's thesis.

Once beyond the erroneous threshold argument of the treaty opponents, their assertion that the State's regulatory scheme does not discriminate against the Indians' off-reservation treaty fishing right necessarily must fail. In short, to subject both treaty fishermen and non-treaty fishermen to the same controls is, in effect, to render the treaty meaningless and thus to deny the former class a vested right.

Under the established precedents of this Court, when the State's regulatory scheme conflicts with the treaty right, an allocation of the fisheries resource is entirely appropriate. Thus, the district court's order apportioning the harvestable catch is valid.

Finally, the district court's allocation of the resource does not violate the concept of equal protection of the law. The treaty rights are rooted in the original sovereignty of the Indian tribes and were specifically retained by them when portions of their territory were granted to the United States. The Constitutional principle of equal protection, which prohibits a discriminatory exercise of power by the federal government, has no application to this case.

ARGUMENT

I.

UNDER ESTABLISHED PRINCIPLES OF LAW, THE OFF-RESERVATION FISHING RIGHT RESERVED BY THE INDIANS MAY NOT BE LIMITED TO A MERE RIGHT OF EQUAL ACCESS TO THEIR TRADITIONAL FISHING SITES.

Fundamental to the examination of any Indian treaty is recognition of the principle that Indian tribes thereunder not only received commitments from the United States in exchange for land or peace, but also generally reserved existing rights from grants they made to the federal government. This Court first noted that principle with respect to the specific treaty provisions here at issue over 70 years ago. *United States v. Winans*, 198 U.S. 377 (1905). In holding that the off-reservation fishing right was a reservation of rights not granted, the Court noted that "[t]he right to resort to the fishing places in controversy was part of larger rights possessed by the Indians, *upon the exercise of which there was not a shadow of impediment.*" (Emphasis added.) *Id.* at 381.

This, then, is the nature and scope of the off-reservations treaty fishing right retained by the Indians—a reserved right unencumbered by "a shadow of impediment." Moreover, the rights of non-treaty fishermen stem

from what the tribes granted to the United States and are, therefore, not a limitation upon what was reserved by the Indians.

A. The Supreme Court consistently has blocked attempts by non-treaty agencies and individuals to limit the off-reservation fishing right of the Washington Indians.

The above-described principle has provided the legal basis for a line of Supreme Court cases rejecting efforts to limit the scope of the off-reservation treaty fishing right. First, the Court in *Winans* rejected the argument that the Indians could be denied access to their traditional fishing sites because the property had passed into non-Indian ownership. The Court recognized that "no other conclusion would give effect to the treaty." 198 U.S. at 381. Similarly, in *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), the term "usual and accustomed places" was held by this Court to mean *all* "usual and accustomed places" at the time of the treaty, whether or not within an area ceded by the tribes. The Court, in refusing to allow the term to be arbitrarily limited, noted that it was "unnecessary to add much to what was said by this Court in [*Winans*] . . . ." 249 U.S. at 198. Finally, in *Tulee v. Washington*, 315 U.S. 681 (1942), the Court held that an "exaction of fees as a prerequisite to the enjoyment of [off-reservation treaty] fishing. . . cannot be reconciled with a fair construction of the treaty." 315 U.S. at 685.

Moreover, the continuing validity of the foregoing principle of treaty analysis has been acknowledged explicitly in the more recent opinions of the Supreme Court. *See Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Antoine v. Washington*, 420 U.S. 194

(1975).[13] In *Puyallup I* this Court quoted with approval from the *Winans* opinion as follows: "To construe the treaty as giving the Indians 'no rights but such as they would have without the treaty' (198 U.S. at 380, 49 L.Ed. at 1092) would be 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more'." 391 U.S. at 397. Thus, contrary to the assertions of the State of Washington, under the still valid principle that the treaty right was an unqualified reservation by the Indians, as established in *Winans* and specifically affirmed in *Puyallup I*, "[t]he right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State. . . ." 391 U.S. at 398.

B. The meaning attributed by the State to the treaty provision concerning off-reservation fishing violates well-recognized principles of Indian treaty construction.

The interpretation of the Indians' off-reservation fishing right advanced by the State of Washington not only violates the specific principles established by this Court with respect to these treaty provisions, but also is inconsistent with more general principles of Indian treaty interpretation. First, the State's construction offends the rule established in *Choctaw Nation v. United States*,[14]

[13] In Antoine v. Washington, 420 U.S. 194 (1975), a treaty provision securing the right to hunt "in common with all other persons" was at issue. The State argued, as it does here, that the "in common with" language secured only the right of equal access with non-treaty hunters to the hunting ground. The Court, citing *Winans* and noting that such an interpretation would mean essentially nothing was secured to the Indians by the treaty provision, specifically denied the validity of the assertion.

[14] 119 U.S. 1 (1886).

and recognized in *Winans*, that a treaty is to be interpreted as the Indians would have understood it.[15] In applying this rule, the Court has declared that: "How the treaty [was] understood may be gathered from the circumstances." *United States v. Winans*, 198 U.S. at 381.

The circumstances attendant to the reservation of off-reservation fishing rights are no secret. For the tribes of the Columbia River and western Washington, fish were a critical resource and the right to fish a key to their survival. As this Court noted in *Winans*, "[t]he right [was] not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381.

The treaty opponents, nevertheless, persist in arguing that the Indians reserved only a limited right of equal access with non-treaty fishermen to traditional fishing grounds and, in addition, that the tribes waived any further assurances that their pre-existing rights would be protected. This assertion not only violates the aforementioned rule for treaty analysis, but also ignores common sense. Simple logic mitigates strongly against the con-

[15] The State and other treaty opponents make much of an intricate legal concept regarding ancient common law principles of common fisheries which secured equal rights to all citizens to fish common areas. Without citing a shred of evidence that the concept was discussed with, or explained to, the Indians, the State baldly asserts that this concept was encompassed by the term "in common with." The argument, stripped to its essence, is merely another way of stating the discredited notion that the treaty secured only "equal access" to the Indians.

Judge Boldt noted, however, that the treaties were negotiated in "Chinook Jargon," a simple language with but 300 words in its vocabulary and, according to the District Judge, incapable of expressing complex concepts. 384 F. Supp. at 330. Under the principles of Indian treaty construction discussed in the text, therefore, the State's elaborate theory of common fisheries should be ignored—as it has been on previous occasions by this Court.

clusion that the Indians knowingly and willingly would so completely jeopardize their most important subsistence resource.

Moreover, even if the circumstances calling for the foregoing conclusion were not so apparent, under a concomitant principal of treaty interpretation, ambiguities in treaties with Indians must be construed to their advantage. *United States v. Winans*, 198 U.S. at 380-381; *Antoine v. Washington*, 420 U.S. 194 (1975); *Choate v. Trapp*, 224 U.S. 665 (1912). As the Court of Appeals for the Ninth Circuit pointed out in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975):

> This principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompanied by fiduciary obligations. [Citations omitted.] While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.

532 F.2d at 660. Accordingly, the term "in common with" cannot be given the narrow, prejudicial construction advocated by the State and its supporters.

In summary, off-reservation treaty fishing rights were reserved by the Indians, free from any impediment. This

Court, in an unbroken line of cases, has prevented limitations from being placed on those rights except in narrowly prescribed circumstances not present here. The above-cited decisions reject the restrictive interpretation of the treaty right advanced by the State of Washington and non-treaty fishermen. Moreover, general principles of Indian treaty construction dictate that the interpretation advocated by the State be found invalid.

II.

THE STATE OF WASHINGTON'S DISCRIMINATORY REGULATION OF THE INDIANS' OFF-RESERVATION TREATY FISHING REQUIRES ALLOCATION OF THE HARVESTABLE FISH TO PROTECT THE TREATY RIGHT.

In determining which competing user group may benefit from its fisheries resources, the State of Washington has acted upon the premise that Indians engaged in off-reservation fishing are entitled to no greater right than "equal access". By adopting this interpretation of the treaty right and by regulating the fisheries consistent with that interpretation, the State of Washington cannot avoid, and, indeed, has not avoided, discriminating against the Indians' off-reservation fishing rights.

A. State fishing regulations cannot discriminate against off-reservation treaty fishing rights, and may affect those rights only when necessary to conserve the resource.

The unimpeded right of the Indians to take fish may be qualified by the State only under narrowly prescribed circumstances. *Puyallup I*, 391 U.S. at 399. When necessary to preserve a specific run or species of fish from complete extinction, the State may regulate the fisheries under "appropriate standards" even if the regulation has

an impact on the treaty right.[16] This Court has defined the "appropriate standards" requirement explicitly as meaning that "the State must demonstrate its regulation is a reasonable and necessary conservation measure, *Washington Game Department v. Puyallup Tribe*, 414 U.S. 44, 38 L.Ed. 2d 254 (1973); *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115 (1942), *and* that its application to the Indians is necessary in the interest of conservation." (Original emphasis.) *Antoine v. Washington*, 420 U.S. at 207.

In other words, the State may regulate the treaty right directly only when the preservation of a species or run is impossible under Washington's authority to regulate non-treaty fishing. Stated yet another way, "[t]he measure of the legal propriety of those kinds of conservation measures is . . . distinct from the federal constitutional standard concerning the scope of the police power of the state." *Puyallup I*, 391 U.S. 402 n. 14.[17]

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[16]In Tulee v. Washington, 315 U.S. at 684, the State of Washington argued that, since its license laws applied equally to all fishermen, they did not discriminate against the Indians. In striking down this argument, the Court noted that the State could impose only those "purely regulatory" restrictions "concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish.*" (Emphasis added.)

[17]The brief of respondent Washington State Passenger Fishing Vessel Association argues that the State has full authority to regulate off-reservation fishing rights unencumbered by any limitation. In taking this position, respondent relies upon the statement in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973) that "[a]bsent express federal law to the contrary" State law may govern the off-reservation activities of Indians. Inexplicably ignoring the fact that treaties are federal laws, respondent concludes that the State "possesses full government powers over the treaty tribes off reservations." Brief of Respondent Washington State Commercial Passenger Fishing Vessel Association, at 19.

The regulatory scheme of the State under review in this case, however, makes no concession to these principles. Petitioner argues that it must be allowed "to apply its conservation regulations without distinctions between treaty and non-treaty fishermen." Brief of the State of Washington, at 113. Thus, the State has promulgated regulations which pay no deference to Indian off-reservation treaty rights.[18] Under these circumstances, the district court had no choice but to allocate the resource.[19]

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[18]Under the "access" interpretation advanced by treaty opponents, of course, the State can render the treaty right meaningless by merely regulating the access in such a manner that no fish are available when the traditional fisheries are open. Indeed, that is, historically, precisely what has happened. The district court specifically found that in the State of Washington "[a] principal method of limiting the commercial take from the salmon runs is limitation on the number of days when fishing is permitted" (384 F. Supp. at 389) and that the Department of Fisheries allowed non-treaty net fishing on salmon runs in some locations while closing treaty net fishing on the same runs. 384 F. Supp. at 393. Judge Boldt found further that the regulations of the Department "in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the . . .tribes' usual and accustomed fishing places. . . ." *Id.* Finally, the district court determined that the regulation of the Department of Game prohibited treaty net fishing, even while admitting such fishing would not necessarily be detrimental to the run, but would be detrimental to steelhead sports fishing (384 F. Supp. at 393), and that the Department "has no idea" where the Indians usual and accustomed fishing places are and has never attempted to determine where they are. 384 F. Supp. at 395.

Moreover, the Ninth Circuit, in upholding the district court, recognized that the State of Washington lawfully could not deny fish to the treaty Indians, but noted: "Nevertheless this is precisely how the State of Washington has regulated fishing for years. In treating Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantee nugatory." United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975).

[19]The district court found that the State not only has engaged in *de jure* discrimination against the treaty rights, but also

[footnote continued]

B. When State regulations conflict with treaty rights, allocation of the harvestable catch is a necessary and appropriate remedy.

On previous occasions the Supreme Court impliedly has confirmed that, under circumstances such as those present in this case, an apportionment of the fisheries resource is an entirely appropriate remedial device. In *Puyallup II*, for example, this Court specifically required that the steelhead on the Puyallup River "be fairly apportioned" when it determined that Washington's regulatory scheme discriminated against the Indians' off-reservation treaty right. *Puyallup II*, 414 U.S. at 48.

Under the discriminatory regulatory scheme at issue here, therefore, the allocation of fish between the treaty and non-treaty fishermen prescribed by the district court is necessary and appropriate. Moreover, the district court's allocation of the entire resource is appropriate and consistent with this Court's rulings.

The resource to be apportioned, anadromous fish, are mobile species. As they follow their life cycles, the salmon and steelhead runs pass the Indians' fishing sites only at certain times of the year. At other times, these same fish are available to a variety of commercial and non-commercial fishermen. If only fish which pass the Indians' fishing sites are considered in the allocation, the fishing may be managed so that few, if any, harvestable fish pass the Indians' fishing grounds.[20]

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has been guilty of *de facto* discrimination. Judge Boldt, for example, found that State authorities wrongfully seized fishing gear and fish from treaty fishermen (384 F. Supp. at 388), and retained for unreasonable periods of time or disposed of fishing gear owned by treaty fishermen without proper notice of proceedings for such acquisition. *Id.*

[20] In a clearly relevant converse holding and in a marked departure from its previous rulings, this Court decided in *Puyallup III*

[footnote continued]

This is the inescapable conclusion reached by the district court below. Moreover, the same conclusion was reached by the district court in *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969). Faced with the discriminatory practices of the States, these district courts each ordered allocation of 50% of the entire fishery resource to the treaty Indians to ensure that their rights were protected.

Although this Court has not specifically established a rule governing allocation of fish, its decisions consistently have supported the actions of the district courts. In *Puyallup III* the Court, while not ruling directly on the validity of the precise figures, upheld a Washington trial court's 45% treaty/55% non-treaty allocation of steelhead.[21] *Puyallup III* 433 U.S. at 177. The relatively minor disparity between the numbers explicitly sanctioned by the Supreme Court, and the numbers deemed appropriate by the two district courts, hardly seems a basis to strike down the 50% allocation mandated here.

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that the regulatory authority of the State extends to on-reservation treaty rights, but that it does so under the same strict "appropriate standards" applicable to off-reservation rights. Significantly, the fundamental reason for the ruling was the mobile nature of the fish. The Court reasoned that, if the State could not regulate for purposes of conservation on the reservation as well as off, the Indians, because the reservation was at the mouth of the river, could frustrate the regulatory jurisdiction of the State by taking every fish passing through the reservation before it reached the spawning grounds. In the instant case, the State demands authority to do to the Indians what this Court has said the Indians cannot do to the State.

[21] The Court's ruling applied only to allocation of the natural run of steelhead. Not properly before the Court, and therefore not considered, was the question of allocating the hatchery run.

III.

AN ALLOCATION OF 50% OF THE HARVESTABLE CATCH TO TREATY INDIANS DOES NOT VIOLATE THE CONSTITUTIONAL PRINCIPLE OF EQUAL PROTECTION OF THE LAWS.

In *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wash. 2d 276, 571 P.2d 1373 (1977), the Supreme Court of the State of Washington ruled that the director of the Department of Fisheries has no authority to apportion the fishery to comply with the district court's order because such action would violate the Constitutional principle of equal protection of the laws. Specifically, the equal protection argument utilized by the Washington Supreme Court and advanced by parties here is based on the following reasoning: (1) in treaties with intervenors, the United States guaranteed to the Indian tribes a right to catch fish at their usual and accustomed fishing grounds in common with other citizens of the states; (2) the district court has interpreted the treaty provisions to mean that the tribes must be assured an opportunity to take up to fifty percent of the harvestable stock;[22] and (3) the district court's interpretation awards to a minority of the fishermen a disproportionate share of the fishing rights and, in doing so, causes the federal treaties in question to come into conflict with the Constitutional principle of equal protection of the laws.

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[22]Harvestable stock was defined by the district court as follows:

> As used above, "harvestable" means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations after deducting the number of fish required for spawning escapement and tribal needs. [384 F. Supp. at 343.]

Appellant's reasoning is fatally flawed because it is based on a complete misconception of the nature of Indian fishing rights analyzed earlier in this brief. As the discussion above demonstrates, the nature of that right can be summarized as follows:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted.* [Emphasis added.] [*United States v. Winans*, 198 U.S. at 381.]

The fishing rights at issue in the present case plainly were not granted to the Indians by the United States. To the contrary, prior to the time treaties were executed, the Indian tribes possessed an exclusive right to fish. Under the treaties, the Indians chose to relinquish a portion of their rights to non-Indians. Thus, in the end this case involves a reservation of governmental powers by Indian tribes rather than the federal government.

For this reason petitioners' discussion of the requirements of equal protection is totally inappropriate. The Constitutional principle of equal protection prohibits the United States from conferring in a discriminatory manner benefits over which it has exclusive power. Indian fishing rights, however, are not among the benefits which the federal government conferred in the treaties.

Treaty provisions relating to such rights, therefore, do not represent action by the United States. Accordingly, the Constitutional principle of equal protection, which prohibits a discriminatory exercise of power by federal or state government, has no application to the present case.

Even if the principle of equal protection were legally relevant, its application in this case provides no support for the State of Washington's position. Specifically, the *Vessel* court's decision and the treaty opponents' argument are based on a misconstruction of the requirements of the Constitutional principle of equal protection of the laws. The principle has been interpreted to necessitate only that ". . . those in the same class be treated with equality." *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117 (1941). *Accord, Cunningham v. United States*, 256 F.2d 467, 473 (5th Cir. 1958).

The two classes created by the federal treaties in question consist, respectively, of certain persons--Indians--who have been guaranteed fishing rights, and certain other persons--non-Indians--with whom the rights must be exercised in common. Under the district court's interpretation of the treaty, each class is entitled to receive half of the benefits involved. All class members, therefore, have been accorded equal treatment. No authority has been cited, and *amicus curiae* knows of none, which holds that a court must go still a step further and apportion such rights strictly on the basis of population.

Furthermore, as this Court has emphasized in prior decisions, distinctions between Indians and non-Indians such as those at issue here are, in the final analysis, not a racial classification, but, instead, are attributable to the

quasi-sovereign political status which Indian tribes historically have enjoyed. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court upheld a federal law mandating the preferential hiring of Indians by the Bureau of Indian Affairs and, in doing so, noted explicitly that the employment preference was not racially based, but was derived from the unique political relationship between the United States and Indian tribes. Moreover, in *Regents of the University of California v. Bakke*, ———*U.S.*———, 57 L. Ed.2d 750, 780 n. 42 (1978), the Court explicitly reaffirmed its *Mancari* analysis.

Finally, this Court's recent actions with respect to *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978), support the aforementioned conclusions. In *Wilson*, defendants, among other arguments, challenged on equal protection grounds, 25 U.S.C. § 194, which provides that, in property disputes involving Indians and non-Indians, the non-Indian parties carry the burden of proof. The United States Court of Appeals for the Eighth Circuit, relying upon the *Mancari* decision, rejected defendants' argument. Significantly, although the Court granted the petition for a writ of certiorari in the *Wilson* case, petitioners' equal protection argument was excluded explicitly from consideration. *See* 47 U.S.L.W. 3332 (U.S. S. Ct., November 13, 1978).

CONCLUSION

Contrary to the assertions of the State of Washington and consistent with the prior decisions of this Court, the off-reservation fishing right reserved by the Indian tribes which are parties to the present action may not be limited to a mere right of equal access to their traditional fishing sites. Furthermore, the State of Washington's persistently discriminatory regulation of the Indians' off-

reservation treaty fishing right requires an allocation of the harvestable fish in order to protect the right. Finally, an allocation of 50% of the harvestable catch to treaty Indians does not violate the Constitutional principle of equal protection of the laws.

In light of the foregoing, *amicus curiae* Nez Perce Tribe of Idaho urges that the Court of Appeals' decisions in Nos. 78-119 and 78-139 be affirmed and that the decisions of the Washington Supreme Court in No. 77-983 be reversed.

Respectfully submitted,

ARTHUR LAZARUS, JR.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

ROBERT C. STROM
120 West Main
Craigmont, Idaho 83523
Attorneys for Amicus Curiae.

Of Counsel:
W. RICHARD WEST, JR.
LEROY W. WILDER

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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-983

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION AND WASHINGTON KELPERS ASSOCIATION,
Respondents.

No. 78-119

STATE OF WASHINGTON, *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, *et al.*,
Petitioners,
v.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE*

American Friends Service Committee; Church Council of Greater Seattle; Washington Association of Churches; Office of Catholic Charities, Archdiocese of Seattle, Native American Task Force; Synod of Alaska Northwest, United Presbyterian Church; Board of Church and Society of the United Methodist Church; American Baptist Churches in the United States of America; Lutheran Council in the United States on behalf of the Lutheran Church in America; Office for Church and Society, United Church of Christ.

Office & Post Office Address:
1500 Hoge Building
Seattle, WA 98104

FREDERICK L. NOLAND of
MACDONALD, HOAGUE & BAYLESS
Attorneys for Amici Curiae

CRAFTSMAN PRESS SEATTLE, WASHINGTON

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Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

This motion for leave to file the annexed brief *amici curiae* is respectfully made pursuant to Rule 42 of the Supreme Court Rules. Consent to the filing of this brief has been granted by counsel for the United States and liaison counsel for the Intervenor Indian Tribes. Counsel for the State of Washington also consented to the filing of this brief, conditioned upon counsel for these *amici* noting that he was formerly counsel of record for the Hoh Indian Tribe, but did not actively participate in the proceedings

below. Consent has been withheld by the Washington State Commercial Passenger Fishing Vessel Association, the Washington Kelpers Association, and the Puget Sound Gillnetters Association.

The *amici* have no political or economic interest in the issue before the Court. Our interest is in the moral implications of these proceedings. The case involves solemn promises made by the United States and various quasi-sovereign Indian nations. The obligations undertaken by the United States were assumed in exchange for the benefits the treaties gave to the United States and its people. The *amici* believe the arguments posed by the state and commercial fishing groups would in effect negate the benefits which the treaties conferred to and the rights reserved by the Indian tribes. *Amici* support the tribes' position before the Court, and respectfully request the Court's consideration of this analysis of the history and law affecting this issue.

The *amici* are familiar with the issues involved in this case. The American Friends Service Committee represents a social justice arm of the Religious Society of Friends. Its concern for the rights of Indian tribes derives from early Quaker principles of contract with tribes developed when establishing the colony of Pennsylvania. The American Friends Service Committee has maintained an active Indian Affairs Program in the Pacific Northwest for many years. Early in 1960 this program initiated an in-depth study of the history behind the fishing rights issue and the contemporary attitudes and forces affecting the on-going conflict. The results of that study became the book *Uncommon Controversy—Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians,* published by the University of Washington Press in 1970. The book, which went into its fourth printing in 1975, has served as a useful background resource and has been widely disseminated. The current AFSC program has produced a study of local law enforcement jurisdiction on reservations in Washington and serves as a resource for public education on contemporary Indian issues.

The Church Council of Greater Seattle is an ecumenical organization established in 1969 to provide a structure within which a number of denominations, local congregations, and church-related entities can make the determinations and decisions necessary to effective Christian witness and ministry in the Greater Seattle area. The Church Council identifies needs in the community which require church action and develops strategies to address these needs through existing church and community structures. The Council has had a Native American Concerns Task Force since 1973 which has reviewed the issues of conflict between Indian tribes and the state. Through the work of the task force, the Church Council has issued statements favoring Indian sovereignty and supporting the 1974 district court decision.

The Washington Association of Churches is an organization committed to dialogue and communication among its denominational membership. The Association has participated on the Church Council Native American Task Force and supports its positions.

These two ecumenical organizations represent the regional level of eighteen major Christian denominations. Two regional denominations have acted individually to join in the brief. They include the Native American Task Force, Office of Catholic Charities, Archdiocese of Seattle,

and the Synod of Alaska Northwest, United Presbyterian Church. In addition to this Pacific Northwest regional constituency, some denominations believe the matter before the Court is of such import that it warrants the voice of the national church organizations. For that reason the following national denominational voices have joined this brief: Lutheran Council in the United States of America on behalf of the Lutheran Church in America; the Board of Church and Society of the United Methodist Church; the American Baptist Churches in the United States of America; and the Office for Church and Society, United Church of Christ.

Too often the nation's relationship with Indian Tribes has been marred by self-seeking expediency, broken promises and unfulfilled obligations. The dominant society's efforts to "re-socialize" our Indian citizens has often failed to recognize the richness of their culture and the rightness of their lifestyle to their own value structure. The result has led to a denial of self-determination and to the disenfranchisement of our native people. All segments of our society have contributed to this unfortunate condition, including some of the past policies of the churches joining this brief. However, hopefully we are embarking on a new era in our relationship with the tribes—an era in which we underscore our obligation to our solemn contracts with them and value the contribution of their culture to our total society. It is in this spirit we approach the Court, and request that this motion to file the annexed brief *amici curiae* be granted.

Respectfully submitted,

Frederick L. Noland of
MacDonald, Hoague & Bayless
Attorney for *Amici Curiae*

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BRIEF OF *AMICI CURIAE*

INTEREST OF *AMICI*

The interest of *amici* is set forth in the preceding motion for leave to file this brief.

INTRODUCTION

Reinhold Niebuhr, the eminent American theologian, observed that:

> The most obvious rational check which can be placed upon the use of coercion is to submit it to the control

> of an impartial tribunal which will not be tempted to use it for selfish ends . . . the supposition is that the government is impartial with reference to any disputes arising between citizens, and will therefore be able to use its power for moral ends . . .[1]

The *amici* believe that the principle of an "impartial tribunal" is fundamental to the issue before this Court.

The State of Washington has a political and economic self-interest in the fishery resource and has allowed that self-interest to cloud the legitimate rights of Indian tribes to a fishery. The tribes are a small minority and have been vulnerable to the coercion of the state. They have been subjected to arrest, gear confiscation, harassment, and humiliation as they have struggled since shortly after the Treaties were ratified to have their fishery recognized and respected.

Illustrative of the disparate *political* power of these two contending groups is the fact that state court judges, who are elected for four- or six-year terms and fear the will of the majority, consistently hold against Indian treaty fishing rights whereas federal judges, who are appointed for life, consistently hold in favor of Indian treaty fishing rights—a situation reminiscent of the 1950's and 1960's when southern state court judges tended to deny civil rights of blacks, whereas federal court judges, although selected from the same pool of lawyers, insisted those rights be upheld.

The full implementation of the Indians' fishing rights, as recognized by the lower federal courts, will require adjustments within the current non-Indian fishery. However,

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1. R. Niebuhr, *Moral Man & Immoral Society* 238 (1932).

when addressing these adjustments, one cannot ignore the years of struggle Indians have faced because of past failure of the state to honor their rights.

SUMMARY OF ARGUMENT

The arguments of the *amici* can be summarized in the following six points:

1. The lower courts' interpretation of the 1855 Stevens Treaties is morally compelled and legally sound.
2. The Washington State Government has a long history of refusing to recognize Indian treaty fishing rights.
3. Hostile state reaction to the lower court decision has caused difficulties in implementation which would have been avoidable if the state had assumed a cooperative posture.
4. The responsibility for difficulties imposed on the non-Indian fishing industry should be shouldered by the state and federal governments which caused the problem, not by the Indians.
5. Implementation of *United States v. Washington* will benefit both the Indian and non-Indian citizens of the state.
6. The decision is consistent with current congressional policy of Indian self-determination.

ARGUMENT

I.

The Lower Courts' Interpretation of the 1855 Stevens Treaties is Morally Compelled and Legally Sound

The trial court, after a comprehensive review of the historical and legal evidence, rendered a decision which is legally sound and morally consistent with our nation's 1787 pledge in the Northwest Ordinance that:

> The utmost good faith shall always be observed toward the Indians; their land and property shall

> never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed unless in just and lawful wars, authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them. *Journal of the Continental Congress* 32:340-41.

The district court correctly recognized that "The treaty was not a grant of rights to the treating Indians, but a grant of rights from them, and a reservation of those not granted." *United States v. Washington*, 384 F. Supp. 312, 407 (W.D. Wash. 1974). *See United States v. Winans*, 198 U.S. 371, 381 (1905). In interpreting the language, "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . .," the district court recognized the paramount importance to the tribes of the fishing rights reserved by them. In so doing, the court correctly interpreted the treaty language as it would have been reasonably understood by the tribe.[2]

Through the treaties, Indian tribes relinquished their claims to vast areas of land, timber, fishery and water resources. The district court noted that:

> To the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the means to acquire vast Indian lands.

United States v. Washington, 384 F. Supp. at 330. If these treaties have any value to the Indians, it is in the protection they offer for the few rights reserved by them. *To argue that the Indians reserved no special rights to the fishery, but only kept rights to fish exactly the same as other citizens of the territory, is untenable and unconscionable.* No specific language would have been necessary to secure such a wholly illusory right. Surely the Indians understood they were reserving something "special" in return for relinquishing virtually the entire Washington Territory.

The State of Washington has argued in the past that the Stevens Treaties recognize no special tribal rights to an off-reservation fishery. This argument was soundly rejected in *United States v. Winans*, wherein the Court noted:

> This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more.

198 U.S. at 380.

Despite this ruling, the state continues to present the same argument. As in the past, the Court should reject it and reaffirm the moral and legal obligation assumed by the United States when the benefits of the treaties were accepted by this nation.

II.

The Washington State Government Has a Long History of Refusing to Recognize Indian Treaty Fishing Rights

In 1886 the Court observed in *United States v. Kagama*, 118 U.S. 375, 384, that:

> Because of the local ill feeling, the people of the States

2. These principles of interpretation applied by the lower courts are well established in case law and were applied to the Stevens Treaties in *United States v. Winans, supra* at 380:

> We have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules." [*Choctaw Nation v. United States*] 119 U.S. 1 . . . [*Jones v. Meehan*] 175 U.S. 1 [1899] . . .

> where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

This prophetic statement describes the situation which has evolved in the State of Washington.

A. *State Court Actions Denying Indian Rights*

The Supreme Court of Washington has a long history of disregard for the basic validity of the treaties. The prevailing attitude was most blatantly stated in the 1916 case *State v. Towessnute*, 89 Wash. 478, 481-82, 154 P. 805, 807 (1916):

> The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained . . . Only that title was esteemed which came from white men. . . .
>
> The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence. . . .
>
> These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

That such a decision could be rendered in 1916 by the highest court of the state in light of the 1905 ruling in *United States v. Winans* is an example of the hostility ingrained in the attitudes of state officials.[3]

In 1977, the State Supreme Court ignored the fact that the basic ruling of the federal district court had been unanimously upheld by the Ninth Circuit Court of Appeals and that this Court had denied *certiorari*. At a time when the district court was continuing to exercise jurisdiction over the subject matter of this dispute, the majority of the Washington Supreme Court in *Puget Sound Gillnetters v. Moos*, 88 Wash. 2d 677, 691 565 P.2d 1151, 1158 (1977), agreed on the remarkable statement:

> Being cited no authority for the proposition that federal district courts have exclusive jurisdiction to construe Indian treaties—treaties which affect important interests of the state— we adhere to our own interpretation of the treaty.[4]

The State Supreme Court then went on to deny the Indian rights so carefully considered and upheld in *United States v. Washington*.[5]

One ground relied upon by the State Supreme Court was

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3. The ruling in *State v. Towessnute* effectively prohibited Indians from fishing without state licenses until the ruling was overturned by *Tulee v. Washington*, 315 U.S. 681 (1942). The lone dissenting judge in Towessnute noted that he could not concur with the majority's reasoning that the Enabling Act of the state implicitly abrogated the treaty. Judge Holcomb observed that: "Whatever may be the views of the majority as to what an Indian treaty with our national government is, whether it is a treaty between two sovereigns or not, it is certainly a solemn compact binding in law and in honor upon both parties to it . . . Good faith requires the observance of the spirit as well as the letter of the compact with the Indians, more especially because the Indian tribe is the weaker of the two parties to the compact." 89 Wash. at 489, 154 P. at 809-10.

4. *See McConaughy, The Interaction of Federal Equitable Remedies with State Sovereignty*, 53 Wash. L. Rev. 787 (1978).

5. Two dissenting state judges correctly stated that the federal district court decision was final in the federal court system and binding on the state.

that the federal interpretation of the treaty denied equal protection to non-Indians under the Fourteenth Amendment to the Constitution. The argument is without validity. This Court has often upheld treaties that reserve or grant to an Indian *tribe* rights that are different than those accorded non-Indians or non-members of the tribe. The benefits of the treaties belong to those individuals who are members of the tribes signing the treaties. All Indians do not as a "race" share in those rights. The classification is not "racial", but is determined by membership in an organization that signed a contract with the United States.

The lower federal courts simply determined the meaning of the rights reserved by the Indians when they entered into the treaties with the United States. To strike down treaties negotiated in 1855 under the Fourteenth Amendment which was adopted in 1868 would require a ruling that treaties, though valid when signed, were made unconstitutional retroactively when the Fourteenth Amendment was adopted thirteen years later. Such a ruling would violate the long-accepted rule of construction that subsequent laws do not vitiate Indian treaties unless a clear intent to do so can be shown. Such a ruling would not only be without precedent but would violate any standards of decency and good faith towards the implementation of these treaties so solemnly entered.

B. *Actions of State Agencies and State Attorney General's Office*

State executive department officers have long used their official positions and powers to deny Indians their off-reservation treaty fishing rights. As the Ninth Circuit Court of Appeals noted:

> The record in this case . . . make[s] it crystal clear that it has been recalcitrance of Washington State officials and their vocal non-Indian commercial and sports fishing allies which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975) [concurring opinion of Judge Burns].

During the 1960's the state fish and game departments pursued a vigorous policy of interference with Indian off-reservation fishing. Numerous arrests were made resulting in gear confiscation, fines, and jail sentences. State court rulings either temporarily or permanently enjoined Indians from fishing on the Green, White, Nisqually, and Puyallup rivers. State court decisions denied the existence of one tribe that was federally recognized by the Bureau of Indian Affairs. The state justified its action on the grounds that Indians had no special treaty fishery rights and that in any event state regulation was necessary for conservation. However, during this time Indians were catching well under 10% of the resource, and the state was encouraging the growth of non-Indian commercial fisheries in marine waters—where the fish were intercepted by non-Indian fishermen before they arrived at the Indians' traditional fishing sites.[6]

In the trial court the state had three years to produce evidence to support its claim that regulation of Indian fishing was necessary to promote conservation. Judge Boldt observed that:

> With a single possible exception testified to by a high-

6. For reference, see: American Friends Service Committee, *Uncommon Controversy Fishing Rights of the Nisqually, Puyallup and Muckleshoot Indians* (1970).

ly interested witness . . . and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay, and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.

United States v. Washington, 384 F. Supp. at 338 n.26.

III.

Hostile State Reaction to the Lower Court Decision Has Caused Difficulties in Implementation Which Would Have Been Avoidable if the State Had Assumed a Cooperative Posture

The refusal of the state to abide by the decision in *United States v. Washington* has obstructed implementation of this decision and encouraged the lawlessness that dominates the salmon fishery.

The Washington Supreme Court effectively prevented implementation of federal court orders by ruling in 1977 that the state fisheries department had no statutory authority to allocate harvestable fish for any purpose other than conservation, and specifically could not do so to implement the Indians' treaty rights. The state Department of Fisheries then claimed to be powerless to implement the federal court orders without new state legislation.

The legislature contributed to the state's obstructionism by failing to enact bills to vest the requisite allocation

authority in the Department of Fisheries. *The Seattle Times,* Washington state's largest newspaper, editorialized on March 7, 1977:

> For far too long, the Legislature has tended to shy away from measures to give the Department of Fisheries better tools and greater flexibility for fisheries management . . . an overhaul of present laws is essential not only to improving the climate for possible negotiated settlements of Indian fishing matters, but as a way to head off violence involving non-Indian fishermen in the fishing seasons that lie ahead.

That same editorial noted a voluntary agreement between Oregon, Washington, and Indian tribes fixing a formula for the allocation of Columbia River salmon. The editors applauded that agreement as "the most important development affecting Columbia River fishing since the Indian treaties of 1855," and noted further that:

> The pact could also be regarded as setting an encouraging precedent for negotiated settlements of the prolonged and complex disputes over the Puget Sound fishery. But prospects for negotiating pacts on Indian fishing here, as well as other fishing issues, will remain fairly remote without action by the Legislature . . .

The executive department of the state has also done little to encourage cooperation and communication with treaty tribes since Judge Boldt's decision. An example is the unfortunate advocacy by the present governor of renegotiation of Indian treaties made during this nation's renegotiation of the Panama Treaty. The State Attorney General has openly opposed the lower court ruling, and has testified before the U.S. Civil Rights Commission that Indians have been made "supercitizens" (hearing before the United States Commission on Civil Rights in Seattle, Washington on October 19-20, 1977, Vol. I. p. 14).

An Assistant Attorney General has appeared before many commercial fishing groups and has been publicly quoted in the press assuring non-Indian fishermen that the lower court decision will be "overruled" because it violates their "equal rights" under the constitution.

The *amici* are distressed that the state has clouded the issue of compliance with federal court orders by the "equal protection" argument. This argument is especially inappropriate here and tends to foster racial bigotry in a society which has suffered far loo long from the damaging effects of racism. These actions by state officials, who have sworn to uphold the Constitution of the United States, are highly unprincipled, have contributed to the current level of agitation in the industry, and have encouraged flagrant illegal fishing by non-Indians. The following observations of the United States Court of Appeals for the Ninth Circuit are particularly appropriate:

> The State's extraordinary machinations in resisting the decree have forced the District Court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted], the District Court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

United States v. Washington, 573 F.2d 1123, 1126 (9th Cir. 1978).

State officials and non-Indian commercial fishing groups have decried the "uncertainty" of the law in this area, in spite of definitive rulings of the federal district and Ninth Circuit courts. The clear implication of these assertions is that with "certainty" will come compliance with the law, correction of the current lawlessness in the non-Indian

fishery, and acceptance of a rational management regime including the treaty Indian fishery. The *amici* cannot accept the state's claim that the rulings of the lower court leave any uncertainties. Rather it has been the obstructionism of the state which has led to the current level of agitation and disrespect for the law. This mistaken perception of "uncertaintly" can and should be rectified by a clear ruling of this Court upholding the lower court decisions.

IV.

The Responsibility for Difficulties Imposed on the Non-Indian Fishing Industry Should be Shouldered by the State and Federal Governments Which Caused the Problem, Not by the Indians

The apportionment in the fishery should have been made 75 or 100 years ago when the state first began encroaching on the treaty right. That it has come at this stage of non-Indian fisheries development is certainly inconvenient, and requires adjustments among non-Indian fishery groups, but does not justify a denial to Indians of what is justly theirs. The burden of this adjustment rests with the state and federal governments, which created the problem by failing to recognize and accommodate the legal rights of the Indians from the beginning.[7] Responsibility for current problems should not be foisted onto the politically less

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7. The historical disregard for Indian treaty rights in Washington is especially appalling in light of the federal government's fiduciary responsibility to protect those rights. Extensive case law has recognized a trust responsibility to Indian tribes. *See, e.g. Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *United States v. Kagama, supra, United States v. Sandoval,* 231 U.S. 28, 45-46 (1913); *United States v. Payne,* 264 U.S. 446, 448 (1924); *Choctaw Nation v. United States,* 119 U.S. 1, 27-28 (1886); and *Seminole v. United States,* 316 U.S. 286, 296-97 (1942).

This trust responsibility has most recently been articulated by Congress in section two of the Indian Child Welfare Act of 1978, P.L. 95-608: "Recognizing the special relationship between the United States and Indian

powerful Indian tribes. Adjustments by the non-Indian fishermen may cause hardships for some commercial and sports fishermen. Such hardships can be and are being addressed through federally sponsored buy-back programs and fishery enhancement programs, and such programs should be continued.

V.

Implementation of *United States v. Washington* Will Benefit Both the Indian and Non-Indian Citizens of the State

A. *Implementation of the Decision Forces More Thoughtful Planning in the Overall Management of the Resource*

For many years the salmon fishing industry in the state has been in serious trouble. The growth of the industry has been guided by the frontier principle that salmon are an inexhaustible resource. This policy placed undue faith in hatchery programs which were expected to replace all fish lost to poor habitat control and over-fishing. As early as 1906 the state fish commissioner noted that excessive and unregulated fishing was being permitted. State policy has continued to encourage the growth of the commercial fishing fleet despite clear evidence that the fish stocks were disappearing. Between 1911 and 1914 the average annual catch of salmon was 24,901,000 fish. The average annual

tribes . . . the Federal responsibility to Indian people . . ." and, ". . . that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."

The federal government has been justly criticized for its apathetic approach towards its legal and moral responsibility to protect Indian resources. In view of the long history of state interference with Indian treaty fishing rights in Washington, the 1970 decision of the United States Department of Justice to file the action below, while appropriate, was long overdue.

catch between 1971 and 1974 was 6,508,000.[8] This drastic decrease occurred despite an increase in the number of fishermen and significantly improved fishing technology.

If Indians had not courageously challenged the practices of the state, the salmon stocks may have continued to decline to a point where very few non-Indians would have enjoyed any success in the industry. As a result of the Indians' court challenges, the public consciousness has been raised, and more citizens are aware of the multidimensional aspects of sound resource management. Certainly continued restriction of Indian fishing will not cure the problems currently facing the industry.

Since the trial court decision, the tribes have taken great strides to enhance their fishery management capabilities. Mere speculation that tribal management might fall short of conservation goals does not justify denial of tribal self-regulation.

Procedures to promote cooperation were established immediately after the district court ruling in 1974. The court obtained the services of a fisheries biologist and eventually created a Fisheries Advisory Board consisting of both state and tribal representatives. This Board has resolved many technical disputes which have arisen during subsequent salmon fishing seasons. This communication is overdue and, given the tribes' interest in and dependence on a healthy resource, should lead to increased respect and concern for one of the state's unique and valuable resources. The process should be noted and encouraged.

8. 38th to 39th *Annual Report—State Department of Fisheries*, 42nd to 45th *Annual Report—State Department of Fisheries*, 1974 State Department of Fisheries *Statistical Report*.

B. *The Decision Enables the Tribes to Develop a Stable Economy to Which They Are Culturally Suited and in Which They Reserve a Property Right*

When the Treaties were signed the tribes had a highly developed fishery on which they were economically dependent. Tribal leaders knew that reserving the right to fish was necessary to their culture and survival. Assaults on this right, along with other forms of political and cultural oppression, have caused widespread poverty and unfortunate social conditions among the Indians in the Pacific Northwest, resulting in high unemployment, shorter life spans, poor health, and low educational achievement. Despite the state's attempts to frustrate it, the trial court decision has resulted in a significant improvement of fishing opportunities to various tribes. The tribes are preparing for a future in all aspects of fishery management—marine biology, fish management technology, law enforcement, and fish processing. This future provides educational goals for tribal members and renews their pride in a livelihood and culture compatible with their history.

The state's economy is enhanced by the growing economic health of tribal communities. Money spent for groceries, goods, and services remains in the state and contributes to the local economy. Increased Indian employment in the fishery reduces poverty and the need for government assistance.

VI.

The Decision Is Consistent With Current Congressional Policy of Indian Self-Determination

Congressional policy of self-determination supports the federal district court decision.[9] The district judge noted

9. *See, e.g.*, Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* (1975); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*; Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*

that current congressional "measures . . . make plain the intent and philosophy of Congress to increase rather than diminish or limit the exercise of tribal self-government." *United States v. Washington*, 384 F. Supp. at 340. Tribal management of the Indians' own fishery is an important element of self-determination. More fundamentally, judicial recognition of the right to harvest a specific percentage of fish provides the tribes with a continuing opportunity for economic and cultural survival and is a profound endorsement of the congressional policy of self-determination.

CONCLUSION

In conclusion we urge that this Court resolve, finally and completely, any conceivable uncertainty that might exist about the meaning of the off-reservation fishing rights reserved to Pacific Northwest Tribes in the Stevens Treaties by rendering an opinion affirming the federal district court and the Ninth Circuit Court of Appeals decisions in *United States v. Washington.*

DATED this 24th day of January, 1979.

Respectfully submitted,

FREDERICK L. NOLAND of
MACDONALD, HOAGUE & BAYLESS
Attorneys for Amici Curiae

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